In The
Supreme Court of Florida

No. 80,899

LONE STAR INDUSTRIES, INC.,

Plaintiff-Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the District Court of Appeal
of Florida, Third District

BRIEF OF *AMICUS CURIAE* NEW FARM, INC. IN SUPPORT OF LONE STAR INDUSTRIES, INC.

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes

Other Authorities

Other Authorities **Page(s)**

INTEREST OF AMICUS CURIAE

As set out in New Farm, Inc.'s accompanying Motion to File Americus Curiae Brief, New Farm is insured pursuant to insurance policies containing provisions similar to those at issue here, including the so-called "sudden and accidental" pollution exclusion. As a consequence, New Farm has a great interest in the interpretation given to those provisions. New Farm is concerned that amicus curiae Insurance Environmental Litigation Association ("IELA"), an association of major insurance companies, urges the Court to reject, and has mischaracterized, the regulatory estoppel argument. New Farm therefore files this brief in support of the regulatory estoppel argument made by appellee Lone Star Industries, Inc. in its answer brief.

STATEMENT OF THE CASE

New Farm adopts the Statement of the Case and Facts set forth in Lone Star's brief.

SUMMARY OF ARGUMENT

When the insurance industry sought approval to add the pollution exclusion to liability insurance policy forms, it represented to the Florida Insurance Commissioner (and those of other states), that only intentional pollution would be excluded from coverage under Comprehensive General Liability ("CGL") policies. The purpose of the pollution exclusion, it

represented, was simply to clarify -- and not to reduce -- already existing coverage. Appellant Liberty Mutual Insurance Company now argues that the pollution exclusion excludes from coverage all pollution except that which is both temporally sudden and accidental. Based on the earlier representations of the insurance industry, Liberty Mutual and other insurers should be estopped from arguing their narrower interpretation of the exclusion.

ARGUMENT

I. LIBERTY MUTUAL AND OTHER INSURERS SHOULD BE BARRED FROM ARGUING FOR A NARROW INTERPRETATION OF THE POLLUTION EXCLUSION

A. This Case Presents An Appropriate Opportunity For The Court To Consider The Regulatory Estoppel Argument

IELA argues that the overwhelming weight of precedent has interpreted the pollution exclusion to bar coverage for all pollution except that which occurs quickly, hastily, immediately, or abruptly. IELA is wrong. To the contrary, the supreme courts of South Carolina and New Jersey have recently held that the pollution exclusion should not be interpreted so narrowly. Greenville County v. Insurance Reserve Fund, 443 S.E.2d 552 (S.C. 1994); Morton Int'l., Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993), cert. denied, -- U.S. --, 114 S.Ct. 2764, 62 U.S.L.W. 3857 (June 27, 1994). Many other

decisions are in accord. See Morton, 629 A.2d at 856-57, 862-70 (numerous cases cited therein).

IELA also points out that the Florida Supreme Court has considered the pollution exclusion and concluded that it was not ambiguous. Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1993), reh'g denied, 19 Fla. L. Weekly S166 (Fla. Mar. 31, 1994). However, the Court was closely divided in Dimmitt; three out of seven justices found ambiguity in the pollution exclusion. Surely, the reasonable consumer could likewise find the wording of that exclusion ambiguous.

Like IELA, New Farm believes that the proper interpretation of insurance policies is in the public interest. Unlike IELA, however, New Farm believes that the interpretation of the pollution exclusion must also be consistent with representations made to state insurance commissioners, including the Florida Insurance Commissioner, by the insurance industry when it sought approval of the pollution exclusion. As described below, the insurance industry represented that the pollution exclusion merely clarified existing coverage -- that is, the policies provided coverage for all pollution other than intentional pollution. Liberty Mutual and other insurers should be estopped from now arguing that only pollution which is both temporally sudden and accidental is covered.

The Supreme Court of New Jersey adopted just this position in Morton. Except for the Morton decision, the regulatory estoppel issue has not been squarely addressed elsewhere in the country in relation to the pollution exclusion.[1] New Farm submits that it has not been squarely addressed in Florida. Regulatory estoppel was first raised before this Court on rehearing of the July 1993 decision in Dimmitt Chevrolet. In denying the insured's motion for rehearing in that case, the four members of the majority may have decided that the issue of regulatory estoppel was not properly preserved or developed below and was therefore not ripe for decision.

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[1] IELA cites two cases as having expressly rejected Morton. Brief of Amicus Curiae IELA at 24 n.26. In the first case, Farm Bureau Mutual Ins. Co. v. Laudick, the court, in distinguishing Morton, stated "[w]e note that, in the case before us, no such public policy issues have been raised and that there is no suggestion of any deception." 859 P.2d 410, 414 (Kan. Ct. App. 1993). In the other case, Monsanto Co. v. Aetna Casualty & Sur. Co., the trial court distinguished Morton on the bases that the latter did not deal with similar exclusions, and because the insured did not provide evidence of insurer statements to Missouri regulators. 1993 Del. Super. LEXIS 442, at *39 (Del. Super. Dec. 9, 1993). Neither case expressly rejects Morton.

Further, IELA cites what it considers authority for refusing to consider extrinsic evidence such as that "upon which the New Jersey court grounded Morton." Brief of Amicus Curiae IELA at 24. Again, IELA misses the mark as all of its authorities are irrelevant. Three of the four cases make no mention of extrinsic evidence, and the fourth, Smith v. Hughes Aircraft Co., found the drafting and marketing history of the pollution exclusion irrelevant because the insured did not show that it relied on the history or that it played any part in policy negotiations. 10 F.3d 1448, 1453 (9th Cir. 1993), amended and superseded by 22 F.3d 1432 (9th Cir. 1994).

In contrast to Dimmitt Chevrolet, the estoppel issue is now squarely before this Court. See Lone Star's Brief at 1-2. New Farm respectfully requests that the Court consider the history of representations to Florida's and other states' insurance commissioners about the pollution exclusion, as outlined below. That history paints a picture of clear and unequivocal assurances that coverage for pollution would continue after the pollution exclusion was added to liability insurance policy forms, except where the pollution was intentional. Liberty Mutual and other insurers should be estopped by their representations from denying coverage for pollution merely because it was not temporally sudden.

B. The Pollution Exclusion Was Represented To State Regulators As A Mere Clarification Of Already Existing Coverage

In 1966, Liberty Mutual, and industry organizations acting on its behalf, represented to policyholders and insurance regulators that the standard form occurrence policy provided coverage for liability related to gradual pollution. In the early 1970's, Liberty Mutual, and industry organizations acting on its behalf, represented to policyholders and insurance regulators that the standard form pollution exclusion served only to clarify, and not to alter, the coverage provided by the 1966 occurrence policy. In reliance on those representations, the Florida Department of Insurance allowed to be sold, and

policyholders purchased, policies containing this pollution exclusion. Liberty Mutual cannot now be heard to deny the coverage it promised would be available under those policies. Under the doctrine of promissory estoppel, it must be required to provide the gradual pollution coverage it promised to provide.

1. Coverage for gradual pollution is provided under the 1966 revised "occurrence" policy

Insurance industry-wide revisions of the standard form CGL policy provisions were made in 1966 and again in 1973.[2] The insurance policies at issue in this case are standard form CGL policies. CGL policies have been in use since the 1940's. See Robert N. Sayler & David M. Zolensky, Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards, Mealey's Litig. Rpts. (Insurance) 4,425, at 4,427 (1987).

Most pre-1966 CGL policies provide coverage for property damage or personal injury "caused by accident." See Robert M. Tyler, Jr. & Todd J. Wilcox, Pollution Exclusion Clauses:

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[2] The 1966 standard form policy was produced by the National Bureau of Casualty Underwriters, later known as the Insurance Rating Board, and Mutual Insurance Rating Bureau. In 1971, the Insurance Rating Board and the Mutual Insurance Rating Board merged to form the Insurance Services Office, Inc., which is currently responsible for revising standard form CGL policies.

Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 574 n.3 (1990) (citing Steven G. Bradbury, Original Intent, Revisionism, and the Meaning of the CGL Policies, 1 Envir. Claims J. 279, 280-81 (Spring 1989) [hereinafter "Bradbury"]).

Problems in Interpretation and Application Under the Comprehensive General Liability Policy, 17 Idaho L. Rev. 497, 499 (Summer 1981). In order to clarify and broaden the scope of coverage, the insurance industry substantially revised the standard form CGL policy in 1966. Id.

The 1966 revised standard form CGL policy -- virtually identical to Liberty Mutual's policies at issue here -- provides coverage for damage resulting from an "occurrence." Liberty Mutual policies define "occurrence" as follows:

> an accident, or an injurious exposure to harmful conditions which results, during the policy period in . . . property damage neither expected nor intended from the standpoint of the insured.[3]

Supplemental Record Vol. I-III ("S.R.") at 1. The 1966 revised "occurrence"-based CGL policy expressly provides coverage for gradually occurring events -- i.e., "a continuous or repeated exposure to conditions."[4] Liberty Mutual's policy is slightly different -- "an injurious exposure to harmful conditions," but the result is the same. (S.R. 1). Gradually occurring events are covered.

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[3] Cf., Tyler & Wilcox, 17 Idaho L. Rev. at 499 (standard definition for occurrence is "an accident, including continuous or repeated exposure to conditions which result in bodily injury or property damage neither expected nor intended from the standpoint of the insured").

[4] Id.

The 1966 revisions were an express expansion of liability insurance coverage for damages arising from gradual events.[5] The Supreme Court of Wisconsin described the effects of the 1966 revisions upon coverage for gradually occurring environmental damages:

> This change in the policy language was widely touted as an important expansion of CGL insurance coverage. Numerous representatives of insurance industry trade associations and the insurance companies that drafted the revised standard form CGL policy actively promoted this policy as providing new, broadened coverage for liabilities arising from gradual pollution. At least with respect to environmental claims, contemporaneous industry commentary on the 1966 CGL policy indicates that there was no intent to avoid coverage for unexpected or unintended pollution. G.L. Bean, Assistant Secretary, Liberty Mutual Insurance Company, in a paper presented at the Mutual Insurance Technical Conference, stated: "[I]t is in the waste disposal area that a manufacturer's basic premises-operation coverage is liberalized most substantially."

Just, 456 N.W.2d at 574 (citations omitted). (emphasis added).

Courts consistently recognized that the "occurrence" language was intended to provide broad coverage for property damage resulting from long-term exposures, including pollution exposures.[6] These decisions were consistent with the insurance

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[5] A conclusion buttressed by the fact that the insurance industry sought to increase premiums on this basis. See Wener Pfennigstorf, Environment, Damages, and Compensation, 1979 Am B. Found. Res. J. 349, 438-39.

[6] See, e.g., Steyer v. Westvaco Corp., 450 F. Supp. 384 (D. Md. 1978) (damage to trees caused by discharges of pollutants over a four-year period); Aetna Casualty & Sur. Co. v. Martin Bros. Container & Timber Prod. Corp., 256 F. Supp. 145 (D. Or.

(continued...)

companies' contemporaneous explanations of occurrence-based coverage.

2. Insurance industry representatives asserted that the 1966 CGL insurance policy covered gradual pollution

Liberty Mutual itself asserted that the 1966 CGL policy covered gradual pollution. Gilbert Bean, a spokesperson at Liberty Mutual stated that "[s]moke, fumes or other air or stream pollution have caused an endless chain of severe claims for gradual property damage." Sayler & Zolensky, supra, at 4,431. Bean explicitly said that gradual injuries arising out of waste disposal were covered:

> [I]f the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date and in fact, over a period of years, with a separate policy applying each year . . . Manufacturing risks producing insecticides, plant foods, fertilizers, weed killers, paints, chemicals, thermostats or other regulatory devices, to name a few, have severe gradual [property damage] exposure. They need this protection and should legitimately expect to be able to buy it, so we have included it.

Id. at 4,432. (emphasis added).[7]

(...continued)
1966) (property damage caused by emission of flyash 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 Ct.App. 1972) (property damage caused by particulate emissions from insured's operations over seven-year period).

[7] See also American Home Prods. Co. v. Liberty Mutual Ins. Co., 565 F. Supp. 1485, 1500-01 (S.D.N.Y. 1983) (describing (continued...)

Liberty Mutual's Mr. Bean also presented a paper to the insurance industry that touted the 1966 revisions as covering some environmental damage claims:

> [C]overage for gradual BI [bodily injury] or gradual PD [property damage] resulting over a period of time from exposure to the insured's waste disposal. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the water intake of downstream industrial sites, the Donora, Pa. atmosphere contamination, and the like.

G.L. Bean (Assistant Secretary, Liberty Mutual Insurance Company) in an Address to The American Society of Insurance Management (October 20, 1965). (S.R. 16).

The drafters, including Liberty Mutual representatives, repeatedly asserted that pollution-related liabilities fell squarely within the scope of coverage of the new occurrence-based CGL policy. Richard Elliott, Secretary of the National Bureau of Casualty Underwriters, an organization that was intimately involved in drafting the standard form language, stated in 1966 that the new CGL form would provide coverage for the "many instances of injury taking place over an extended period of time before they become evident," and specifically cited the "slow ingestion of foreign substances or inhalation of noxious fumes"

(...continued)
the involvement of Liberty Mutual's Richard Schmalz and Gilbert Bean in drafting and approving the 1966 standard form CGL insurance policy) aff'd as modified, 748 F.2d 760 (2nd Cir. 1984).

as examples of latent injuries covered under "occurrence" policies. Richard Elliot, "The New Comprehensive General Liability Policy," in Liability Insurance Disputes (S. Schreiber ed. 1968), at 12-5.[8]

3. Coverage for pollution was a "sales point" for Liberty Mutual's policies

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[8] Representatives of insurance companies other than Liberty Mutual made similar statements. Lyman Baldwin, Secretary of Underwriting for the Insurance Company of North America, stated that the occurrence language in the 1966 revised policy would provide coverage for unintended property damage resulting from the emission of noxious fumes from a chemical manufacturing plant. Lyman Baldwin, Jr., Address to the American Society of Insurance Risk Management, (October 20, 1965) quoted in Sayler & Zolensky, supra, at 4,431. Baldwin served on one of the drafting committees that approved the 1966 revisions.

Baldwin also stated that unintended damage caused by noxious emissions would be covered under the 1966 revised occurrence-based policy:

> Let us consider how this would apply in a fairly commonplace situation where we have a chemical manufacturing plant which, during the course of its operations emits noxious fumes that damage the paint on buildings in the surrounding neighborhood. Under the new policy there is coverage until such time as the insured becomes aware that the damage is being done.

Just, 456 N.W.2d at 574 (quoting George Pendygraft, et al., Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation, 21 Ind. L. Rev. 117, 142 (1988) [hereinafter "Pendygraft"]).

Another leading industry spokesman, Henry Mildrum of Hartford, explained that the introduction of the "occurrence" form broadened coverage to include "the discharge of corrosive material into the atmosphere or water courses." See Sayler & Zolensky, supra, at 4,431.

Liberty Mutual's 1966 instructions to salespersons are enlightening. (S.R. 17). The annotated CGL policy shows that Liberty Mutual had two different stories: one -- pro-coverage -- for use when marketing its policies; and another -- anti-coverage -- for use when claims are made against those same policies. (S.R. 18).[9]

Liberty Mutual's annotated policy for its salespersons shows that Liberty had a very different interpretation for its potential customers than it has for Lone Star today. Liberty Mutual listed broadened coverage for "gradual, unintended, cumulative bodily injury or property damage for policyholders using or disposing of toxic substances or those whose operations

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[9] Courts have noticed that coverage positions seemingly become altered between the time a policy is purchased, and the time a claim is made. In a different context, Kentucky's highest court made the following observation at approximately the same time that the "pollution exclusion" was being drafted:

> Ambiguity and incomprehensibility seem to be the favorite tools of the insurance trade in drafting policies. Most are a virtually impenetrable thicket of incomprehensible verbosity. It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered. The miracle of it all is that the English language can be subjected to such abuse and still remain an instrument of communication.

Universal Underwriters Ins. Co. v. Travelers Ins. Co., 451 S.W.2d 616, 622-23 (Ky. 1970). (emphasis added).

It is, of course, precisely this conduct which promissory estoppel is designed to prevent. Crown Life Ins. Co. v. McBride, 517 So. 2d 660 (Fla. 1987) (discussed below).

produce noise, vibration, odor or dust . . . Under the new CGL policy the same underwriting standards apply, but occurrence coverage . . . is automatically extended without additional premium or special endorsement." "Liberty Mutual, Broadened Coverages - 1966 Comprehensive General Liability Policy," by Charles C. Flora, H.O. Administration, at 1 (July 1, 1966). (S.R. 16).

Under the heading "Sales Point," Liberty Mutual's salespersons were told to sell the new policy on the basis of its broadened coverage for pollution. For instance, sales persons were coached to tell customers that "with the current emphasis on air and water pollution, many risks have a hidden exposure too often not recognized." Id. at 1. The point of Liberty Mutual's emphasis was to tell its salespersons to promise policyholders that the new policy covered this "hidden exposure."

4. The addition of the pollution exclusion was represented to be a "clarification" of existing coverage

The intent of insurance companies, including Liberty Mutual, to provide coverage for liability arising out of long-term pollution remained unchanged in 1970, when the insurance industry added a mandatory endorsement to the standard form CGL policy that came to be known as the "pollution exclusion." In selling that exclusion to state regulators and to policyholders, the insurance industry represented that the exclusion was

intended merely to clarify, not restrict, existing coverage under the "occurrence"-based CGL policy. (S.R. 22). As the court noted in Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989), "the Insurance Rating Board represented 'the impact of the ["pollution exclusion" clause] on the vast majority of risks would be no change.'" Id. at 689.

The "contamination or pollution endorsement" was developed in 1970 for use in standard CGL policies by the Insurance Rating Board ("IRB"), a trade association of stock insurance companies. Bradbury, supra, at 283. In May and June of 1970, the IRB and the Mutual Insurance Rating Bureau ("MIRB") (a trade association of mutual companies, including Liberty Mutual) sent a circular to all of their member and subscriber companies describing the endorsement. Id. at 283-84. It stated that "[c]overage is continued [under the proposed exclusion] for pollution contamination caused injuries when the pollution or contamination results from an accident." Id. at 284.

Contemporaneous representations made by the insurance industry confirm that the pollution exclusion "clarified but did not reduce the scope of coverage." Just, 456 N.W.2d at 575. Some government regulators questioned whether the purpose of the pollution exclusion was to limit coverage rather than "clarify" it. The MIRB, in a submission designed to mollify the concerns of the West Virginia Commissioner of Insurance, explained that

the intent of the clause was to clarify "that the definition of occurrence excludes damages that can be said to be expected or intended." Pendygraft, supra, at 154 (emphasis added), quoted in Just, 456 N.W.2d at 575.

The West Virginia Commissioner of Insurance approved the clause on the basis of this and similar representations. The Commissioner stated:

> 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 coverages as defined and limited in the definition of the term occurrence contained in the respective policies to which said exclusions would be attached.

Just, 456 N.W.2d at 575 (citation omitted).

Liberty Mutual itself described the "exclusion" as a clarification. A Liberty Mutual training manual published around 1975, and used to instruct policyholder risk managers, stated that coverage is provided for injuries caused by unintentional pollution, and that the "pollution exclusion" was a clarification of intent. "Insurance Principles for Risk Control, Lesson 1 Overview," Liberty Mutual Insurance Company, at 19. (S.R. 17).

Richard Schmalz of Liberty Mutual was one of the drafters of the pollution exclusion. Supplemental Record, Separately Bound Volume ("S.R. Ref.") at 5. Mr. Schmalz testified in a deposition that the drafters of the pollution exclusion wanted "language that at least some people in the insurance business had seen

before" and hence "turned to" the "analogous concept" in the boiler and machinery insurance policy. Memorandum in Support of Plaintiff the Boeing Company's Motion For Partial Summary Judgment as to the So-Called "Pollution Exclusion," at 12-13, n.7, Boeing Company v. Aetna Casualty & Sur. Co., No. C86-352WD (W.D. Wash. filed Feb. 8, 1990). (S.R. Ref. 5). As used in boiler and machinery insurance the phrase more properly was interpreted to mean "unintended and unexpected," not "instantaneous." Anderson & Middleton Lumber Co. v. Lumberman's Mutual Cas. Co., 333 P.2d 938, 941 (Wash. 1959) (construing "sudden and accidental" to mean "unexpected and unintended"); see also George J. Couch, 10A Couch on Insurance 2d § 42:396 (M. Rhodes rev. 2d ed. 1982) ("'sudden' is not to be construed as synonymous with instantaneous"); Stephen A. Cozen, Insuring Real Property § 5.03(2)(a), at 5-14 (1989) (in context of boiler and machinery insurance, the courts have uniformly held that the dictionary definition of sudden as 'unforeseen, unexpected and unintentional' is controlling).

The insurance industry drafted its exclusion well after this interpretation of the phrase "sudden and accidental" was part of insurance case law. The exclusion should be considered to have been sold with the drafters' interpretation placed upon it. See John A. Appleman, 13 Insurance Law and Practice § 7404, at 335-36 (1976); Couch, supra, § 15:20, at 196 (M. Rhodes rev. 2d ed.

1984). The phrase "sudden and accidental" had already been defined to mean "unexpected and unintended." Liberty Mutual must be held to that interpretation.

C. The Statements Of Liberty Mutual And The Industry Organizations Of Which It Was A Member Induced The Florida Department Of Insurance To Permit The Use Of The Pollution Exclusion

IELA itself provides some of the best support for the conclusion that, in Florida, Liberty Mutual was successful in its attempt to portray the pollution exclusion as a mere clarification of existing coverage, rather than a coverage reduction. In footnote 29 of its Brief of Amicus Curiae, IELA admits that an insurance policy which excludes coverage for all but "instantaneous" pollution events should have a lower premium than a policy which provides coverage for gradual pollution. Yet the Florida Department of Insurance permitted the insertion of the 1970 pollution exclusion into CGL policies without any concomitant reduction in premiums.[10] That fact alone mandates the conclusion that the Florida Department of Insurance did not

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[10] As supposed evidence that the Florida Department of Insurance was not deceived by the industry's misleading explanation of the import of the exclusion, IELA argues that several other state commissioners did, in fact, either restrict or prohibit the adoption of the exclusion. The fact that the insurance industry's deceptive tactics were not successful in other states is irrelevant to the question of whether the Florida Department of Insurance relied on the insurance industry's representations that the exclusion would not affect existing coverage.

view the pollution exclusion to be the dramatic restriction that Liberty Mutual now argues that it is. This is further evidenced by a letter representative of correspondence sent by the insurance industry to the Florida Department of Insurance, dated May 28, 1970, stating in pertinent part:

> 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 when the pollution or contamination results from an accident . . ..

Dimmitt Chevrolet, 19 Fla. L. Weekly at S166 (Overton, J., dissenting); see also Morton, 629 A.2d at 851, 852-53 (identical language filed with New Jersey Department of Insurance in May of 1970). Given Liberty Mutual's current interpretation of the pollution exclusion, the earlier promise of coverage by the insurance industry was clearly misleading and untrue, and a misrepresentation.

Even more conclusive evidence of that fact is provided by the Department's actions in 1984, when the Insurance Services Office, Inc.[11] submitted the so-called "absolute pollution exclusion" to the Department for approval. In initially rejecting the exclusion, the Department wrote:

> Section 627.031, Florida Statutes, requires the Department to protect the policyholder and public

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[11] See supra note 2.

> against the adverse effect of excessive, inadequate, or unfairly discriminatory insurance rates. The policy for which the captioned filing applies contains specific pollution coverage. The losses arising from their coverage have become a component part of the rates charged for the policy or policies. The endorsement you have filed for our review reflects no change in the current rating structure, and we are therefore unable to conclude that the existing rate with lessened coverage is not excessive or unfairly discriminatory.
>
> Pollution coverage has long been an integral part of general liability policies, and it is the Department's position that the best interest of the insurance-buying public is not being served by approval of a form which excludes this coverage.

(S.R. 22).

These statements belie any claim that the Florida Department of Insurance "understood" in 1970 -- or, indeed, at any time prior to 1985 -- that the standard form pollution exclusion had served to remove from the CGL policy, coverage for all but "instantaneous" pollution liability. It is inconceivable that, had the Department so interpreted the 1970 pollution exclusion, it would have permitted the exclusion to be adopted without a corresponding reduction in premium.

In supposed contravention of these record facts, the IELA cites to an affidavit by Broward Williams, the Commissioner of Insurance, annexed to an article written by an insurance industry attorney.[12] What IELA fails to note, however, is that Mr.

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[12] Brief of Amicus Curiae IELA at 34. IELA's reliance on the hearsay, after-the-fact statements of Mr. Williams is ironic, given the fact that it objects to the Morton court's reliance on (continued...)

Williams does not represent in the affidavit that he was at all involved in the 1970 review of the pollution exclusion. In fact, he cannot make such a representation, as he admits he "[does] not have a precise recollection of the filing of the pollution exclusion in 1970."[13] The statements he does make, however, are totally at odds with the contemporaneous documents from the era.[14] In short, Mr. Williams' 1993 "assumptions" as to what the Florida Department of Insurance thought in 1970 about the pollution exclusion are insufficient to overcome the clear record establishing that the Department relied on the assurances of Liberty Mutual and the rest of the insurance industry that the pollution exclusion would not restrict coverage provided by the CGL policy.

(...continued)
contemporaneous written admissions and public record documents to examine the regulatory history of the pollution exclusion.

[13] See Edward Zampino, et al. *Morton International*: The Fiction Of Regulatory Estopppel, 24 Seton Hall L. Rev. 847, 919 (1993) (affidavit of Broward Williams ¶ 5) [hereinafter "Zampino"].

[14] For example, Mr. Williams states that "[i]t was perceived that claims for most cases of gradual pollution would already be precluded by the language of the occurrence definition." Zampino, supra, at 919. As shown by the contemporaneous regulatory and drafting history set forth above, that statement is not an accurate reflection of the understood scope of the occurrence policy. Certainly, the Department of Insurance in 1983 did not understand that most cases of gradual pollution" would be excluded, as shown in its rejection of the "absolute" pollution exclusion.

D. Liberty Mutual Must Be Estopped From Denying Coverage For Gradual Pollution Damage Which Was Unexpected And Unintended

Virtually every court that has considered the drafting and regulatory history set forth above has held that the clause must be read to provide the coverage that the insurance industry promised would be provided by policies containing the exclusion. See, e.g., Morton 629 A.2d 831 (N.J. 1993), cert. denied, -- U.S. --, 114 S.Ct. 2764, 62 U.S.L.W. 3857 (June 27, 1994); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991); Claussen, 380 S.E.2d 686 (Ga. 1989); Outboard Marine Corp. v. Liberty Mutual Ins. Co., 607 N.E.2d 1204 (Ill. 1992); Joy Technologies, Inc. v. Liberty Mutual Ins. Co., 421 S.E.2d 493 (W.Va. 1992); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990). That conclusion is in direct accord with Florida law that an insurance company may not promise coverage, then fail to provide it. See Crown Life Ins. Co. v. McBride, 517 So. 2d 660 (Fla. 1987). This principle is discussed at greater length in Lone Star's Brief at 34-39.

The most recent articulation of that conclusion is the New Jersey Supreme Court's decision in Morton wherein the court recognized that, because the Commissioner of Insurance is charged with protecting policyholders' interests, a promise of coverage made in the form of a regulatory submission is enforceable by affected policyholders:

> This Court is now asked to construe CGL policies containing the pollution-exclusion clause in a manner consistent with the clause's literal language, ignoring the industry's misleading presentation to state regulators over twenty years ago, and overlooking the apparent unfairness that such an interpretation would impose on policyholders who were charged rates that did not reflect the radical diminution in coverage contemplated by the insurance industry. So to construe the pollution-exclusion clause would, in this Court's view, violate this State's strong public policy requiring regulation of the insurance business in the public interest, and would reward the industry for its misrepresentation and nondisclosure to state regulatory authorities.
>
> In a non-regulatory context, this Court has long recognized the doctrine that an insurer who misrepresents the coverage of, or the exclusions from, an insurance contract to the insured's detriment may be estopped from denying coverage on a risk not covered by the policy . . . .
>
> Although we have not heretofore applied the estoppel doctrine in a regulatory context, its application to these circumstances is appropriate and compelling. A basic role of the Commissioner of Insurance is "to protect the interests of policy holders" and to assure that "insurance companies provide reasonable, equitable and fair treatment to the insuring public." . . . In misrepresenting the effect of the pollution-exclusion clause to the Department of Insurance, the IRB misled the state's insurance regulatory authority in its review of the clause, and avoided disapproval of the proposed endorsement as well as a reduction in rates. As a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB, its designated agent, in presenting the pollution exclusion clause to state regulators.

629 A.2d at 872-74.

Florida law, like that of New Jersey, holds that an insurance company is estopped from denying coverage when its misleading statements have induced reasonable reliance, where to refuse to

do so would sanction fraud or other injustice. Crown, 517 So. 2d 660.[15] Simply put, an insurer cannot promise coverage that it does not deliver. Like that of New Jersey, the Florida Department of Insurance is charged with the protection of policyholders' interests; § 627.031, Fla. Stat. (1993), makes clear that the purpose of requiring submission of proposed policy language to the Department of Insurance is "to protect policyholders and the public against the adverse effects of excessive, inadequate, or unfairly discriminatory insurance rates." And, as in New Jersey, Liberty Mutual and the rest of the insurance industry misleadingly represented the effect of pollution exclusion to the Florida Department of Insurance. Accordingly, this Court, like the New Jersey Supreme Court, should estop Liberty Mutual and other insurers from interpreting

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[15] IELA makes the absurd argument that the estoppel imposed by the New Jersey Supreme Court constituted a unconstitutional "taking" without compensation, or an abrogation of the insurance companies' contract rights. Brief of Amicus Curiae IELA at 25-26. Taken to its logical conclusion, such an argument would preclude any court from forcing one who has profited from fraud and deception to disgorge him or herself of the fruits of the fraud.

The lack of merit in this absurd argument, and in IELA's claims that the insurance industry's constitutional due process rights were somehow violated in Morton is shown by the fact that the United States Supreme Court has recently denied the insurance companies' petition for certiorari in that case. See Morton Int'l., Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993), cert. denied sub nom, Insurance Co. of North America v. Morton Int'l Inc., -- U.S. --, 114 S.Ct. 2764, 62 U.S.L.W. 3857 (June 27, 1994).

the pollution exclusion narrowly and denying coverage for pollution merely because it was not temporally sudden.

Conclusion

The insurance industry represented to the Florida Department of Insurance, and to the insurance buying public, that the pollution exclusion simply clarified -- and did not reduce -- existing coverage provided by CGL policies. Liberty Mutual, however, now argues that the pollution exclusion excludes from coverage all pollution except that which is temporally sudden and unintentional. Based on the earlier representations of the insurance industry to the Florida Department of Insurance (and those of other states), New Farm respectfully requests that the Court estop Liberty Mutual and other CGL insurers from arguing their narrower interpretation of the pollution exclusion.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus Curiae New Farm, Inc. was served by U.S. Mail this 26th day of July, 1994 on:

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