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In The Florida Supreme Court

No. 80,899

LONE STAR INDUSTRIES, INC.,

Plaintiff-Appellee,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

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

BRIEF OF *AMICUS CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION

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INTEREST OF AMICUS CURIAE

The Insurance Environmental Litigation Association ("IELA") is an association of major property/casualty insurers that presents its members' position in environmentally related insurance litigation.[1] The member companies of IELA have entered into insurance contracts containing provisions similar to those at issue here with many insureds, in Florida and elsewhere.

IELA believes that the proper interpretation of insurance contracts is in the public interest, and benefits both insurers and insureds. Lone Star Industries, the appellee here, asks the Court to find that Liberty Mutual must continue to defend it against claims that are plainly excluded from coverage by the pollution exclusion. In making this request, Lone Star would have this Court (1) retroactively rewrite its insurance contracts, and/or (2) refuse to enforce the clear meaning of those contracts,

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[1] These companies include Allstate Insurance Company, American International Group, Chubb Group of Insurance Companies, CIGNA Property and Casualty Companies, Continental Insurance Company, Crum & Forster Corporation, Fireman's Fund Insurance Company, Hanover Insurance Company, Hartford Insurance Group, Home Insurance Company, Maryland Casualty Company, Prudential Reinsurance Company, Royal Insurance Company, St. Paul Companies, The Travelers Insurance Companies, and United States Fidelity & Guaranty Company.

Liberty Mutual Insurance Company, Appellant here, and Aetna Life and Casualty Company are also members of IELA. This brief is not filed on their behalf, however.

thereby granting industrial polluters insurance for which they never paid.

Under the recently decided Dimmitt Chevrolet cases, the Court already has resolved the issues and examined the evidence involved in this case -- mainly, the meaning of the "sudden and accidental" pollution exclusion and evidence related to the exclusion's regulatory history. In Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 18 Fla. L. Weekly S400, 1993 WL 241520 (Fla. July 1, 1993) ("Dimmitt II"), this Court held that the "sudden and accidental" pollution exclusion in many comprehensive general liability ("CGL") insurance policies is plain and unambiguous. Less than two-and-a-half months ago, the Court similarly rejected the New Jersey Supreme Court's nonsensical regulatory estoppel theory after a thorough review of evidence and arguments by both policyholders and insurers. Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 19 Fla. L. Weekly 5166 (Fla. Mar. 31, 1994).[2/] Accordingly, because there is nothing left for the Court to decide, the decision of the court of appeal must be reversed.

Lone Star's creative attempts to subvert the plain meaning of its insurance contracts may appear to provide

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[2/] In Morton Int'l., Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993) ("Morton"), the Supreme Court of New Jersey properly concluded that the pollution exclusion was plain and unambiguous. Nonetheless, that Court refused to give effect to the exclusion on the ground that insurers allegedly had misled state insurance regulators in 1970 as to the exclusion's meaning.

short-term benefits for itself and other large industrial companies. In reality, however, such contractual contortions tend to encourage irresponsible behavior, to limit all insureds' choices with respect to coverage, and to raise premiums. This is particularly true in the environmental context, where routine industrial polluting activities may be difficult to detect, and often go undiscovered for years.

Liberty Mutual has already provided the Court with a thorough and insightful analysis of the law regarding the pollution exclusion and how that law applies to the long-term intentional discharge of pollution in the regular course of Lone Star's business. In this amicus brief, IELA will show that this Court reached the correct result in Dimmitt II when it conclusively determined that the pollution exclusion is plain and unambiguous. IELA will also demonstrate why the Court should reaffirm its prior rejection of the Morton decision. Finally, IELA will show that public policy considerations reinforce what the law requires -- i.e., that the insurance contract be construed and enforced according to its terms, and not distorted or rendered unenforceable to provide free coverage.

STATEMENT OF THE CASE

This case arises out of environmental pollution at the site of a wood-treatment plant formerly operated by Lone Star. During the approximately 12-year period in which Lone Star or its subsidiary operated the plant, discharges of toxic chemicals onto the soil took place virtually every working day, as part of the regular course of the operation.[3/] Wood was removed from the pressure-treating vessel and stacked in the open, where the treating solution dripped onto the ground.[4/] This was a recognized and accepted consequence of the manner in which the plant was operated.

In 1983, the Dade County Department of Environmental Resource Management ("DERM") sued Lone Star and several other parties, including present and past owners of the site. DERM alleged that the defendants "willfully, wantonly and in utter disregard for the safety and health of the residents of Dade County" had caused and were continuing to cause pollution of the soil and groundwater at and near the site.

[3/] See Seaboard Sys. R.R., Inc. v. Clemente, 467 So. 2d 348, 351 (Fla. 3rd DCA 1985). In Seaboard, this Court affirmed the grant of a preliminary injunction requiring Lone Star and other parties to undertake investigative and cleanup efforts at the site.

[4/] Seaboard, 467 So.2d at 352. The treating agent was chromated copper arsenate, or CCA, which contains the hazardous metals chromium and arsenic. Id.

Lone Star retained attorneys to defend it in against the DERM's suit, and forwarded to Liberty Mutual the papers relating to the suit. Lone Star asked Liberty to analyze whether any portions of the law suit were covered by the insurance policies. Liberty responded with a lengthy letter setting forth various provisions of the insurance policies that might be applicable, including the pollution exclusion at issue here. That exclusion, contained in a manuscript endorsement to the policy, provides,

> [i]t is agreed that this insurance does not apply to any liability arising out of pollution or contamination due to the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental or results from an underground seepage of which the insured is unaware.[5/]

Liberty disclaimed coverage of some parts of the suit, and reserved its rights to make further disclaimers on the grounds set forth in the letter. Pending its further investigation, Liberty agreed temporarily to assume the costs of the defense for which Lone Star had already arranged.

Liberty's investigation eventually confirmed what the underlying complaint alleged: namely, that the polluting discharges at issue were intentional and took place

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[5/] Except for the "underground seepage" exception -- which is not at issue in this case -- this exclusion is not materially different from the widely used exclusion construed by the many judicial decisions discussed herein and in the brief of Liberty Mutual.

continuously over a long period of time. Liberty then disclaimed coverage and declined to make further payments of defense costs. Its decision rested on the pollution exclusion and on the policies' definition of "occurrence," which requires that damage, to be covered, be "neither expected nor intended" by the insured.

Lone Star subsequently filed this declaratory judgment action, seeking coverage for the suit. Lone Star moved for partial summary judgment, asking the circuit court to declare that Liberty must provide a defense. Despite the clear applicability of the pollution exclusion, the trial court granted that motion in an unexplained order, and Liberty appealed.

The court of appeal affirmed. Its two-sentence per curiam opinion rested solely on this Court's holding in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., No. 78,293, 1993 WL 241520 (Fla. Sept. 3, 1992) ("Dimmitt I"). Relying primarily on "drafting history" evidence presented by policyholders, that decision had said that the "sudden and accidental" exception to the pollution exclusion was ambiguous. Based solely on that opinion, the intermediate court concluded that the pollution exclusion in the policies issued by Liberty Mutual to Lone Star did not exclude Liberty Mutual's duty to defend its insured.

Liberty Mutual next appealed to this Court. Meanwhile, this Court overruled Dimmitt I in Dimmitt II. Dimmitt

Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 18 Fla. L. Weekly S400 (Fla. July 1, 1993) ("Dimmitt II"). In Dimmitt II, this Court, after examining evidence presented by insurers as well as policyholders, recognized that the pollution exclusion was plain and unambiguous, and that the term "sudden" includes a temporal aspect. The Court later declined to rehear Dimmitt II, despite petitioners' arguments that -- even if the pollution exclusion is plain and unambiguous -- the Court should not enforce it in light of Morton's regulatory estoppel rule. Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 19 Fla. L. Weekly 5166 (Fla. Mar. 31, 1994).

SUMMARY OF ARGUMENT

This case is about a large industrial concern, Lone Star, that seeks to have its CGL insurance carrier, Liberty Mutual, defend it for the company's knowing, long-term environmental polluting activities which occurred in the regular course of the company's business. Lone Star seeks this result despite the inclusion in its policies of a pollution exclusion relieving Liberty Mutual of any duty to defend unless Lone Star's polluting activities were "sudden and accidental." The appellate court below found, in a two-sentence opinion which relied solely on this Court's now-superseded holding in Dimmitt I, that Liberty Mutual was obligated to defend Lone Star.

The appellate court's decision was erroneous as a matter of law because this Court has already conclusively determined in Dimmitt II, after massive briefing and extended consideration of drafting history and other evidence, that the pollution exclusion is plain and unambiguous. In so holding, the Court joined the overwhelming majority of courts recognizing that polluting discharges are "sudden and accidental" only if they are: (1) quick, abrupt, and instantaneous; and (2) unexpected and unintended. Lone Star's polluting events were not sudden and accidental; rather, they took place with the company's knowledge, over a long period of time, and were a routine part of the company's operations. Accordingly, under the pollution exclusion in this case, Liberty Mutual is not obligated to defend Lone Star.

By declining to rehear Dimmitt II, the Court also conclusively determined that Morton is not the law in Florida. In Morton, the New Jersey Supreme Court likewise held that the pollution exclusion was plain and unambiguous, but nonetheless stated, in dicta, that courts should not enforce that plain meaning on regulatory estoppel grounds. Specifically, relying upon extra-record "evidence" and failing to give the insurers an opportunity to present their side of the issue, the Morton court alleged broadly (and erroneously) that the "insurance industry" had essentially

"defrauded" state insurance regulators in 1970s when the pollution exclusion was first introduced.

This Court -- after a thorough review of the evidence, whether labelled as "drafting history" or "regulatory history" -- wisely rejected Morton before, and should do so again here. Rejection is warranted if for no other reason that the New Jersey Supreme Court violated the insurers' procedural and substantive rights under the United States Constitution. By failing to allow the insurers to present evidence, to cross examine witnesses, and to exercise numerous other procedural due process rights mandated by the U.S. Constitution, the New Jersey Supreme Court passed judgment on an entire industry without giving the members of that industry their day in court. Moreover, these procedural infirmities aside, the Morton court arbitrarily invalidated valuable contract rights in which the insurers have a property interest.

Moreover, although extrinsic evidence cannot and should not be employed to "interpret" the unambiguous contractual provisions, that evidence conclusively demonstrates that insurers did not mislead state insurance regulators -- including those in Florida -- about the meaning and effect of the pollution exclusion. Florida's former Insurance Commissioner has stated unequivocally that the purpose of the change to "occurrence"-based policies in the 1960s was not to provide expansive coverage of pollution claims -- as many

insureds now contend -- and that the effect of the pollution exclusion was to eliminate coverage for gradual pollution. Any other rendition of the activities of the "insurance industry" in the 1960s and early 1970s simply distorts history.

Finally, sound public policy dictates that the appellate court's ruling below be reversed. The courts should not rewrite the plain and unambiguous terms of insurance contracts, or preclude their enforceability, to benefit intentional and knowing polluters like Lone Star. Instead, all participants in the insurance market -- from small businesses to state regulators -- are best served when the courts adhere to time-tested principles of insurance contract interpretation, like those used by this Court in Dimmitt II. Such an approach promotes fairness, stability, and the equitable allocation of costs within the market.

ARGUMENT

I. THE POLLUTION EXCLUSION IS PLAIN AND UNAMBIGUOUS UNDER FLORIDA LAW

The Court has already carefully considered this precise question, and concluded that the 1970 ISO pollution exclusion precludes coverage for gradual and intentional pollution. In Dimmitt I, relying primarily on one-side "drafting histories" provided by policyholders, the Court initially held that the pollution exclusion was ambiguous.

Later, after numerous rounds of briefing and an extensive examination of the record evidence provided by insurers as well as policyholders, the Court in Dimmitt II properly withdrew its opinion in Dimmitt I, and found that the pollution exclusion unambiguously bars coverage for a waste oil generator's CERCLA[6/] liability arising from contamination at a recycling facility. Answering a question certified to it from the Eleventh Circuit Court of Appeals, this Court found that "[t]he ordinary and common usage of the term 'sudden' includes a temporal aspect with a sense of immediacy or abruptness." Dimmitt II, 1993 WL 241520 at *4.

In Dimmitt II the Court properly reasoned that, although the term "sudden" standing alone might be interpreted to mean "unexpected," because the term "accidental" is generally understood to mean "unexpected or unintended," to "construe sudden also to mean unintended and unexpected would render the words sudden and accidental entirely redundant." Id. In reaching this conclusion, the Court emphasized that the meaning of the pollution exclusion is plain and unambiguous:

> We do not find the pollution clause to be riddled with ambiguities despite the best efforts of [the insured] to create them. Specifically, we believe the district court erred when it treated the pollution exclusion and the "occurrence" definition provisions as interchangeable . . . We believe that the "occurrence" definition results in a policy that provides coverage for continuous or repeated exposure to conditions causing damages in all cases except those situations where the discharge was "sudden and accidental." We

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[6/] Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-56, (1988).

> fully agree with the conclusion that this "language is clear and plain, something only a lawyer's ingenuity could make ambiguous."

Id. at *5 (citation omitted).

The pollution exclusion in Liberty Mutual's policy thus bars coverage for losses from most pollution events. The pollution exclusion at issue here was used widely by liability insurers from 1970 to 1985. It precludes coverage for most losses related to pollution discharges, such as those resulting from the routine discharges that took place during the years of Lone Star's wood-treatment operations. The only relevant exception under the exclusion in Liberty Mutual's policy is for losses resulting from pollution discharges that are both "sudden and accidental." Yet there is no evidence here that Lone Star's discharges arose unexpectedly and instantaneously; on the contrary, they took place in the normal course of business, over a long period of time, and were a natural and known consequence of Lone Star's activities.

Accordingly, Dimmitt II compels reversal of the district court of appeal's decision. Dimmitt II's holding that the pollution exclusion is plain and unambiguous means that the district court's sole reliance on Dimmitt I for the opposite conclusion -- i.e., that the pollution exclusion is ambiguous -- is erroneous as a matter of law. Fontainebleau Hotel Corp. v. Walters, 246 So. 2d 563, 565 (Fla. 1971) (reversal warranted where district court -- in affirming without

opinion a decision by the trial court -- relied upon cases by the Florida Supreme Court which were subsequently superseded by more recent authority).[7/]

Reversing the district court would comport with the overwhelming majority of cases addressing this issue. As this court is by now well aware, the exclusion and its "sudden and accidental" exception have been the subject of literally hundreds of civil actions in courts throughout the United States. Policyholders like Lone Star seeking coverage for their routine acts of pollution over extended periods of time have generally argued that "sudden and accidental" means merely "unexpected and unintended" -- thereby attempting to eliminate any temporal connotation from the word "sudden." This argument has been roundly rejected, in favor of the contentions of insurers, based on principles of contract construction requiring that each word in a contract be given effect wherever possible, that "sudden" has an independent meaning only when the word is understood in its temporal sense. As such, these courts have found that "sudden and accidental" denotes polluting discharges that are quick, abrupt, and instantaneous (i.e., "sudden"), as well as unexpected and unintended (i.e., "accidental").

[7/] Accord Adjmi v. State, 154 So. 2d 812, 817 (Fla. 1963) (reversal mandated where opinion of district court is in conflict with prevailing decisions by the Florida Supreme Court); Tyus v. Apalachicola Northern R. Co., 130 So. 2d 580, 586-88 (Fla. 1960) (to the same effect).

There is no doubt that Dimmitt II reached the correct result, in accord with the overwhelming weight of precedent. In addition to Florida, state supreme courts in Ohio,[8] Michigan,[9] New York,[10] North Carolina,[11] and Massachusetts[12] have enforced the exclusion as written, as

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[8] Hybud Equip. Corp. v. Sphere Drake Ins. Co., 597 N.E.2d 1096 (Ohio 1992), cert. denied, 113 S. Ct. 1585 (U.S. 1993).

[9] Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392, 403 (Mich. 1991) ("when considered in its plain and easily understood sense, 'sudden' is defined with a temporal element that joins together conceptually the immediate and the unexpected").

[10] Technicon Elecs. Corp. v. American Home Assurance Co., 542 N.E.2d 1048, 1050 (N.Y. 1989) (exception to pollution exclusion not operative unless occurrence is both "sudden" and "accidental"); Powers Chemco, Inc. v. Federal Ins. Co., 548 N.E.2d 1301, 1302 (N.Y. 1989) (same).

[11] Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 382 (N.C. 1986) ("[t]he exception . . . describes the event -- not only in terms of its being unexpected, but in terms of its happening instantaneously or precipitantly").

[12] Liberty Mutual Ins. Co. v. SCA Servs., Inc., 588 N.E.2d 1346 (Mass. 1992) (pollution at landfill occurring gradually over several months of repeated activity was not the result of a "sudden and accidental" discharge); Hazen Paper Co. v. United States Fidelity & Guar. Co., 555 N.E.2d 576, 579 (Mass. 1990) (pollution exclusion provides coverage "only if the discharge or release was not only accidental but also 'sudden,' in the sense of an unexpected, abrupt discharge or release"); Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 555 N.E.2d 568, 572 (Mass. 1990) ("[i]f the word 'sudden' is to have any meaning or value in the exception to the pollution exclusion clause, only an abrupt discharge or release of pollutants falls within the exception"); Polaroid Corp. v. Travelers Ins. Co., 610 N.E.2d 912, 915 (Mass. 1993) (pollution exclusion bars coverage where evidence showed that "the discharge of pollutants into the environment happened gradually, over a lengthy period of time").

have intermediate appellate courts in California,[13] Pennsylvania,[14] Indiana,[15] Oregon,[16] Iowa,[17] and

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[13] Shell Oil Co. v. Winterthur Swiss Ins. Co., 15 Cal. Rptr. 2d 815, 840 (Ct. App., 1st Dist. 1993) (a temporal connotation is inherent in ordinary meaning of "sudden"; for pollution exclusion to permit coverage, discharge must be abrupt as well as unexpected), rehearing denied and opinion modified on other grounds (Feb. 22, 1993), review denied (May 13, 1993); Truck Ins. Exch. v. Pozzuoli, 21 Cal. Rptr. 2d 650, 651 (Ct. App., 4th Dist. 1993) (pollution exclusion barred coverage for leak from underground storage tank of at least 60 days' duration), review denied (Nov. 17, 1993); ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co., 22 Cal. Rptr. 2d 206, 215 (Ct. App., 4th Dist. 1993) ("gradual is the opposite of sudden"; no coverage for long-term leakage from corroded storage tanks on property purchased by insured), modified on other grounds, (Sept. 21, 1993), review denied, (Nov. 17, 1993).

[14] Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393, 398 (Pa. Super. Ct. 1989) ("sudden" means "abrupt and lasting only a short time"), appeal denied, 567 A.2d 653 (Pa. 1989); Techalloy Co. v. Reliance Ins. Co., 487 A.2d 820, 827 (Pa. Super. Ct. 1984) (pollution exclusion bars coverage for discharges regularly over a period of many years); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957, 958 (Pa. Super. Ct. 1993) (pollution exclusion unambiguously bars coverage for "gradual migration" of polluting gases).

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

[16] Mays v. Transamerica Ins. Co., 799 P.2d 653, 657 (Or. Ct. App. 1990), review denied, 806 P.2d 128 (Or. 1991) (pollution exclusion bars coverage for releases of wastes over a ten-year period); Transamerica Ins. Co. v. Sunnes, 711 P.2d 212, 214 (Or. Ct. App. 1985) (pollution exclusion bars coverage for discharges "regularly over a period of many years"), review denied, 717 P.2d 631 (Or. 1986).

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

Minnesota,[18] as well as at least seven federal circuits.[19] Like Dimmitt II, all of these decisions recognize that "sudden," as used in the pollution exclusion, necessarily implies an event that occurs quickly, hastily, immediately, or abruptly. Accordingly, coverage for Lone Star's gradual pollution is precluded by the exclusion, and the district court's determination should be reversed.

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[18] Sylvester Bros. Dev. Co. v. Great Central Ins. Co., 480 N.W.2d 368, 375 (Minn. Ct. App) ("sudden" "carries the temporal connotation of 'abruptness,'" such that the discharge "occurs relatively quickly rather than gradually over a long period of time"), petition for review denied (Minn. Mar. 26, 1992); Board of Regents v. Royal Ins. Co., 503 N.W.2d 486, 491 (Minn. Ct. App.) ("the 'sudden and accidental' exception to the pollution exclusion is unambiguous and . . . 'sudden' has a temporal connotation") (citation omitted), petition for review granted (Minn. Aug. 16, 1993); Sylvester Bros. Dev. Co. v. Great Central Ins. Co., 503 N.W.2d 793, 796 (Minn. Ct. App.) , review denied, (Sept. 30, 1993).

[19] See, e.g., Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 938 F.2d 1423 (1st Cir. 1991), cert. denied, 112 S. Ct. 969 (1992); State of New York v. AMRO Realty Corp., 936 F.2d 1420 (2d Cir. 1991); Northern Ins. Co. v. Aardvark Assocs., Inc., 942 F.2d 189 (3d Cir. 1991); Ray Indus. Inc., v. Liberty Mutual Ins. Co., 974 F.2d 754 (6th Cir. 1992); Aetna Casualty & Sur. Co. v. General Dynamics Corp., 968 F.2d 707 (8th Cir. 1992); Smith v. Hughes Aircraft Co., 10 F.3d 1448 (9th Cir. Nov. 26, 1993); United States Fidelity & Guar. Co. v. Morrison Grain Co., 999 F.2d 489 (10th Cir. 1993). For a list of court decisions nationwide holding that the word "sudden" in the pollution exclusion has a temporal meaning, see Addendum A.

II. EXTRINSIC EVIDENCE SHOULD NOT BE CONSIDERED IN INTERPRETING THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE POLLUTION EXCLUSION

Because this Court has already determined that the pollution exclusion is plain and unambiguous, extrinsic evidence cannot be used to vary the provision's plain meaning. In its order accepting jurisdiction of this appeal, the Court already has denied Lone Star's request for a full briefing and oral argument to revisit the merits of Dimmitt II and other settled issues of Florida law.[20/] There is no need to revisit this issue or to entertain untested submissions relating to clear and unambiguous language.

It is, of course, well-settled that extrinsic or parol evidence may not be used to vary the terms of unambiguous contracts. See Dimmitt II, 1993 WL 241520 at *8 ("Because we conclude that the policy language is unambiguous, we find it inappropriate and unnecessary to consider the arguments pertaining to the drafting history of the pollution exclusion clause."); Randy Int'l, Ltd. v. American Excess Corp., 501 So.2d 667, 670 n.4 (Fla. 3rd DCA 1987) (to the same effect). Courts in jurisdictions around the country have likewise

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[20/] See Denial of Respondent's Motion for the Entry of an Order Denying Review, or in the Alternative Accepting Jurisdiction, and Permitting a Full Briefing and [sic] on the Merits and Oral Argument, or in the Alternative, Accepting Jurisdiction and Relinquishing Jurisdiction to the Third District Court of Appeals with Directions (April 5, 1994).

refused to consider extrinsic evidence in construing the pollution exclusion.[21/]

Notwithstanding this conventional application of venerable common-law principles, one court has anomalously relied on such material to estop the entire "insurance industry" from enforcing the plain meaning of the pollution exclusion. Morton, 629 A.2d at 847-49. This Court should once again reject such an approach.

In Morton, the Supreme Court of New Jersey acknowledged that the pollution exclusion was plain and unambiguous. Accordingly, the court agreed that the clear terms of the exclusion barred coverage for pollution-related losses unless the polluting discharge was both (1) temporally "sudden," and

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[21/] See, e.g., Sylvester Brothers Development Co. v. Great Central Ins. Co., 480 N.W.2d 368, 377 (Minn Ct. App.) ("As for the documents pertaining to the drafting history of the pollution exclusion clause, we have no use for these materials because the exception is to the exclusion is susceptible of only one reasonable interpretation"), petition for review denied, (Minn. Mar. 26, 1992); Polaroid Corp. v. Travelers Indem. Co., 610 N.E.2d 912, 916 n.7 (Mass. 1993) ("Even if we were to assume that the drafting and regulatory history of a policy provision could be instructive in resolving an ambiguity concerning the meaning of the provision, here there is no ambiguity"); Lumbermans Mut. Casualty Co. v. Bellevill Indus., Inc., 555 N.E.2d 568, 573 (Mass. 1990) ("Because the word 'sudden' in the pollution exclusion clause is not ambiguous, we have no need to consider the drafting history of that clause or any statements made by insurance company representatives concerning the intention of its drafters"); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392, 396 n.6 ("we do not look to the drafting history when interpreting and applying the policy terms"), reh'g denied, 503 N.W.2d 442 (Mich. 1991). A list of decisions rejecting consideration of extrinsic evidence of drafting or regulatory history in interpreting insurance contracts is attached as Addendum B.

(2) unexpected and unintended (i.e., "accidental"). Specifically, the court recognized that the "sudden and accidental" exception to the exclusion "does not characterize or relate to the damage caused by pollution but instead narrowly limits the kind of 'discharge, dispersal, release or escape' of pollutants for which coverage is provided." Id., 629 A.2d at 847. The Morton court further acknowledged that the word "sudden" "possesses a temporal element, generally connoting an event that begins abruptly or without prior notice or warning," and that the phrase "sudden and accidental" "describes only those discharges, dispersals, releases, and escapes of pollutants that occur abruptly or unexpectedly and are unintended." Id.

Nonetheless, in a bizarre departure from both common sense and settled principles of constitutional law, the Morton court precluded insurers from enforcing that recognized plain meaning. Instead, based on so-called "facts" outside the record on which no evidentiary hearing had been held, the Morton court said in dicta that it was estopping the entire "insurance industry" from enforcing the pollution exclusion according to its terms. The Morton decision thus creates coverage by going beyond the terms of the contract to rely upon "evidence" purporting to show that the "insurance industry," acting through the Insurance Rating Bureau ("IRB"), misled insurance commissioners across the country regarding the effect of the pollution exclusion.

This so-called evidence consists of selected statements from industry and regulatory documents quoted in partisan articles written by policyholder counsel or from other decisions erroneously considering such "evidence" from identical sources.

CIGNA, an insurer involved in the Morton case, has filed a petition for certiorari challenging this decision. Whatever the outcome of that filing, this Court should continue to reject the Morton rule and instead enforce the plain language of the pollution exclusion, thereby eliminating any need for extrinsic evidence.[22/]

III. THIS COURT SHOULD CONTINUE TO REJECT MORTON'S REGULATORY ESTOPPEL RULE

Less than two-and-a-half months ago, this Court considered, and rejected, the precise question of whether Florida would adopt the decision of the New Jersey Supreme Court in Morton. Dimmitt II, 1994 Fla. LEXIS 458 (Fla. March

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[22/] In addition to Florida, state supreme courts in Michigan and Massachusetts have likewise rejected the Morton approach. See Upjohn, 476 N.W.2d 392 n.6, reh'g denied, 503 N.W.2d 442 (Mich. 1991) (refusing to consider drafting history); Lumbermans, 555 N.E.2d 568, 572-73 (Mass. 1990). Since Morton, at least six court decisions either published or to be published have rejected Morton's "regulatory estoppel" theory. See Smith v. Hughes Aircraft Co., 10 F.3d 1448 (9th Cir. 1993) (decided under Minnesota law), petition for reh'g pending; United States Fidelity & Guar. Co. v. Morrison Grain Co., Inc., 999 F.2d 489 (10th Cir. 1993); Farm Bureau Mut. Ins. Co. v. Laudick, 859 P.2d 410 (Kan. Ct. App.), review denied, (Kan. Nov. 9, 1993); ACL Technologies, Inc. v. Northbrook Property & Cas. Ins. Co., 22 Cal. Rptr. 2d 206 (Ct. App. 4th Dist.), modified on other grounds (Sept. 21, 1993), review denied, (Cal. Nov. 17, 1993).

31, 1994) (denial of motion for rehearing and clarification of Dimmitt II over dissent arguing for adoption of Morton).[23/] Following this Court's decision in Dimmitt II that the pollution exclusion is plain and unambiguous, policyholders requested that Dimmitt II be reheard or clarified. Specifically, policyholders -- relying on the same drafting history evidence which already had been vetted by the Court in Dimmitt I and Dimmitt II, but now relabelled "regulatory history" -- urged the Court to adopt Morton's regulatory estoppel theory.

After a thorough review of the record evidence and arguments by policyholders and insurers, the Court conclusively rejected Morton's regulatory estoppel rule. Accordingly, there is no reason for the Court to revisit this precedent. The Court's repudiation of Morton was appropriate because: (1) the decision by the New Jersey Supreme Court is constitutionally flawed in numerous respects; and (2) even if this Court were to consider extrinsic evidence relating to the pollution exclusion, such evidence does not support the result in Morton.

[23/] Even prior to the Morton decision, Florida courts recognized the general rule that estoppel may not be used to create or extend insurance coverage. Crown Life Ins. Co. v. McBride, 517 So.2d 660 (Fla. 1987) (citing cases).

A. The Morton Decision Is Constitutionally Flawed

The Morton decision violates numerous procedural and substantive rights due litigants under the United States Constitution. This Court would run afoul of these same constitutional principles if it were to adopt Morton at this stage of the Lone Star litigation.

First, in Morton, the insurers' procedural rights under the Due Process Clause of the United States Constitution were violated because of the unorthodox way in which the New Jersey Supreme Court reached its decision.[24/] In arriving at its conclusion, the Morton court, acting at the policyholder's urging, relied on documents relating to the process by which state insurance regulators approved the use of the exclusionary language in the early 1970s and on one-sided characterizations of those documents. Pointing primarily to isolated documents and to evaluations of this so-called "regulatory history" in articles written by counsel who regularly represent policyholders in insurance coverage litigation, the Morton court drew the erroneous inference that the so-called "insurance industry" -- and, in particular, the insurer organization that drafted the exclusion, the IRB -- had somehow misled the regulators as to the true meaning and impact of the new exclusion. On this basis, the court in effect radically rewrote the provision to

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[24/] U.S. CONST., amend. XIV, § 1.

preclude coverage only where "the insured intentionally discharges a known pollutant, irrespective of whether the resulting property damage was intended or expected." Morton, 629 A.2d at 875 (emphasis in original and added).

The Constitution requires that a litigant have an opportunity to set forth evidence that supports its position, as well as be afforded a hearing before substantive remedies are decreed against it by a court; none of these procedural rights were afforded the insurers in Morton. Among the constitutional errors committed by the Morton court are the following:

- The theory of "regulatory estoppel" was first raised and imposed by the court sua sponte in its final decision.
- The Morton court employed that theory only on the basis of so-called "evidence" contained in law review articles authored by partisan, pro-policyholder counsel.
- The "evidence" consisted entirely of hearsay.
- The insurer parties were not given any prior notice that they were potentially subject to imposition of an equitable estoppel.
- The insurer parties opposing this theory were given no opportunity to challenge this "evidence." Specifically, those opposing the theory were given no opportunity to present evidence that could help the court develop a full factual record -- perhaps by means of a remand to the trial court, where the trier of fact (either a judge or a jury) could weigh the full body of materials constituting the so-called "regulatory history" and the disputed questions of fact concerning the elements of misrepresentation, reasonable reliance, and detriment that must be proved to support an estoppel. Instead, the Morton court relied solely on materials first introduced on appeal by the policyholders to reach the incredible conclusion

that these partisan materials afforded an "accurate and comprehensive basis" for the decision it reached, 629 A.2d at 848, and that remanding the matter for an evidentiary hearing would be merely "redundant." 629 A.2d at 848.

- The insurers had no opportunity to confront and cross-examine opposing witnesses, and were therefore deprived of the ability to elicit inconsistent statements or evidence of bias from those witnesses, as well as the opportunity to adduce from them testimony in support of the insurers' position and contrary to that of the policyholders.

- The New Jersey Supreme Court also denied all petitions for reconsideration, despite the fact that the insurer parties offered the affidavits of no fewer than forty-five state insurance regulators -- including a New Jersey regulator -- showing that there was no valid factual predicate for imposition of the estoppel.

That the Morton decision rests on fundamental procedural errors is evidenced by the fact that a growing number of courts -- including several federal courts of appeals -- have refused to consider extrinsic evidence such as that upon which the New Jersey court grounded Morton.[25/] Other courts have expressly rejected the Morton court's method or result.[26/]

Like the insurers in Morton, Liberty Mutual here has been given no opportunity to present evidence in opposition

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[25/] See, e.g., Smith, 10 F.3d 1448 (9th Cir. 1993); Bituminous Casualty Co. v. Tonka Corp., 9 F.3d 51 (8th Cir. 1993); Bureau of Engraving, Inc. v. Federal Insurance Co., 5 F.3d 1175 (8th Cir. 1993); Morrison Grain, 999 F.2d 489 (10th Cir. 1993).

[26/] See Farm Bureau Mut. Ins. Co. v. Laudick, 859 P.2d 410 (Kan. Ct. App.), review denied (Nov. 9, 1993); Monsanto Co. v. Aetna Casualty & Sur. Co., No. 88C-JA-118 (Del. Super. Ct. Dec. 9, 1993).

to a regulatory estoppel rule or otherwise exercise its rights to due process on this issue at this stage of the litigation. Accordingly, this Court would deprive Liberty Mutual of its due process rights by adopting Morton at this stage of the litigation.

Second, and in addition to its procedural deficiencies, the Morton court also violated the insurers' substantive rights under the Constitution.[27] Specifically, the New Jersey Supreme Court barred insurers from enforcing their contracts, and thus in effect retroactively invalidated them, thereby depriving insurers of their property without due process of law. As Justice Brandeis emphasized in Lynch v. United States, 292 U.S. 571, 579 (1934), "the due process clause [prevents the government] from annulling [valid insurance contracts], unless, indeed, the action taken falls within the federal police power or some other valid power."

Fundamentally, New Jersey, acting through its judicial branch, has arbitrarily invalidated contract rights in which insurers have a property interest. See Lynch, 292 U.S. at 577 ("[W]ar Risk [insurance] policies, being contracts, are property and create vested rights."); see also id. at 579

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[27] This Court should be aware that the portion of the Morton decision regarding the unenforceability of insurance contracts on regulatory estoppel grounds was dicta. Ironically, the New Jersey Supreme Court did not enforce its novel regulatory estoppel theory in the case before it because the court concluded that the policyholder there had unquestionably "expected and intended" the damage at issue. Morton, 629 A.2d at 882.

("Valid contracts are property, whether the obligor be a private individual, a municipality, or the United States.").[28] The state may not take property from one party, in this case the insurers, and give it to another party, i.e., policyholders, without just cause or just compensation. See, e.g., Perry v. United States, 294 U.S. 330, 354 (1935) ("While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and . . . remains binding upon the conscience of the sovereign"). "[T]he Constitution forbids even a compensated taking of a property when executed for no reason other than to confer [a] private benefit on a particular private party." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984). And, to the extent that the New Jersey court has taken the property for the public's benefit, it generally has an obligation to pay just compensation.[29]

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[28] In addition, although the Contracts Clause of the United States Constitution technically applies to state legislation only, it is quite clear that had the rule announced by the Morton court been adopted by the legislature, it unquestionably would have violated the Contracts Clause. U.S. Const. art. I, § 10 ("No State shall [pass] any [law] impairing the Obligation of Contracts."). This highlights the unconstitutional and illegitimate nature of the Morton decision.

[29] Put another way, the New Jersey Court is essentially "taking" the premium that would have been actuarially justified had the pollution exclusion been excluded. Plainly, insurers today charge more for policies without pollution exclusions. By excising the pollution exclusions from the insurance contracts after the premiums

(continued...)

Accordingly, by adopting Morton, this Court likewise would deprive Liberty Mutual -- and presumably other insurers in Florida -- of its property rights without due process of law. The effect of such a decision would be an unconstitutional taking of insurers' property rights (here, insurance premiums) without just compensation.

This Court should not perpetuate the Morton rule with all its procedural and substantive constitutional flaws. Rather, as the Court recognized in Dimmitt II, the pollution exclusion must be enforced as written. Moreover, even if this court decides to revisit Morton, Liberty Mutual should at least be entitled to an opportunity to be heard before its property is confiscated for the public weal.

B. Even If Extrinsic Evidence Were To Be Considered, Such Evidence Would Confirm That The Plain and Unambiguous Language of the Pollution Exclusion Should Be Enforced According To Its Terms

Even if the Court were to allow the introduction of extrinsic evidence related to the meaning of the pollution exclusion, there is simply no credible evidence that is at odds with the exclusion's plain meaning or that could be reasonably read to support the view that Florida insurance regulators were misled with respect to that meaning. It would, therefore, be futile for this Court to entertain such

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[29] (...continued)
have been set and paid, the court has forced the insurers subject to the Morton theory to sell a more expensive product at a lesser price.

evidence now, or to remand this case for the development of the record -- especially in light of the fact that the Court already has examined the relevant extrinsic evidence related to the pollution exclusion's history.[30/]

1. The History of the Pollution Exclusion Confirms That Its Meaning Is Plain and Unambiguous

Prior to 1966, general liability policies were generally written on an "accident" basis, limiting coverage to events that were distinct in time and place.[31/] This classical accident (or "boom" event) had always been understood by insurers and insurance regulators to be sudden or abrupt.[32/]

[30/] Whether labelled "drafting history" or "regulatory history," the evidence presented by insurers and policyholders was vetted fully by the Court in the Dimmitt Chevrolet cases. Nonetheless, to ensure a complete and balanced record for this appeal, background information related to insurers' view of the pollution exclusion in this context are attached for the Court's convenience. See Bernard J. Daenzer & Edward Zampino, Environmental Liability and the Pollution Exclusion: Why Some Courts Find Coverage, 46 Chartered Property & Casualty Underwriters Journal No. 2, 84 (June 1993) (Exhibit 1); Victor C. Harwood, III, Brian J. Coyle & Edward Zampino, The "Frivolity" of Policyholder Gradual Pollution Discharge Claims, 5 Mealey's Litig. Reps.: Ins., No. 40 (Aug. 27, 1991) (Exhibit 2); and Edward Zampino, Richard C. Cavo and Victor C. Harwood, III, Morton International: The Fiction of Regulatory Estoppel, 24 Seton Hall L. Rev. 847 (1993) (Exhibit 3). The authors of these articles regularly represent insurers in environmental coverage litigation.

[31/] See, e.g., E. Joshua Rosenkranz, The Pollution Exclusion Clause Through the Looking Glass, 74 Geo. L.J. 1237, 1241-42 (1986). A copy of this article is attached as Exhibit 4 for the Court's convenience.

[32/] See Zampino, Cavo & Harwood, supra note 30, at 859-865; Harwood, Coyle & Zampino, supra note 30, at 22-24 & n.6.

In 1966, "occurrence"-based coverage became the industry standard.[33/] The 1966 definition of "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results, during the policy period in . . . property damage neither expected not intended from the standpoint of the insured" removed the temporal element of suddenness previously incorporated in the term "accident" to provide coverage for gradual losses. As the IRB explained to state insurance regulators in seeking approval of the "occurrence" definition in 1966, "[a]n 'occurrence,' as defined, includes not only a sudden event identifiable in time which is characterized as an 'accident,' but also exposures to conditions which may continue for days, weeks, months or even years."[34/] This change in coverage was initiated without any rate increase to insureds.[35/]

While this change to "occurrence"-based coverage removed the temporal limitation previously incorporated in the term "accident," it was not -- as many insureds now claim -- designed to provide wide-ranging coverage for pollution claims.[36/] The limitation of coverage to damage "neither expected nor intended" by the insured, which sets forth the

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[33/] Rosenkranz, supra note 31, at 1246-48.

[34/] IRB Explanatory Memorandum of Changes, quoted in Zampino, Cavo & Harwood, supra note 30, at 863.

[35/] Id. at 857.

[36/] See, e.g., Zampino, Cavo & Harwood, supra note 30, at 854-56; Rosenkranz, supra note 31, at 1248.

element of fortuity that is necessary for a risk to be insurable, was understood by the industry and its regulators to place damage resulting from the routine operation of the insured's business outside the scope of coverage.[37/]

This was certainly the understanding of Mr. Broward Williams, the former Florida Insurance Commissioner, who has said:

> Prior to 1966, the general liability policy covered "accidents," which were "boom" events that occurred suddenly or abruptly. "Accidents" were fortuitous events identifiable in time and place. The 1966 CGL "occurrence" policy broadened coverage to include gradual exposures as long as the damage was not intended or expected. These meanings were a matter of common knowledge in the Insurance Department at the time.[38/]

Further, when the pollution exclusion was introduced in 1970, state and federal governments were still years away from enacting the wide-ranging, strict liability statutes such as CERCLA that have led to today's explosion of environmental insurance coverage litigation. As such, the insurance industry and its regulators had little if any loss experience with regard to such claims. The scarcity of such claims belies the suggestion of policyholders that they, at the time the exclusion was implemented, had an expectation that "occurrence" coverage would extend to pollution liability they incurred in their regular course of business.

[37/] Id.

[38/] See Zampino, Cavo & Harwood, supra note 30, at 862 (Broward Williams Affidavit at ¶ 3).

2. Insurance Regulators in Florida and Elsewhere Fully Understood The Plain Meaning of the Pollution Exclusion in 1970

The available evidence confirms that state insurance regulators in Florida and elsewhere completely and accurately understood the clear and unambiguous language of the pollution exclusion at the time it was submitted for regulatory approval. First and foremost, the central representation made by the insurance industry to the state insurance regulators and by insurance companies to their policyholders concerning the meaning of the pollution exclusion is the language of the exclusion itself, which this Court has found to be clear and unambiguous. Dimmitt II, 18 Fla. L. Weekly S400. Any suggestion by policyholders that the insurance policy industry somehow "misrepresented" the clear and unambiguous terms of a policy exclusion whose meaning is plain defies logic. In fact, the materials submitted by the policyholders in Morton as evidence of alleged "misrepresentation" actually confirm the plain meaning of the pollution exclusion. This is especially the case when these materials are viewed together with the language of the exclusion, as they were when they were submitted to state insurance regulators.

The pollution exclusion was drafted by the IRB. In 1970, the IRB's General Liability Governing Committee decided to adopt "a policy exclusion of pollution that would run to bodily injury and property damage . . for all general

liability insurance, the exclusion to except pollution caused injuries when the pollution results from a classical accident."[39/] In applying to state insurance commissioners for approval of the exclusion, the exclusion's drafters submitted the proposed language of the exclusion, which was substantially the same in all instances, was as follows:

> This insurance does not apply . . . to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[40/]

The explanatory memorandum submitted with the exclusion further stated:

> 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 the situation so as to avoid any question of intent. Coverage is contained for pollution or contamination caused injuries when the pollution or contamination results from an accident.[41/]

The language of these documents directly contradicts any claim by insureds that insurers represented that the

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[39/] See Minutes of IRB General Liability Governing Committee meeting (March 12, 1970), quoted in Harwood, Coyle & Zampino, supra note 30, at 22.

[40/] Zampino, Cavo & Harwood, supra note 30, at 848 n.2.

[41/] See Zampino, Cavo & Harwood, supra note 30, at 850 n.11 (quoting from a Circular from the Insurance Rating Board to Its Member Insurance Companies Regarding the Qualified Pollution Exclusion, at 2 (May 5, 1970)).

pollution exclusion would not change coverage for pollution claims under the occurrence-based policies. The occurrence definition focuses on intent; for there to be an occurrence, the damage must not be expected or intended. In contrast, the IRB submission plainly and unambiguously confirms what is clear on the face of the exclusion, that the exclusion "avoid[s] any question of intent." As that submission states, the pollution exclusion does this by eliminating coverage for all pollution-related liability unless it was caused by a discharge that occurred suddenly and accidentally. Numerous courts agree that this is the proper interpretation of the exclusion and the IRB filing.[42/]

Further, as recent articles on the subject demonstrate, when Florida's insurance regulators approved the use of the pollution exclusion, they fully understood that the exclusion

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[42/] See, e.g., American Motorists Ins. Co. v. General Host Corp., 120 F.R.D. 129, 133-34 (D. Kan. 1988) (finding that the submission "support[s] the court's previous interpretation that the pollution exclusion has an independent, objective meaning and is not simply a restatement of the subjective definition of occurrence"); North Pacific Ins. Co. v. United Chrome Prods., Inc., No. CV 89-0777, slip op. at 5 (Or. Cir. Ct. Sept. 30, 1991) (finding that insurance commissioners accepted pollution exclusion knowing it resulted in change of coverage), rev'd on other grounds, 857 P.2d 158 (Or. Ct. App. 1993).

would eliminate coverage for gradual pollution.[43] According to Broward Williams:

> The term "sudden," as used in the 1970 pollution exclusion, meant quick or abrupt in a temporal sense. This was also a matter of common knowledge in the Insurance Department at the time . . .
>
> I have . . . reviewed the Explanation submitted to the Insurance Department in 1970. It states that the pollution exclusion continued to provide coverage for a pollution "accident." In 1970, the Insurance Department would have readily recognized from the explanatory materials that pollution coverage would be returned to a sudden accident or "boom" basis. Only pollution events that were fortuitous and identifiable in time and place would be covered.[44]

Policyholders and their representatives recognized and understood this intent as well. One broker wrote in the leading publication for corporate insurance buyers that the exclusion's "intent is to provide for some very short term phenomenon."[45] An insurance consultant wrote:

> the exception to the [pollution] exclusion states that the dispersal, release or escape must be 'sudden and accidental.' In other words, it must

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[43] See Zampino, Cavo & Harwood, supra note 30; Elizabeth A. Eastwood, The Regulators Speak: The True Understanding Of The Pollution Exclusion In 1970 Versus That Of The New Jersey Supreme Court In Morton International, 8 Mealey's Litig. Reps.: Ins., No. 23 (Apr. 19, 1994). A copy of this article, written by an attorney who regularly represents insurers in coverage litigation, is attached as Exhibit 5 for the Court's convenience.

[44] See Zampino, Cavo & Harwood, supra note 30 (Broward Williams Affidavit at ¶¶ 4-5).

[45] G.R.E. Bromwich, Pollution and Insurance, 1971 Risk Mgmt. 15, 19 (1971). A copy of this article is attached as Exhibit 6 for the Court's convenience.

be both sudden and accidental rather than either sudden or accidental.[46]

Thus, as a number of commentators have shown, a full and fair consideration of the regulatory history material establishes that the pollution exclusion was always represented as a bar to coverage for gradual pollution of the sort at issue here.

Numerous state regulatory documents confirm that other insurance commissioners also understood that the pollution exclusion restricted coverage. After considering the exclusion, the Kansas Insurance Commissioner wrote, "In view of the obvious reduction in coverage, to what extent will the premiums be reduced when this endorsement is attached?"[47] Moreover, Iowa, Louisiana, Michigan, South Dakota, Hawaii, Virginia, West Virginia, and the District of Columbia -- because of the reduction in coverage -- all required the consent of the policyholder before they would permit the endorsement to be deemed part of outstanding policies.[48]

Significantly, two states initially disapproved the exclusion because it eliminated coverage. The New Hampshire Insurance Commissioner, in a 1970 press statement, announced its disapproval of the exclusion because it excluded coverage that otherwise might be available on an occurrence basis; and

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[46] Warren G. Brockmeier, Pollution - The Risk and Insurance Problem, 12 For The Defense 77, 79 (1971). A copy of this article is attached as Exhibit 7 for the Court's convenience.

[47] Daenzer & Zampino, supra note 30, at 89.

[48] Harwood & Coyle & Zampino, supra note 30, at 41.

the Vermont Insurance Commissioner initially disapproved the exclusion as well.[49/] Obviously, if the exclusion were merely a "clarification" that did not restrict or limit coverage, these regulatory actions would have been unnecessary. It was only because the exclusion eliminated coverage that state insurance commissioners took these steps.

In sum, the record of available evidence confirms that the plain meaning of the pollution exclusion was clearly represented by the industry and clearly understood by regulators and commentators alike in 1970. Therefore, it would be futile for this Court to entertain evidence about what insurance regulators were told in 1970, or to remand the case to allow discovery on this issue.

IV. IGNORING THE PLAIN MEANING OF INSURANCE CONTRACTS UNDERMINES THE PUBLIC INTEREST BY DESTABILIZING THE INSURANCE SYSTEM AND HARMING ENVIRONMENTAL GOALS

Any failure to enforce the clear provisions of insurance contracts necessarily affects the integrity of the insurance underwriting process in general. Insurance involves an agreement by the insurer to protect the insured against a specified risk for a fee. Insurance can cover risks, even very large ones, that can be actuarially predicted over a large number of insureds. This vital risk-spreading function is undercut, however, by excessive uncertainty as to the nature of the risk assumed. No insurer can (or would) agree

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[49/] Id. at 43.

to cover a carefully defined risk if courts felt free to impose liability as they saw fit, notwithstanding the plain language of the policy.[50/]

In short, settled assumptions concerning judicial enforcement of contracts underlie insurers' actuarial projections of their expected loss experience and the resulting calculation of premiums, particularly for large commercial risks. Distorting policy language as appellants urge would transform the insurance contract from a pool of actuarially predictable risks into a gambling transaction with the odds stacked so that the insurer always pays. In the context of environmental claims, such a profound alteration of the insurance risk would expose insurers to liabilities many times greater than the capacity of the industry as a whole.

Moreover, if a court were to disregard the express and unambiguous provisions defining the risks that the insurer agreed to cover, the underwriter must pass on the cost of this uncertainty to all consumers of insurance. The failure

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[50/] As the United States General Accounting Office recently noted in testimony before a subcommittee of the United States House of Representatives, the projected cost of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) alone is as much as five times the total surplus of the U.S. property/casualty insurance industry. See Insurance Liability for Cleanup Costs at Hazardous Waste Sites: Hearing Before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess. 50 (1990) ("Potential Liability of Property/Casualty Insurers for Costs of Cleaning Up Hazardous Waste Sites").

to enforce the insurance contract as written therefore would affect the price and availability of insurance coverage for those who do not have the resources to self-insure, e.g., individuals and small businesses.[51/] As the California Supreme Court observed in Garvey v. State Farm Fire & Casualty Co., 770 P.2d 704, 711 (Cal. 1989), judicially created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities."

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

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

the district court of appeals -- by relying on Dimmitt I and concluding that the pollution exclusion was ambiguous -- erroneously affirmed the circuit court's determination that Liberty Mutual is obligated to defend Lone Star from claims relating to Lone Star's knowing, long-term environmental polluting which occurred in the regular course of Lone Star's business. Dimmitt II, the plain meaning of the pollution exclusion, the weight of case authority, public policy, and common sense all require reversal of the district court.

CONCLUSION

For the reasons stated above, amicus curiae Insurance Environmental Litigation Association respectfully recommends that this Court reverse the decision of the district court of appeals and remand this case for further proceedings.

Respectfully submitted,

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