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IN THE SUPREME COURT OF FLORIDA

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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' REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The certified question must be answered in the negative because (1) the phrase "sudden and accidental" as used in the standard-form "pollution exclusion" may reasonably describe both abrupt and gradual pollution that was not expected or intended by the policyholder, and (2) alternatively, even if the phrase can only refer to abrupt pollution, there is still coverage under the undisputed facts in this case.

Southeastern and its amicus supporters mischaracterize the record evidence and distort the applicable rules for construction of insurance contracts under Florida law. In addition, Southeastern fails to address the mass of material in the record which starkly demonstrates the insurance industry's intent when adding the pollution exclusion to standard-form liability policies in 1970. Southeastern's further contention that the pollution at the Peak Oil Site ("the Site") was not "accidental" ignores the accepted meaning of that term under Florida law and is contrary to the record evidence. The Dimmitts adopt by reference the public policy arguments presented by the Florida Attorney General in his amicus curiae briefs in this Court and in the Eleventh Circuit. As noted by the Attorney General, Southeastern's position in this case would seriously undermine the integrity of the system of insurance regulation in Florida

and would frustrate the State's efforts to effect the rapid cleanup of contaminated waste sites.[1]

ARGUMENT

I. SOUTHEASTERN AND ITS AMICUS SUPPORTERS MISCHARACTERIZE THE RECORD EVIDENCE

The Eleventh Circuit invites this Court to resolve the meaning of the disputed policy language in the context of "the environmental contamination that occurred in this case." Industrial Indem. Ins. Co. v. Crown Auto Dealerships, 935 F.2d 240, 243 (11th Cir. 1991) (hereinafter "Crown Auto II"). Consequently, this Court must, as a preliminary matter, identify those material facts relating to the contamination of the Site which are not in dispute. Although Southeastern initially purports to accept the facts as stated by the Dimmitts, Southeastern Br. at 5, it then proceeds to mischaracterize many of those facts without a single reference to the certified record. Careful examination of that record establishes, as a matter of law, that the following facts regarding contamination at the Site are beyond dispute:

1. The Dimmitts did not expect or intend either the pollution discharges or the resulting property damage.

This assertion, which Southeastern does not contest, is solidly supported by the affidavits of the following individuals submitted by the Dimmitts in support of their summary judgment

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[1] As used herein, the appellants' opening brief is referred to as "Dimmitts Br.", and those of Southeastern and the Insurance Environmental Litigation Association ("IELA") as "Southeastern Br." and "IELA Br."

motion: Maureen Mack ("Mack Aff.") (R3-63 Exh. C) ¶¶ 5-9, Paul Gruber ("Gruber Aff.") (R2-35 Exh. E) ¶ 22, and David Morris ("Morris Aff.") (R2-35 Exh. D) ¶ 14.

2. The operators of the Site did not expect or intend the property damage.

It is undisputed that the operators of Peak neither expected nor intended the pollution that occurred at the Site. Morris Aff. ¶ 9; Gruber Aff. ¶ 22. Judge Hodges found the record clear on this point: "To be sure, the operators of Peak did not intend to deliberately contaminate the site...." Industrial Indem. Ins. Co. v. Crown Auto Dealerships, Inc., et al., 731 F. Supp. 1527, 1521 (M.D. Fla. 1990) (hereinafter "Crown Auto I").

3. Unintended releases of contaminants occurred at the Site.

Southeastern does not dispute the district court's observation that there were unintentional releases of contaminants at the Site. Southeastern Br. at 6-7. In addition, the Eleventh Circuit pointed out at least one event not mentioned by the district court, the bursting of a retention dike in 1978. Crown Auto II, 935 F.2d at 242 n.1. These fortuitous polluting events are described in greater detail in the uncontested affidavit testimony of Morris and Gruber. Morris Aff. ¶¶ 10-11; Gruber Aff. ¶¶ 3, 18-23. Moreover, there is no suggestion in the record that the Site operators expected or intended any releases of contaminants into groundwater--a major environmental problem at the Site.

4. Many of the pollution discharges happened abruptly.

Southeastern adopts the district court's statement that "the pollution occurred gradually as a normal result of Peak's business operations." Southeastern Br. at 8. The factual record, however, which Southeastern has not contested, plainly shows that many of the pollution discharges were neither gradual nor the result of normal business operations. Gruber Aff. ¶¶ 3, 18-23; Morris Aff. ¶¶ 9-11.

5. Abrupt, unintended releases of pollution accounted for much, if not most, of the property damage at the Site.

Southeastern asserts, again without reference to the record, that pollution at the Site resulted primarily from the leaching of contaminants from sludge lagoons into soil and groundwater. Southeastern Br. at 6. This conclusion, which Southeastern adopts from the district court's opinion, is not supported by the factual record. This record establishes that much, if not most, of the contamination resulted from abrupt, unintended events. See, for example, Gruber Aff. ¶ 3.[2]

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[2] Indeed, Paul Gruber, whose affidavit is cited by the district court for this proposition, testified to the contrary that damage to soil, surface water, and groundwater at the Site occurred primarily as a result of accidental spills and leaks of used oil, surface runoff of contaminants, disposal of acid sludge, and migration of contaminants from off-site. Gruber Aff. ¶ 3. Note, too, that the Eleventh Circuit's certification decision states only that "much"--not most--of the pollution resulted from sludge disposal. Crown Auto II, 935 F.2d at 242. The district court also cites the Environmental Protection Agency's administrative consent order. This order, however, alleges only that Peak's "operations" were the source of contamination at the Site; not that the sludge lagoons, or any type of deliberate conduct, caused the contamination. R2-35 Exh. 6 at 3.

(continued...)

II. SOUTHEASTERN AND ITS AMICUS SUPPORTERS DISTORT THE FLORIDA RULES FOR CONSTRUCTION OF INSURANCE POLICIES

A. Under Florida Law, An Undefined Policy Term Susceptible Of Two Reasonable Meanings Must Be Construed In Favor Of Insurance Coverage

This Court first articulated this black letter "ambiguity rule" 88 years ago in L'Engle v. Scottish Union and National Fire Ins. Co., 48 Fla. 82, 37 So. 462 (1904) ("Where two interpretations equally fair may be given, that which gives the greater indemnity will prevail"), and has reaffirmed it frequently since.[3] This ambiguity rule, sometimes referred to as contra proferentem, applies with particular force where the ambiguity appears in a policy exclusion.[4]

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[2](...continued)

Southeastern's attempt to link all contamination at the Site to the operation of the sludge pits is pure fiction. Its contention, without reference to the certified record, that "regular spills and overflows occurred incidental to the maintenance of these acid sludge pits" is simply wrong.

[3] See, for example, State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d 1245, 1248 (Fla. 1986); Hodges v. National Union Indem. Co., 249 So. 2d 679, 680-81 (Fla. 1973); DaCosta v. General Guaranty Ins. Co., 226 So. 2d 104, 105 (Fla. 1969); Hartnett v. Southern Ins. Co., 181 So. 2d 524, 528 (Fla. 1965); Gulf Life Ins. Co. v. Nash, 97 So. 2d 4 (Fla. 1957). The Dimmitts do not quarrel with Southeastern's contention that courts in Florida are to look at the insuring instrument as a whole in determining whether a given phrase is ambiguous. But once the entire policy is examined, if the disputed policy term still lends itself to more than one reasonable meaning, the meaning providing the greater coverage must be adopted.

[4] Demshar v. AAACon Auto Transport, Inc., 337 So. 2d 963, 965 (Fla. 1976); Poole v. Travelers Ins. Co., 130 Fla. 806, 179 So. 138 (Fla. 1937); Meister v. Utica Mut. Ins., 573 So. 2d 128, 130 (Fla. 4th DCA 1991); Kingdom, Inc. v. First So. Ins. Co., 573 So. 2d 885, 887 (Fla. 3d DCA 1990); Triano v. State Farm Mut. Auto. Ins. Co., 565 So. 2d 748, 749 (Fla. 3d DCA 1990); United

(continued...)

Southeastern would subvert this long-held principle by arguing that a "genuine" ambiguity can only exist where the "terms or provisions of a policy are hopelessly irreconcilable." Southeastern Br. at 16. This qualification, which finds no support in the two cases cited by Southeastern, would make it extremely difficult to find an ambiguity in a contract of insurance.[5] This is not the rule in this State. Florida courts have consistently held that the standard for showing an ambiguity in an insurance contract is simply whether the disputed word or phrase is capable of two reasonable interpretations.[6]

IELA goes even further by arguing, in effect, that this Court has rejected the ambiguity rule altogether. IELA Br. at 9 n. 6. Based on this contention, IELA claims that this case can

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[4](...continued)
States Aviation Underwriters v. Van Houtin, 453 So. 2d 475 (Fla 2d DCA 1984).

[5] Neither Oliver v. United States Fidelity & Guar. Co., 309 So. 2d 237 (Fla. 2d DCA 1975), nor Government Employees Ins. Co. v. Sweet, 186 So. 2d 95 (Fla. 4th DCA 1966), held, as Southeastern claims, that ambiguities can only be found where two different policy provisions are irreconcilable. Such a test would compel a policyholder to identify two provisions in a policy that were in conflict before either could be considered ambiguous.

[6] Friedman v. Virginia Metal Prod. Corp., 56 So. 2d 515, 517 (Fla. 1952) (policy language is ambiguous where it "is reasonably capable of having more than one meaning...."); Lane v. Allstate Ins. Co., 472 So. 2d 823, 824 (Fla. 4th DCA 1985) (an ambiguity exists "[i]f there is any doubt, uncertainty or ambiguity in the phraseology of a policy, or if the phraseology is susceptible to two meanings"); New Amsterdam Cas. Co. v. Addison, 169 So. 2d 877, 881 (Fla. 2d DCA 1964) (an ambiguity arises when more than one interpretation "may fairly be given" to a policy provision).

be distinguished from the Claussen decision[7] because the ambiguity rule remains in force in the State of Georgia. IELA Brief at 22 n. 20. IELA cites no authority for this argument, as none exists. The Dimmitts' characterization of the ambiguity principle in Florida is precisely as it has been articulated by the Florida courts and is virtually identical to the analogous principle in Georgia.[8]

B. Under Florida Law, Extrinsic Evidence Is Admissible To Show That A Disputed Policy Term Has More Than One Reasonable Meaning

A variety of extrinsic materials in the certified record reveals the intent of the insurance industry when it added the pollution exclusion to standard-form CGL policies in the early 1970's. See Dimmitts Br. at 16-33. The Eleventh Circuit has

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[7] Claussen v. Aetna Casualty & Sur. Co., 676 F. Supp. 1571 (S.D. Ga. 1987) question certified, 865 F.2d 1217 (11th Cir. 1989), certified question answered, 380 S.E.2d 686 (Ga. 1989) (hereinafter "Claussen").

[8] Compare Claussen ("Thus, if an insurance contract is capable of being construed two ways, it will be construed against the insurance company and in favor of the insured") with this Court's statement of the ambiguity rule in the cases cited above. IELA cites Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 36 So. 2d 938 (Fla. 1979), for the proposition that this Court has rejected the ambiguity rule. IELA Br. at 9-10. That case says nothing of the kind. In Excelsior, this Court simply decided, after looking at the insurance policy in its entirety, that the disputed language was not ambiguous. In fact, the Court reaffirmed the ambiguity rule: "Moreover, even were we to find that the policy is ambiguous, that is susceptible of both [the insurer and insured's] interpretations, we would still have to prefer Excelsior's interpretation because it maintains the widest range of coverage and is therefore actually the more favorable to the insured." Id. at 942.

concluded that all of this extrinsic interpretive material is properly in the record. Crown Auto II, 935 F.2d at 243 n. 3.

Rather than address this highly revealing evidence directly, Southeastern strenuously argues that this Court must simply disregard it. Southeastern's arguments on this point are essentially twofold: (1) The latent ambiguity doctrine, though still valid under Florida law, does not allow this Court to consider extrinsic evidence until after an ambiguity is found in the policy, and here no such ambiguity can be found; and (2) Even if extrinsic evidence is admissible to demonstrate or clarify an ambiguity in the policy, the extrinsic material offered by the Dimmitts must still be rejected because it has not been shown that the parties were aware of it at the time of contracting. We address each of these arguments in turn.[9]

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[9] Southeastern objects to some of the extrinsic material offered by the Dimmitts on the grounds that it would not be admissible at trial. Southeastern Br. at 41. The Eleventh Circuit has already concluded that all of this extrinsic material is properly part of the certified factual record. Crown Auto II, 935 F.2d at 243 n.3. The Eleventh Circuit also noted that the Dimmitts were not given an adequate opportunity to test the admissibility of this material at trial through a motion in limine, as was their intention. Id. Moroever, because the certified question arises from the parties' cross-motions for summary judgment, the question of whether some or all of this material would be admissible at trial is not controlling. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 265 (1986), on remand sub nom. Catrette v. Johns-Manville Corp., 816 F.2d 33, cert. denied, 484 U.S. 1066, 108 S.Ct. 1028, 98 L. Ed. 992 (1988). Accordingly, this Court should assume that the extrinsic material offered by the Dimmitts is properly part of the factual record. This Court need only decide whether under Florida law the material is relevant to the question certified. At any rate, virtually all of this material would be admissible at trial under Federal Rules of Evidence 803(16) (statements in documents over 20 years old excepted from hearsay rule), 901

(continued...)

It must be reiterated at the outset that the latent ambiguity doctrine comes into play only if a court finds, unlike at least two courts in Florida and over 50 courts nationwide, that the pollution exclusion is clear on first reading. However, even assuming for the sake of discussion that on first reading this Court does find the phrase "sudden and accidental" unambiguous, under Florida law the Court should then examine any extrinsic evidence in the record that may reveal a "latent ambiguity" in the phrase.

Although reluctantly conceding that the latent ambiguity doctrine remains valid under Florida law, Southeastern mischaracterizes the doctrine as permitting courts to consider extrinsic evidence only after finding a latent ambiguity in the policy. This turns the concept of a "latent" ambiguity on its head. Such an ambiguity "arises when language is clear and intelligible and suggests but a single meaning, but some extrinsic fact or some extraneous evidence creates a necessity for interpretation or choice between two or more possible meanings." Black's Law Dictionary 1284 (5th ed. 1979). As this Court stated in Whitfield v. Webb, 100 Fla. 1619, 1621, 131 So. 786, 788 (1931): "A latent ambiguity in description arises when the writing upon its face appears clear and unambiguous, but

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[9](...continued)
(certain documents over 20 years old considered self-authenticating), and 902(5) (statements in newspapers and periodicals admissible).

there is some collateral or extrinsic matter which renders its application uncertain" (emphasis added).[10]

Once a latent ambiguity is shown by extrinsic evidence, that evidence may assist the court in interpreting the meaning of the ambiguous language. As discussed previously, however, under Florida law this examination is limited where insurance contracts are concerned: once an ambiguity is found, courts must conclude there is coverage if the evidence shows that the policyholder's interpretation is a reasonable one.[11]

As a fallback, Southeastern and IELA argue that even if this Court were to conclude that extrinsic evidence may be considered to find or clarify ambiguity in the pollution exclusion, the interpretive material offered by the Dimmitts must still be rejected. They argue that this Court may only consider extrinsic material that Southeastern and the Dimmitts were both aware of at the time of contracting. There is no support in Florida law for

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[10] See also Ace Elec. Supply Co. v. Terra Nova Elec., Inc., 288 So. 2d 544 (Fla. 1st DCA 1974); Atlantic & Gulf Properties, Inc. v. Palmer 109 So. 2d 768, 771 (Fla. 3d DCA 1959); Landis v. Mears, 329 So. 2d 323 (Fla. 2d DCA 1976); Drisdom v. Guar. Trust Life Ins. Co., 371 So. 2d 690, 693 (Fla. 3d DCA 1979).

[11] See also Spencer A. Gard, Florida Evidence §14:18 at 69-70 (2d ed. 1980), and 3 Corbin on Contracts § 536, at 28 (1991):

> [I]t is invariably necessary, before a court can give any meaning to the words of a contract and can select one meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence shall be heard to make the court aware of the "surrounding circumstances," including the persons, objects, and events to which the words can be applied and which caused the words to be used.

such a radical limitation on the type of extrinsic material that may be considered in resolving disputed policy language.

Florida courts have long interpreted contracts in light of customary industry usage or practice, without reference to whether the contracting parties knew of that usage at the time of contracting. See Carr v. Stockton, 82 Fla. 501, 503, 92 So. 814, 815 (Fla. 1922); Conrad Constr. v. Exchange Bank, 178 So. 2d 217, 221 (Fla. 1st DCA 1965). Further, in the context of insurance agreements, Florida courts liberally receive evidence of the contract drafters' declared intent to further demonstrate the existence of a latent ambiguity and to resolve the intended meaning of an ambiguous term. Atlantic & Gulf Properties, Inc., 109 So. 2d 768, 771 (Fla. 1959); Carey Canada, Inc. v. Columbia Cas. Co., 940 F.2d 1548, 1556 (D.C. Cir. 1991). See also Guarantee Abstract & Title. Ins. Co. v. St. Paul Fire & Marine Ins. Co., 216 So. 2d 255 (Fla. 2d DCA 1968) ("phrase 'actual possession' is a term of art with a precise legal meaning, and must be examined in that light"); National Merchandise v. United Serv. Auto. Ass'n., 400 So. 2d 526, 531 (Fla. 1st DCA 1981) ("[c]onfronted with a term that is standardized in the industry" such that those "engaged in such trade may be considered as contracting with reference to it, such meaning will be assumed in reinterpreting the policy).[12]

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[12] In addition, the Florida Supreme Court recently endorsed the consideration of drafting history to interpret disputed language in a treaty, which the Court determined should be interpreted under Florida contract principles. See Eastern Airlines, Inc. v. King, 557 So. 2d 574, 577 (Fla. 1990).

The interpretative materials at issue here are precisely the kind of industry usage or trade practice milieu relied on by Florida courts in construing disputed insurance contract terms. The documents proffered by the Dimmitts include the drafting and marketing history of the pollution exclusion, explanations of the exclusion by the insurance industry to state regulators, authorities showing that "sudden and accidental" had already become a term-of-art at the time of its inclusion in CGL policies, and recent statements as to the meaning of the exclusion by insurance company officials.

All insurance sold in Florida must, by law, be consistent with filings before state regulators made by or on behalf of the carrier selling the policy.[13] At no point has Southeastern denied that its parent company was a member of the Insurance Rating Board ("IRB") in 1970. Nor has Southeastern denied that the IRB and its sister organization, the Mutual Insurance Rating Bureau ("MIRB"), were speaking on behalf of their members when explaining the pollution exclusion to state regulators. See Dimmitts Br. at 20 n. 21. Accordingly, when it sold policies to the Dimmitts with standard-form language identical to that introduced and explained to the Florida regulators by the IRB and MIRB, Southeastern is assumed to have understood and adopted the

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[13] § 627.191, Fla. Stat., (1973). See also Phoenix Ins. Co. v. Glenn Falls Ins. Co., 253 F. Supp 1015, 1019 (M.D. Fla. 1966).

official interpretations of these trade associations.[14] Even if Southeastern could show that it was not represented by either association--which Southeastern has never claimed--it would still be necessary and proper for this Court to refer to those industry explanations in discerning the intended meaning of the exclusion.[15] Moreover, the fact that the Dimmitts may not have been aware of this extrinsic material at the time of contracting does not help Southeastern. Under the ambiguity rule in Florida, the test is whether the Dimmitts' interpretation of ambiguous language is objectively reasonable, not whether they were specifically aware of that meaning at the time of contracting.[16]

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[14] See Gerrish Corp. v. Universal Underwriters Ins. Co., 947 F.2d 1023 (2d Cir. 1991) (insurance trade association's filings with state regulators on behalf of its members assumed to be incorporated into policies sold in that state).

[15] See Allegheny Airlines, Inc. v. Forth Corp., 663 F.2d 751, 755 (7th Cir. 1981) (even if insurer was not member of trade association that interpreted disputed policy language, court may "look to the standards of the association in its determination of interpretations given to terms used in the casualty insurers' industry."); American Home Prod. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500 n.3 (S.D.N.Y. 1983) (given "similar language and concepts" in standard-form CGL policy and policy sold by insurer, "the CGL drafting process and the intent of its drafters provides probative evidence of the meaning attributed in the industry" to disputed policy language).

[16] As succinctly stated by an insurance carrier in another coverage dispute,

> Because of the way the insurance industry operates, most of the relevant policy language is found in standardized insuring forms, drafted by insurance associations or bureaus, and used industry-wide. Thus, questions of intent may be addressed on a standardized basis. Predictably, there will be precious little evidence of the negotiation of individual policies. The primary evidence on the intent of the parties

(continued...)

III. THE INSURANCE INDUSTRY INTENDED THE POLLUTION EXCLUSION TO PRECLUDE COVERAGE ONLY FOR ENVIRONMENTAL DAMAGE EXPECTED AND INTENDED BY THE POLICYHOLDER

While it is true that the caselaw is sharply divided on the meaning of the pollution exclusion, it cannot be denied that the overwhelming majority of courts--and every appellate court of which we are aware[17]--that have analyzed the extensive body of evidence showing the insurance industry's original intent have concluded that the phrase "sudden and accidental" was meant by the insurance industry itself to include gradual, non-deliberate pollution. In contrast, the appellate cases cited by Southeastern and its amicus supporters ignore the history of the exclusion, either because those courts were unaware of that

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[16](...continued)
drafting of the contracts, and their expectations about scope of coverage, will be obtained through document production from key industry-wide organizations....

Brief for Travelers Indemnity Co. at 7-8, Armstrong Corp. v. Aetna Casualty & Sur. Co., No. C315367 (Cal. Super. Ct., Dec. 21, 1980), quoted in Brooke Jackson, Liability Insurance for Pollution Claims: Avoiding a Litigation Wasteland, 26 Tulsa L.J. 209, 233-34 (1990) (copy of article attached hereto as Appendix A).

[17] Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990) ("Just"); Claussen, 380 S.E.2d 686; Hecla Mining Co. v. New Hampshire Ins. Co., 811 P. 2d 1088 (Colo. 1991) ("Hecla"); New Castle County v. Hartford Accident and Indem. Co., 933 F. 2d 1162 (3rd Cir. 1991); Broadwell Realty Servs. Inc. v. Fidelity & Casualty Co., 528 A.2d 76 (N.J. App. Div. 1987); United Pac. Ins. Co. v. Van's Westlake Union Co., 664 P.2d 1262 (Wash. App. 1982); review denied, 100 Wash. 2d 1018 (1983); United States Fidelity & Guaranty v. Specialty Coatings, Inc., 535 N.E.2d 1071 (Ill. App. Ct. 1989) ("Specialty Coatings"); 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).

history at that time or had concluded that they could not consider it under their respective rules of evidence.[18]

Southeastern can point to nothing in the historical record of the pollution exclusion to support its bald assertion that the "intent and relative culpability of the insured with respect to the resultant damage is irrelevant under the terms of this exclusion." Southeastern Br. at 10. This is because nothing in the historical record supports such a statement.[19]

IELA attempts to explain away the mass of "original intent" evidence in the record by lifting two phrases out of context and distorting them beyond recognition. First, IELA quotes from the IRB's letter to the Florida Insurance Commissioner: "the impact of the [pollution exclusion clause] on the vast majority of risks would be no change." According to IELA, this statement shows that the exclusion must have been meant to effect some change in the then-existing "occurrence" policies. IELA Br. at 37. In reality, the statement simply reflects the IRB's belief at the

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[18] For example, in Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 555 N.E. 2d 568 (Mass. 1990), the Massachusetts Supreme Court declined to consider "any statement made by insurance company representatives concerning the intention of its drafters." The court noted that "we have not decided whether the drafting history and other possibly instructive material must be included in the record on appeal...." Id. at 573. In contrast, the Eleventh Circuit in this case has already determined such evidence is properly part of the certified record. Crown Auto II, 935 F. 2d at 243 n. 3.

[19] For a comprehensive analysis of the large body of material showing the original intent of the drafters of the exclusion, see Robert N. Sayler, The Emperor's Newest Clothes, Revisionism and Retreat: The Insurers' Last Word On The Pollution Exclusion, 5 Mealey's Litig. Rep. 27 (1991), copy attached hereto as Appendix B.

time that most (not all) pollution damage was expected or intended, and therefore was not covered under the "occurrence" policies. The IRB was pointing out that, in its opinion, the "vast majority of risks" were not covered (because they were deliberately caused) and that this situation would simply continue after the pollution exclusion was added to the policies. This point is made clear in the mass of other industry pronouncements on this subject, all of which IELA conveniently ignores, including this statement of the IRB:

> Coverage for pollution or contamination is not provided in most cases under the 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.[20]

Second, IELA quotes out of context the phrase "so as to avoid any question of intent" in the above passage and argues that this phrase reflects the IRB's understanding that the exclusion was meant to eliminate the policyholder's intent as a relevant factor in deciding if there is coverage. This is sheer fabrication. The phrase has nothing whatsoever to do with the policyholder's intent; it plainly refers to the insurance industry's intent in adding the exclusion to CGL policies. This is what the industry's trade association said to the Georgia Insurance Commissioner in 1970:

> The impact of the proposal on the vast majority of risks would be no change. It is rather a situation of

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[20] Quoted in Just, 456 N.W.2d at 575.

> clarification which will make for a complete understanding by the parties to the contract of the intent of coverage.

Claussen v. Aetna Casualty & Surety Co., 676 F. Supp. 1571 (S.D. Ga. 1987), rev'd, 888 F.2d 747 (11th Cir. 1989) (emphasis added). Similarly, the MIRB told the West Virginia Insurance Commissioner that the exclusion was "actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected and intended." Specialty Coatings, 535 N.E.2d at 1077 (emphasis added). Clearly, this statement refers to the "original intent" of the insurance industry, not that of policyholders. Similarly, at the time state insurance departments were considering the pollution exclusion, the IRB explained to Business Insurance, an industry trade publication, that the proposed exclusion clarified that coverage would not be provided for deliberate polluters. An IRB spokesman said such a clarification was necessary "to avoid any misunderstanding of the intention of the insurers" (emphasis added). Copy at R4-101 Exh. 6. Thus, read in context and in light of other expressions of the pollution exclusion's purpose, there can be no doubt that the only "intent" being referred to by the IRB and MIRB was that of the drafters of the exclusion.

IV. THE POLLUTION EXCLUSION IS AMBIGUOUS EVEN DISREGARDING ITS EXPANSIVE DRAFTING HISTORY

Southeastern argues that because the phrase "sudden and accidental" is clear on its face, it may only be read in isolation, without reference to extrinsic interpretive evidence--regardless of how revealing that evidence might be.

Even without reference to that evidence, however, the phrase has at least two distinct and equally reasonable meanings. See Dimmitts Br. at 37-45.

Contrary to Southeastern's assertion, the Dimmitts do not argue that the terms "sudden" and "accidental" should be read in isolation. Rather, the Dimmitts have repeatedly emphasized that the phrase "sudden and accidental" is a single concept, a term-of-art that has evolved over time in the insurance industry and should be viewed in that context. Well before the phrase was incorporated into CGL policies, it had come to mean "unexpected and unintended"--precisely as the industry represented to state regulators.[21] As Professor Kenneth S. Abraham observes in his recently-published book on environmental liability insurance: "Support for this interpretation [of sudden meaning unexpected] might be derived from the fact that at the time the pollution exclusion was drafted the phrase sudden and accidental had been in use for many years in boiler and machinery insurance, and had been interpreted to mean 'unexpected and unintended'."[22] See

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[21] See Dimmitts Br. at 28-31. The evolution of standard phrases into terms-of-art are common in insurance law. For example, this Court noted in Guarantee Abstract & Title Ins. Co. v. St. Paul Fire and Marine Ins. Co., 216 So. 2d 255, 257 (Fla. 1968), that the phrase "actual possession" is a term of art with a precise legal meaning, and must be examined in that light."

[22] Kenneth S. Abraham, Environmental Liability Insurance Law 148 n. 32 (1991) (hereafter "Abraham"). Relevant excerpts from Professor Abraham's book are provided in Appendix C hereto. In 1988, Professor Abraham authored an article in the Columbia Law Review which is one of the authorities cited by the district court for the proposition that "some judicial decisions have emasculated the pollution exclusion." Crown Auto I, 731 F. Supp. (continued...)

also G. Couch, Couch on Insurance 2d § 42:383 (1963): "'sudden' [as used in boiler and machinery policies] is not to be construed as synonymous with instantaneous." Similarly, high-level underwriting and claims officials of the Federated Mutual Insurance Company, a former party in this action, testified during depositions that "sudden and accidental" is an established term-of-art in the industry, meaning "unexpected and unintended." Dimmitts Br. at 42-45.

While IELA pays lip service to the notion that the phrase must be read as a single concept, it proceeds to analyze the words "sudden" and "accidental" in isolation, arguing that the two words must be assumed to have completely different meanings

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[22](...continued)
at 1520 n.5. He later acknowledged, however, that he was not aware of the extensive drafting history of the exclusion at the time he wrote this article, and, after reviewing it, has had serious second thoughts about his initial conclusion. In sworn testimony in February 1990, Professor Abraham stated:

> I look at the representations by the insurers at the time the pollution exclusion came in, which I really hadn't studied very carefully, in which they seem to say, "This is a superfluous paragraph," and I say, "Well, I'm no longer so sure about my conclusions there." I still think that judicial decisions are what caused the pollution exclusion to disappear, but I'm no longer so certain that the judicial decisions are wrong.

See transcript excerpts in Exhibit 15 to the Dimmitts' brief in support of its motion to alter or amend judgment, R-4 Exh. 15, at 1-181 to 1-182. See also Abraham at 160:

> [T]he history of what led to regulatory approval of the pollution exclusion in some jurisdictions is more than enough to give the interpreter pause .... In the end, although the weight that should be given the industry's statements and representations may be debated, it is difficult to ignore the drafting history of the exclusion entirely.

which cannot overlap in any way. IELA Br. at 11-18. Even if both words are examined in isolation, however, and even if the rules of construction urged by Southeastern and IELA are applied, the pollution exclusion remains ambiguous.

The crux of the argument of Southeastern and its amici is that "sudden" can only describe events that happen abruptly. Such a construction would have this Court disregard the varying dictionary definitions of the term, the great number of conflicting judicial interpretations, and the different ways the word "sudden" is used in everyday speech. Dimmitts Br. at 37-45.

Even Southeastern must acknowledge that the one Florida appellate court to define the term "sudden" in an insurance context--in the phrase a "sudden settlement" of land--concluded that the word was meant to describe a gradual, unexpected event. Zimmer v. Aetna Ins. Co., 383 So. 2d 992, 994 (Fla. 5th DCA 1980). While the court in Zimmer did find support for its interpretation in the underlying purpose of a Florida statute, it cannot be denied that the court had no difficulty interpreting the word "sudden" to describe a gradually occurring process.[23]

Judicial interpretations of the term "happening suddenly" within the meaning of the Florida workers' compensation law are also instructive. Far from reinforcing the notion that "sudden"

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[23] Southeastern states that the court in Zimmer found "two subtly different connotations" in the word "sudden." In truth, the court expressly rejected the insurer's argument that sudden can only mean instantaneous, and instead concluded that the term, as used with the word "settlement," can only describe "losses which occur unexpectedly, without previous notice and which are unforeseen and unprepared for." 383 So. 2d at 994.

can only mean happening very rapidly, as Southeastern contends, many of these cases hold just the opposite. In Worden v. Pratt and Whitney Aircraft, 256 So. 2d. 209, 210 (Fla. 1971), for example, a worker's repeated exposure to infrared radiation over a seven-year period fell within the statutory definition of "accident" as "an unexpected or unusual event or result, happening suddenly." The Court reasoned that the "accidental nature of an injury is not altered by the fact that, instead of a single occurrence, the injury is the cumulated effect of a series of occurrences." Id. See also Czepial v. Krohne Roofing Co., 93 So. 2d 84 (Fla. 1957) (rejecting employer's argument that injury resulting from employee's long-term inhalation of contaminants did not occur "suddenly" within meaning of statute).[24]

Southeastern and IELA support their contention that "sudden" can only mean "abrupt or immediate" by emphasizing the rule of construction that all words in a contract must be given meaning so as to avoid "mere surplusage." Hence, Southeastern argues that giving a non-temporal meaning to "sudden" results in a "redundant construction" because the phrase "sudden and accidental" becomes "unexpected and unexpected and unintended."

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[24] Even the two workers' compensation cases cited by Southeastern conclude that multiple and repeated exposure to conditions over a period of hours or days are events that occur "suddenly" within the meaning of the statute. See Spivey v. Battaglia Fruit Co., 138 So. 2d 308 (Fla. 1962)(after more than ten hours of repeated activity, worker "gradually" started having back pains); Meehan v. Crowder, 158 Fla. 361, 28 So. 2d 435 (Fla. 1947) (three days of repeated exposure to toxic fumes caused worker's illness). If nothing else, this Court's workers' compensation decisions underscore the highly variable meaning of the word "suddenly."

Southeastern Br. at 18. This redundancy results, however, only if one accepts Southeastern's premise that "accidental" must mean both "unexpected and unintended," which is not the case. An identical "redundancy" argument was flatly rejected by the Court of Appeals in New Castle County: "Simply put, sudden means unexpected, and accidental means unintended." 933 F.2d at 1194. The phrase "sudden and accidental" is therefore no more redundant than the phrase "neither expected nor intended" in the "occurrence" clause. Moreover, even if there is some overlap between the concepts of "sudden" and "accidental," such overlap is common in insurance contracts. "In practice, of course, insurance policies routinely use synonymous words that, while not strictly redundant, express the same general concept." Id.[25] The redundancy problem that concerns Southeastern disappears altogether if the phrase "sudden and accidental" is read as it was meant to be read by the insurance industry: as a term-of-art that had evolved within the industry well before the drafting of the pollution exclusion.

Southeastern's argument that every word in the exclusion must be given separate meaning, coupled with its claim that "sudden" can only mean "abrupt," can be seen to create ambiguity in the clause, not eliminate it. The pollution exclusion only

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[25] For example, the words "discharge, dispersal, release or escape" in the pollution exclusion convey overlapping meanings, as do the words "care, custody and control" in the so-called "owned property" exclusion in CGL policies, and as do numerous other phrases that appear in insurance contracts. A rule that every word in such phrases must be given a separate and distinct meaning would, in practice, be virtually impossible to implement.

precludes coverage if the "discharge, dispersal, release or escape is "sudden and accidental." A typical dictionary definition of the word "dispersal" reads as follows:

> 1. Act or result of dispersing or scattering; dispersement; distribution. 2. Ecology. The process or result of spreading by active migration, or of passive transfer of organisms from one place to another.

Webster's New International Dictionary 751 (2d ed. 1966). The ecological definition of "dispersal," as would apply to the dispersal of pollutants in the environment, is inconsistent with an exclusively temporal definition of "sudden." A "process or result of spreading by active migration" can be "unexpected and unintended," but it is difficult to conceive how such a process could be abrupt. As noted by Professor Abraham, "[t]he term 'dispersal' often connotes slow spreading--a notion that would be inconsistent with the assertion that 'sudden' means 'short in duration.'" Abraham at 149. Hence, the concept of an "abrupt dispersal" creates an ambiguity, it does not eliminate one.[26]

V. THE POLLUTION AT THE SITE WAS ACCIDENTAL

Southeastern and IELA not only reject the notion that the pollution of the Site was not "sudden," they also argue that it was not "accidental." This argument ignores the accepted meaning of "accidental" in insurance policies as unexpected and unintended from the standpoint of the insured and is contrary to the undisputed material facts that neither the pollution

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[26] In finding the pollution exclusion ambiguous, a New York appellate court found the same incongruity in the concept of an "abrupt dispersal." See Farm Family Mut. Ins. Co. v. Bagley, 64 A.D.2d 1014, 409 N.Y.S. 2d 294, 296 (App. Div. 1978).

discharges at the Site nor the pollution damage were expected or intended by the Dimmitts.

Southeastern and IELA seize upon the district court's faulty conclusion that the discrete leaks and spills evidenced in the record are not "sudden and accidental" because they "appear to be commonplace events which occurred in the course of daily business." Crown Auto I, 731 F. Supp. at 1521.[27] This conclusion apparently stems from the court's erroneously expansive definition of "accident ... as an event which is unexpected or unintended and does not take place within the usual course,"[28] 731 F. Supp. at 1520 (emphasis added), and the court's application of that definition from the standpoint of Peak rather than from the standpoint of the Dimmitts.

While courts are divided over the meaning of "sudden," there is "no similar division of authority concerning the meaning of the term 'accidental.' The courts have interpreted 'accidental' to refer to pollution which is not expected or intended by the insured." American Motorists Ins. v. General Host Corp., 946 F.2d 1484, 1486 (10th Cir. 1991). Accord, e.g., Payne v. United States Fidelity & Guaranty Co., 625 F. Supp. 1189, 1192 (S.D.

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[27] Contrary to IELA's suggestion, the district court did not rule that the discharges were not accidental. It only ruled that they were not sudden and accidental.

[28] The underlined portions of this definition do not comport with the meaning of "accident" under Florida law or in the insurance policies at issue, and the district court cited no authority for this definition. As explained below, under Florida law, an accident includes intentional acts performed in the usual course that have unintended consequences.

Fla. 1985), quoting with approval from Lansco, Inc. v. Department of Envtl. Protection 350 A.2d 520, 524 (N.J. Ch. 1975), aff'd, 368 A.2d 363 (N.J. Super. Ct. App. Div. 1976), cert. denied 372 A.2d 322 (N.J. 1977) ("whether an 'occurrence is accidental must be viewed from the standpoint of the insured'"); Couch on Insurance 2d, 341:8, at 13 ("a determination of whether an 'accident' has occurred must be made from the standpoint of the insured."); J. Appleman, Insurance Law and Practice § 360 (1981) ("In answering whether or not a certain result is accidental, it is customary to look at the casualty from the point of view of the insured, to see whether or not, from his point of view, it was unexpected, unusual, and unforseen.").[29]

The three cases relied upon by the district court simply do not support the court's analysis of "sudden and accidental" from the standpoint of Peak rather than that of the Dimmitts. 731 F. Supp. at 1521-1522.[30] Likewise, in every case cited by IELA

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[29] Whether a pollution release or resulting damage is "accidental" must be assessed from someone's point of view. The definition of "occurrence" in the policy clearly dictates that "accidental" be assessed from the standpoint of the insured. Even were the court to determine that the policy is ambiguous as to whose point of view should be used, that ambiguity must be resolved in favor of coverage. Moreover, the reasonable expectation of the policyholder would certainly be to assess "accidental" from the policyholder's point of view, not from that of a third party over whom the policyholder has no control.

[30] In Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. Ct. App. 1981), the pollution was not accidental because the policyholder was aware of the problem, had received numerous complaints, and knew that the harmful emissions would continue as part of its normal business operations. In Grant-Southern Iron & Metal Co. v. CNA Ins. Co., 669 F. Supp. 798 (E.D. Mich. 1986), the pollution was not accidental because the

(continued...)

(at pp. 14-18 and note 13) where the court concluded that the pollution was not accidental, the court found that the pollution was expected or intended from the standpoint of the insured. Accordingly, the cases cited by the district court and by IELA are consistent with the Dimmitts' position that the pollution exclusion was aimed at denying insurance coverage to deliberate polluters and that "accidental" must be assessed from the standpoint of the policyholder. Even if, contrary to the Dimmitts' position, the discharge rather than the resulting property damage must be unintended, that assessment also must be made from the standpoint of the insured. See, for example, New Castle County, 933 F.2d at 1201-1202.

Here, the policyholders were not deliberate polluters. It is undisputed that the Dimmitts never intended or expected any of the releases of used oil or other materials at the Site, much less the resulting property damage, see pp. 2-3 above. And, it certainly cannot be said that the releases and property damage resulted from the Dimmitts' normal business operations.

Alternatively, the releases and property damage were accidental even if improperly assessed from the standpoint of Peak. The record is clear that many of the releases at the Site, and all of the resulting environmental contamination, were

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[30](...continued)
policyholder's polluting activities continued after the policyholder had received notice of the problem. In American Mut. Liab. Ins. v. Neville Chem., 650 F. Supp. 929 (W.D. Pa. 1987), the pollution was not accidental because the contamination was expected by the policyholder, which had prior notice of the harm being cause by its polluting activities.

unintended. "To be sure, the operators of Peak did not intend to deliberately contaminate the site...." Crown Auto I, 731 F. Supp. at 1521. The district court found only that the leaks and spills of used oil onto the ground were commonplace events that occurred in the course of Peak's daily business.[31] Even with respect to the sludge lagoons, there is no record evidence that releases of contaminants from the lagoons into groundwater, or any other property damage that may have resulted from the lagoons, was expected or intended by the Site operators.

Under Florida insurance law, intentional conduct resulting in unintended property damage constitutes an "accident."[32] Here,

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[31] This factual finding is controverted by record evidence: "it was always company policy to avoid pollution-causing accidents as much as possible and to clean up any spills that did occur." Morris Aff. ¶ 9. Even if Peak expected or intended the spills and leaks, it certainly did not expect or intend the subsequent releases of contaminants into the groundwater. In any event, under Florida insurance law, unexpected consequences of ordinary events are considered accidental. Gray v. Employers Mut. Liab. Ins. Co., 64 So. 2d 650 (Fla. 1954) ("an unexpected injury received in the ordinary performance of a duty in the usual manner is an injury by accident....").

[32] Hartford Fire Ins. Co. v. Spreen, 343 So. 2d 649, 650-51 (Fla. 3d DCA 1977) (insurance policies covering liability for an "accident" apply to property damage where insured does not intend to cause any harm; "this result obtains even though damages are caused by the insured's intentional acts and were reasonably foreseeable by the insured."). See also Gulf Life Ins. Co. v. Nash, 97 So.2d 4 (Fla. 1957) (holding that insured's death was accidental because he did not intend to kill himself when playing "Russian Roulette," although he deliberately pulled trigger); Phoenix Ins. Co. v. Helton, 298 So. 2d 177 (Fla. 1st DCA 1974) (finding that insured's injury to bystander was "unintentional" because he drove into crowd with purpose of dispersing it rather than with intention of harming people); Cloud v. Shelby Mut. Ins. Co., 248 So. 2d 217 (Fla. 1st DCA 1974) (holding that although insured had deliberately pushed car that was blocking him, ensuing injury to passenger inside was unintentional).

the operators of Peak did not know that "commonplace events in the course of its daily business" would harm the environment.[33] As noted above, the district court acknowledges that Peak did not intend to contaminate the Site. Thus, all of the pollution was "accidental" under Florida law, because even if Peak intended to place some of the used oil or wastes into the lagoons or onto the ground, it did not intend the resulting property damage. See Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F. Supp. at 1541, 1549 (S.D. Fla. 1987) ("Plaintiffs intentionally caused the dumping of oil, but the release of PCBs into the aquifer was ... an unintended result from [their] point of view.").[34]

VI. ABRUPT RELEASES OF POLLUTANTS WERE A CONCURRENT CAUSE OF PROPERTY DAMAGE

Southeastern counters the Dimmitts' concurrent causation argument by rejecting their assertion that "there is no way to distinguish the property damage that was caused by gradual releases of contaminants from that caused by abrupt releases."

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[33] As late as 1981, well after the policy periods at issue, environmental inspectors renewed Peak's operating permit, concluding that "this facility should not be expected to adversely affect water quality...." Morris Aff. ¶ 12.

[34] There is some dispute in the cases as to whether the discharge or the resulting damage must be "sudden and accidental." There is further dispute as to whether the relevant discharge is the initial discharge of the waste material onto the ground or the subsequent release or dispersal of the contaminants into and through the soil and groundwater. In this case, these distinctions are of no importance because it is undisputed that the Dimmitts did not expect or intend the initial discharges, the subsequent releases into the environment, or the resulting property damage.

Southeastern's Br. at 31 n.6. However, Southeastern has never contested the EPA's conclusion that the commingling of contaminants at the Site is so extensive that none of the property damage is divisible and, consequently, that all parties responsible for releases of pollutants at the Site are jointly and severally liable for the entire cleanup.[35]

IELA suggests that the Dimmitts' concurrent causation argument was rejected in Belleville. In that case the federal appellate court concluded that the abrupt accidental releases of pollutants were de minimis compared to the other causes of pollution. Lumbermens Mut. Casualty Co. v. Belleville Ind., 938 F.2d 1423, 1428 (1st Cir. 1991). Attempting to equate the facts in Belleville with the situation at Peak, IELA states that at Peak the "leaks and spills were de minimis when compared to the contamination caused by the lagoons." IELA Br. at 16 n. 14. IELA cites no authority for this conclusion, and none exists in the record.

IELA further counters the Dimmitts' concurrent causation argument by stating that "all of the pollution damage was caused by discharge of the same contaminants." IELA Br. at 16 n. 14. Not only is this wrong as a factual matter,[36] it is completely beside the point. The Dimmitts' concurrent causation argument is

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[35] See Southeastern's brief in opposition to defendants' motion for summary judgment (R4-74) at 17-18.

[36] See Gruber Aff. ¶¶ 3, 17, and the EPA's Administrative Order By Consent (R2-35 Exh. G) at 3-4.

based on the different ways that contaminants were released at the Site, not on the type of contaminants released.

CONCLUSION

At the very least, the Dimmitt's interpretation of the standard-form pollution exclusion clause is a reasonable one. That interpretation is fully consistent with the phrase "sudden and accidental" as that expression has evolved in insurance law. It is also fully consistent with the use of the term "sudden" in everyday speech, and, most telling, with the insurance industry's own explanations of the exclusion when it was first introduced. The arguments of Southeastern and its amicus supporters mischaracterize Florida law on the construction of insurance contracts and the use of extrinsic evidence to interpret those contracts. Their arguments also distort undisputed facts in the record and misconstrue the meanings of "sudden" and "accidental" as these terms have come to be defined under Florida law. For these reasons, the certified question must be answered in the negative.

Respectfully submitted,

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