IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,899

LIBERTY MUTUAL INSURANCE COMPANY

Petitioner/Appellant

vs.

LONE STAR INDUSTRIES, INC.

Respondent/Appellee

On Review from the Third District Court of Appeal of Florida
(Case No. 90-02498)

ANSWER BRIEF OF LONE STAR INDUSTRIES, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT x

STATEMENT OF THE CASE AND FACTS 1

The Case 1

The Facts 4

The Miami Wood Actions 6

The Clemente Action 6

The Amended Clemente Complaint 8

The DER Action 9

The Futura Action 10

The Davidson Action 10

Notice To Liberty And Its Response 11

SUMMARY OF ARGUMENT 13

ARGUMENT 15

I. WHETHER THE TRIAL COURT'S JUDGMENT HOLDING THAT LIBERTY MUST DEFEND LONE STAR IN THE MIAMI WOOD ACTIONS MUST BE AFFIRMED. 15

The Scope Of This Court's Review 15

A. Whether The Judgment Appealed Must Be Affirmed, Notwithstanding This Court's Decision In Dimmitt, Because Liberty's Policies Provide Coverage For Releases Or Dispersals Or Escapes Or Discharges Of Pollutants Resulting From An Underground Seepage Of Which Lone Star Was Unaware . . 16

B. Whether Liberty Is Still Obligated To Defend Lone Star, Even If The Underground Seepage Exception To The Pollution Exclusion Is Ignored 20

C. Whether Liberty Must Defend Lone Star, Because The Miami Wood Actions Allege Dispersals And Seepages Of Pollutants To Groundwater, Which Is Not Within The Scope Of The Pollution Exclusion. 27

II. WHETHER LIBERTY IS ESTOPPED FROM ADVANCING AN INTERPRETATION OF THE POLLUTION EXCLUSION WHICH IS INCONSISTENT WITH THE PROMISES AND REPRESENTATIONS OF COVERAGE MADE TO INSURANCE REGULATORS 34

CONCLUSION 40

CERTIFICATE OF SERVICE 42

TABLE OF AUTHORITIES

CASELAW:

Admiral Ins. Co. v. Columbia Casualty Ins. Co.,
486 N.W.2d 351 (Mich. Ct. App. 1992) 22

Airmanship, Inc.
v. United States Aviation Underwriters, Inc.,
559 So. 2d 89 (Fla. 3d DCA 1990) 28

American Gen. Fire & Cas. Co. v. Progressive Cas. Co.,
799 P.2d 1113 (N.M. 1990) 22

American Home Assurance Co. v. Ozburn-Hessey Storage Co.,
817 S.W.2d 672 (Tenn. 1991) 22

American Motorists, Ins. Co. v. General Host Corp.,
667 F. Supp. 1423 (D. Kan. 1987) 25

American Mut. Liab. Ins. Co. v. Nevel Chemistry Co.,
650 F. Supp. 929 (W.D. Penn. 1987) 25

Atchison, T. & S. F. Ry. Co. v. Hadley,
35 P.2d 463 (Okla. 1934) 30

Atlantic Masonry v. Miller Constr.,
558 So. 2d 433 (Fla. 1st DCA 1990) 35

Avondale Indus., Inc. v. Travelers Indem. Co.,
887 F.2d 1200 (2d Cir. 1989) 23, 28

Baron Oil Co. v. Nationwide Mut. Fire Ins. Co.,
470 So. 2d 810 (Fla. 1st DCA 1985) 20, 21

Bay Cities Paving & Grading, Inc.
v. Lawyers' Mut. Ins. Co.,
855 P.2d 1263 (Cal. 1993) 28

Board of Regents of Univ. of Minn.
v. Royal Ins. Co. of Am.,
Nos. C1-93-24, C8-93-36, C5-93-186,
1994 WL 264756 (Minn. 1994) 31

Boeing Co. v. Aetna Casualty & Sur. Co.,
No. C86-352WD, 1991 WL 575712 (W.D. Wash 1991) 37

Braley v. American Home Assurance Co.,
354 So. 2d 904 (Fla. 2d DCA 1978) 28

Bull v. Siegrist,
126 P.2d 832 (Or. 1942) 30, 31

C. & W. Coal Corp. v. Salyer,
104 S.E.2d 50 (Va. 1958) 30

Capoferri v. Allstate Ins. Co.,
322 So. 2d 625 (Fla. 3d DCA 1975) 21

Claussen v. Aetna Cas. & Sur. Co.,
754 F. Supp. 1576 (S.D. Ga. 1990) 36

Consolidated Mut. Ins. Co. v. Ivy Liquors, Inc.,
185 So. 2d 187 (Fla. 3d DCA 1966) 21

Criterion Leasing Group
v. Gulf Coast Plastering & Drywall,
582 So. 2d 799 (Fla. 1st DCA 1991) 35

Crown Life Ins. Co. v. McBride,
517 So. 2d 660 (Fla. 1987) 14, 34

D'Agostino v. State,
310 So. 2d 12 (Fla. 1975) 16

Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.,
17 Fla. L. Weekly S579 (Fla. Sept. 3, 1992)
("Dimmitt I") 3

Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.,
636 So. 2d 700 (Fla. 1993)
("Dimmitt II") 3, 4, 15

Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.,
636 So. 2d 700 (Fla. 1993), reh'g denied,
19 Fla. L. Weekly S166 (Fla. March 31, 1994)
("Dimmitt III") . iii, iii, 1, 3, 13, 15, 16, 20, 22, 26, 36, 38

Doe v. Illinois St. Med. Inter-Insurance Exchange,
599 N.E.2d 983 (Ill. App. Ct. 1992) 22

EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co.,
905 F.2d 8 (2d Cir. 1990) 25, 26

Emanuel v. United States Fidelity & Guar. Co.,
583 So. 2d 1092 (Fla. 3d DCA 1991) 35

Farm Family Mut. Ins. Co. v. Bagley,
409 N.Y.S.2d 294 (N.Y. App. Div. 1978) 18

First United Bank of Bellevue v. First Am. Title Ins. Co.,
496 N.W.2d 474 (Neb. 1993) 22

Florida Ins. Guar. Ass'n v. Giordano,
485 So. 2d 453 (Fla. 3d DCA 1986) 20

Florida Physicians Ins. Co. v. Stern,
563 So. 2d 156 (Fla. 4th DCA 1990) 22

Fountainbleu Hotel Corp. v. United Filigree Corp.,
298 So. 2d 455 (Fla. 3d DCA),
cert. denied, 303 So. 2d 334 (Fla. 1974),
disapproved on other grounds in LaMarche
v. Shelby Mut. Ins. Co., 390 So. 2d 325 (Fla. 1980) 28

Gaservice Maintenance Corp.
v. American Casualty of Redding, Pa.,
Vol. 5, No. 22 Litig. Rep. - Ins. (Mealey)
B-1 (N.Y. Sup. Ct. 1991) 23

Government Employees Ins. Co. v. Novak,
453 So. 2d 1116 (Fla. 1984) 17

Grant-Southern Iron & Metal Co. v. CNA Insurance Co.,
669 F. Supp. 798 (E.D. Mich. 1986) 25

Grissom v. Commercial Union Ins. Co.,
610 So. 2d 1299 (Fla. 1st DCA 1992) 21, 22

In Re: Acushnet River,
725 F. Supp. 1264 (D. Mass. 1989) 24

Joy Technologies, Inc. v. Liberty Mut. Ins. Co.,
421 S.E.2d 493 (W.Va. 1992) 36, 40

Just v. Land Reclamation, Ltd.,
456 N.W.2d 570 (Wis. 1990) 36, 37

Kelly v. Scussel,
167 So. 2d 870 (Fla. 1964) 16

Kings Point West, Inc. v. North River Ins. Co.,
412 So. 2d 379 (Fla. 2d DCA 1982) 21

Liberty Mut. Ins. Co. v. Lone Star Indus., Inc.,
556 So. 2d 1122 (Fla. 3d DCA 1989) 2

Liberty Mut. Ins. Co., et al. v. Lone Star Indus., Inc.,
17 Fla. L. Weekly D2215 (Fla. 3d DCA Sept. 22, 1992) . . . 1, 3

MAPCO Alaska Petroleum, Inc.
v. Central Nat'l Ins. Co. of Omaha,
795 F. Supp. 941 (D. Alaska 1991) 32

Marr Investments, Inc. v. Greco,
621 So. 2d 447 (Fla. 4th DCA 1993) 20-22, 27

Meister v. Utica Mut. Ins. Co.,
573 So. 2d 128 (Fla. 4th DCA 1991) 33

Miami Beach v. State,
49 So. 2d 538 (Fla. 1950) 27

Middlesex Mut. Ins. Co. v. Levine,
675 F.2d 1197 (11th Cir. 1982) 22

Midwest Mut. Ins. Co. v. Santiesteban,
287 So. 2d 665 (Fla. 1973) 18

Morgan Int'l Realty, Inc.
v. Dade Underwriters Ins. Agency, Inc.,
617 So. 2d 455 (Fla. 3d DCA 1993) 20, 21

Morton International, Inc.
v. General Accident Ins. Co. of America,
629 A.2d 831 (N.J. 1993), cert. denied, ___ US ___,
114 S.Ct. 2764, 62 U.S.L.W. 3857 (June 27, 1994) . iii, 14, 34, 36, 38-40

Mutual of Omaha Ins. Co. v. Eakins,
337 So. 2d 418 (Fla. 2d DCA 1976) 22

New York v. Amro Realty Corp.,
936 F.2d 1420 (2d Cir. 1991) 26

New York v. Blank, Nos. 1092, 1093, 1094, 93-7952,
93-9002, 93-9004, 1994 WL 262350 (2d Cir. 1994) . . . 23, 25, 28

New York v. Traveler's Indemnity Co.,
508 N.Y.S.2d 698 (N.Y. App. Div. 1986) 32

Paxar Corp. v. Lumberman's Mut. Casualty Co.,
No. 90 Civ. 8059 (KTD), 1993 WL 126705 (S.D.N.Y. 1993) . . . 24

Petr-All Petroleum Corp.
v. Fireman's Ins. Co. of Newark, N.J.,
593 N.Y.S.2d 693 (N.Y. App. Div. 1993) 23

Powers Chemco, Inc. v. Federal Ins. Co.,
548 N.E.2d 1301 (N.Y. 1989) 23

Refined Sugars, Inc. v. Southern Commodity Corp.,
709 F. Supp. 1117 (S.D. Fla. 1988) 40

Reliance Ins. Co. v. Royal Motorcar Corp.,
534 So. 2d 922 (Fla. 4th DCA 1988),
rev. denied, 544 So. 2d 200 (Fla. 1989) 21

Sackett v. Coral Gables,
246 So. 2d 162 (Fla. 3d DCA 1971) 27

Seaboard Sys., R.R., Inc. v. Clemente,
467 So. 2d 348 (Fla. 3d DCA 1985) 27

Security Ins. Co. of Hartford
v. Commercial Credit Equip. Corp.,
399 So. 2d 31 (Fla. 3d DCA 1981) 17

Security Ins. Co. of Hartford
v. Investors Diversified Ltd., Inc.,
407 So. 2d 314 (Fla. 4th DCA 1981) 28

Tampa Elec. Co. v. Stone & Webster Eng'g Corp.,
367 F. Supp. 27 (M.D. Fla. 1973) 21

Tampa Waterworks Co. v. Cline,
37 Fla. 586, 20 So. 780 (1896) 30, 31

Technicon Elec. Corp. v. American Home Assurance Co.,
542 N.E.2d 1048 (N.Y. 1989) 23, 25, 26

Tequesta v. Jupiter Inlet Corp.,
371 So. 2d 663 (Fla. 1979) 30, 31

Time Oil Co. v. Cigna Property & Casualty Co.,
743 F. Supp. 1400 (W.D. Wash. 1990) 32

Trizec Properties, Inc. v. Biltmore Constr. Co.,
767 F.2d 810 (11th Cir. 1985) 21

Tropical Park, Inc.
v. United States Fidelity and Guar. Co.,
357 So. 2d 253 (Fla. 1st DCA 1990) 35

United States Fidelity & Guar. Co.
v. Murray Ohio Mfg. Co.,
693 F. Supp. 617 (M.D. Tenn. 1988) 25

United States Fidelity & Guar. Co. v. Korman Corp.,
693 F. Supp. 253 (E.D. Penn. 1988) 24

United States Fidelity & Guaranty Co.
v. Star Fire Coals, Inc.,
856 F.2d 31 (8th Cir. 1988) 24

United States Fire Ins. Co. v. Morejon,
338 So. 2d 223 (Fla. 3d DCA 1976) 18

Warren v. Department of Administration,
554 So. 2d 568 (Fla. 5th DCA 1990) 36

Zeidwig v. Ward,
548 So. 2d 209 (Fla. 1989) 40

STATUTES:

42 U.S.C.A. § 9601 (West Supp. 1994) 10

Sections 627.031(1)(a) and (2) Fla. Stat. (1993) 39

OTHER AUTHORITIES:

13 John A. Appleman,
Insurance Law and Practice §7403 (1976) 33

29 Fla. Jur. 2d Injunctions §5 (1981) 27

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The Effect of Living Backwards,
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PRELIMINARY STATEMENT

This is an insurance coverage case which comes to this Court because Liberty Mutual Insurance Company contends that the decision of the District Court of Appeal, Third District of Florida, affirming a Partial Summary Judgment in favor of Liberty's policyholder, Lone Star Industries, Inc., expressly and directly conflicts with this Court's recent, and sharply divided decision in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1993), reh'g denied, 19 Fla. L. Weekly S166 (Fla. March 31, 1994).[1] Liberty cannot prevail, because:

> Unlike the pollution exclusion interpreted by this Court in Dimmitt, the pollution exclusion in the policies which Liberty sold to Lone Star is worded differently, because by its express terms the exclusion does not apply to underground seepage of which the policyholder is unaware.
>
> Unlike Dimmitt, this case arises on an Appeal from a Partial Summary Judgment limited to the duty to defend. Since the underlying complaints against Lone Star include allegations expressly within the coverage of Liberty's policies, there is a duty to defend irrespective of this Court's decision in Dimmitt.
>
> The pollution exclusion does not exclude the claims for groundwater contamination embraced within the Miami Wood actions, because it only applies if the discharge or dispersal or release or escape of the pollutant is into or upon land, the atmosphere, a watercourse or body of water. Plainly, the Biscayne Aquifer is not a "watercourse" or "body of water".
>
> Even were this Court to believe its decision in Dimmitt to be controlling, despite all of the differences outlined above, the Supreme Court of New Jersey's decision in Morton International, Inc. v. General Accident Ins. Co. of America, 629 A.2d 831 (N.J. 1993), cert. denied, ___ US ___, 114 S.Ct. 2764, 62 U.S.L.W. 3857 (June 27, 1994) counsels that this Court hold Liberty to

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[1] Throughout this Brief, the decision will be simply referred to as Dimmitt, unless clarity requires express reference to one of this Court's opinions.

be estopped from asserting a coverage restrictive interpretation of the pollution exclusion.

For these reasons, Lone Star respectfully requests that the Third District's opinion be quashed, with directions to affirm the trial court's Judgment for the reasons expressed in this Brief.

The following symbols will be used:

"LS App.___" - for portions of the record included in the Appendix filed herewith. "LM App.___" - for portions of the record included in the Appendix submitted by Liberty Mutual Insurance Company in its Initial Brief. "R. ___" - for portions of the recorded forwarded to this Court by the Third District Court of Appeal. "S.R. ___" - for portions of the Supplemental Record Vol. I-III. "S.R. Ref. ___" - for portions of the Reference materials included in the Supplemental Record.

References to the page numbers in the Briefs submitted by Liberty Mutual Insurance Company and the Insurance Environmental Litigation Association shall be as follows: Liberty Brief at ___; IELA Brief at ___.

Petitioner/Appellant Liberty Mutual Insurance Company will be referred to throughout as Liberty. The Insurance Environmental Litigation Association, Liberty's cohort in these proceedings, will be referred to as the IELA. Lone Star Industries, Inc. shall be called, simply Lone Star.

Unless otherwise indicated, all emphasis is the writers'.

STATEMENT OF THE CASE AND FACTS

Liberty seeks reversal of an opinion by the Third District Court of Appeal, affirming, per curiam, a decision of the trial court granting Partial Summary Judgment in Lone Star's favor as to the duty to defend. Liberty Mut. Ins. Co., et al. v. Lone Star Indus., Inc., 17 Fla. L. Weekly D2215 (Fla. 3d DCA Sept. 22, 1992). However, and like its Brief in the Third District, Liberty again fails to address all of the Complaints in the consolidated State Court actions and Federal Court action which are the subject matter of the trial court's Judgment.[2] Liberty also neglects to place the procedural and factual posture of this case in relevant context, so as to hide the critical distinctions between this case and Dimmitt.

The Case

In February, 1987, Lone Star initiated a declaratory action in the Circuit Court seeking a judgment requiring that Liberty defend Lone Star, and that Liberty and the Aetna Casualty and Surety Company (Aetna) indemnify Lone Star for damages to Florida's groundwater alleged in the Miami Wood actions. (S.R. 7). Liberty filed an Answer and Affirmative Defenses, as well as a Counterclaim seeking a contrary declaration. (S.R. 8). In its Amended Answer to this Counterclaim, as well as in its Reply to Liberty's Affirmative Defenses, Lone Star asserted defenses of waiver and estoppel. (S.R. 9 and 10). For example, in its seventh defense, Lone Star pled:

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[2] For convenience, all parties have called the four cases the Miami Wood actions.

> [Liberty] is estopped to raise its interpretation of the polluter's exclusion on the basis of collateral, equitable, administrative and/or judicial estoppel arising out of certain proceedings which took place before the Insurance Commissioner, State of West Virginia wherein Liberty's representative stated that the polluter's exclusion is simply intended as clarification of and/or restatement of the definition of occurrence contained in Liberty's policies.

(S.R. 9).

On October 27, 1988, Liberty filed a Motion for Summary Judgment contending that the "pollution exclusion" contained in its Comprehensive General Liability policies relieved it from defending and indemnifying Lone Star in the Miami Wood actions. (LS App. 1). Lone Star responded to Liberty's submissions, and filed a cross Motion for Partial Summary Judgment as to the duty to defend. (S.R. 29). Lone Star also proffered a Memorandum of Law claiming Liberty is estopped to assert a coverage-restrictive interpretation of the pollution exclusion due to representations made by Liberty and its agents to regulatory authorities concerning the scope and effect of the exclusion. (LS App. 2).

The trial court denied Liberty's Motion for Summary Judgment as to indemnity on December 20, 1988. (S.R. 35). On April 24, 1989, it entered an Order granting Lone Star's Motion for Partial Summary Judgment as to the duty to defend. (S.R. 38). While Liberty sought to appeal this Order, the Third District dismissed the appeal as premature. Liberty Mut. Ins. Co. v. Lone Star Indus., Inc., 556 So. 2d 1122 (Fla. 3d DCA 1989). On remand, Lone Star moved for the entry of a Partial Summary Judgment consistent with the trial court's earlier Order. After several hearings, a Judgment was entered in

Lone Star's favor on October 8, 1990. (R. 1-3). Liberty filed its Notice of Appeal to the Third District Court of Appeal on November 6, 1990. (R. 1-3). After the filing of a number of briefs, including briefs of amicus Curiae, and after oral argument, the Court affirmed the Partial Summary Judgment appealed.[3] Liberty Mut. Ins. Co., et al. v. Lone Star Indus., Inc., 17 Fla. L. Weekly D2215 (Fla. 3d DCA Sept. 22, 1992). The Third District expressly based its decision on this Court's ruling of September 3, 1992 in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 17 Fla. L. Weekly S579 (Fla. Sept. 3, 1992) ("Dimmitt I"). Liberty's Motions for Rehearing or Reconsideration or to Certify Decision to this Court were denied. As a consequence, on December 8, 1992, Liberty filed a Notice to invoke the discretionary jurisdiction of this Court. (R. 341-343).

On July 1, 1993, this Court issued its revised opinion on Rehearing in Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1993) ("Dimmitt II"). In a four to three decision, this Court concluded that the pollution exclusion was not ambiguous, and the particular exception to the exclusion for sudden and accidental discharges requires that the discharge or dispersal be temporally limited. Id. at 705. On March 31, 1994, this Court denied the policyholders' Petition for Rehearing of Dimmitt II.[4]

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[3] Liberty did not appeal, or otherwise question the propriety of the trial court's denial of Liberty's summary judgment motion on indemnity.

[4] 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) ("Dimmitt III").

Shortly thereafter, this Court issued its Order accepting jurisdiction, and setting a briefing schedule.

In its Statement of the Case, Liberty contends that "the proceedings before this Court . . . are limited solely to the question of whether the Third DCA's decision conflicts with Dimmitt II." Liberty Brief at 4. However, and as Lone Star will show below, since this Court has accepted jurisdiction, its jurisdiction is plenary to reach all issues on the merits.

The Facts

Lone Star restates the facts, because Liberty's statement of the facts is argumentative, erroneous and incomplete. For example, Liberty incorrectly states as a fact that "the Miami Wood actions alleged that, in the course of daily operations at the Site, pollutants were routinely allowed to drip onto the soil, causing extensive contamination of the Site and leading DERM and others to file suit against Lone Star." Liberty Brief at 4-5. Liberty does not provide a record reference for this "fact", because there is none, and the allegations of the underlying Complaints against Lone Star are utterly devoid of such statements.

Liberty admits that it sold Lone Star Comprehensive General Liability policies during the time that Lone Star operated at the Miami Wood site. (S.R. 22). Liberty also admits that the policies sold to Lone Star by Liberty were based upon standardized forms developed prior to October, 1966, by the National Bureau of Casualty

Underwriters, the Insurance Rating Board, and the Mutual Insurance Rating Bureau of which Liberty was a member. (Id. at ¶ 18).[5]

Each of the policies Liberty sold to Lone Star contains the same insuring clause, which states that Liberty will pay on behalf of Lone Star:

> All sums which [Lone Star] shall become obligated to pay as damages by reason of liability imposed upon [Lone Star] by law or assumed by [Lone Star] under contract because of . . . property damage to which the policy applies, caused by an underlying occurrence. Subject to the following paragraph [Liberty] shall have the right and duty to defend any suit against [Lone Star] seeking damages on account of such . . . property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but may make such investigation and settlement of any claim or suit as it deems expedient.[6]

Liberty's policies define an occurrence as:

> 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 [Lone Star] . . .

Each of Liberty's policies also contains a "contamination or pollution" exclusion. That exclusion reads:

> It is agreed that the 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,

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[5] In addition, Liberty admits that it employed Richard Schmaltz, one of the principal drafters of the Comprehensive General Liability policy, as well as Gilbert Bean, an early commentator on the intended coverage of the policy. (S.R. 22).

[6] Liberty has failed to provide this Court with a copy of its policy. An example of a Liberty policy sold to Lone Star is included in the Supplemental Record at 1. The relevant language is the same in each policy under which defense and indemnity is sought. Furthermore, underscored words in the original are defined terms in the policy. All of the words chosen by Liberty for use in the pollution exclusion are not defined in the policy.

> 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 or results from an underground seepage which [Lone Star] is unaware.[7]

Liberty's entire argument that it has no duty to defend Lone Star is bottomed on the supposition that this exclusion unambiguously applies to all of the allegations of the Complaints in the Miami Woods actions.

The Miami Wood Actions

In its Brief to the Third District Court of Appeals, Liberty acknowledged that in resolving the duty to defend, one "must examine the complaint against the insured and the insurance policies." (R. 20 at p. 11). In the Third District, Liberty ignored three of the four underlying actions for which defense and coverage are sought by Lone Star. (R. 20 and R. 147). Once again, Liberty ignores one of the Complaints against Lone Star, and mischaracterizes the Complaints it does analyze by ignoring language in the original and Amended Complaints that requires defense and coverage.

The Clemente Action

Lone Star first learned of any concern regarding environmental contamination at the site in 1983, years after Lone Star ceased operations at the site. (S.R. 28, Interrogatory No. 14). In May, 1983, Lone Star, together with Seaboard System Railroad, Inc. (Seaboard), Stanley S. Davidson (Davidson) and Futura's Coral Way

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[7] This exclusion is not the insurance industry's standard form exclusion, because of the additional language "or results from an underground seepage of which [Lone Star] is unaware." This broad exception to the exclusion is unique to the Lone Star policies.

Properties I, Ltd. (Futura), were named as defendants in a case filed in the Dade County Circuit Court by Anthony J. Clemente (hereinafter the Clemente Action). (S.R. 2). The original Complaint sought relief in three counts: injunctive relief, civil penalties, and compensatory and punitive damages, as well as restoration and reimbursement of costs and expenses. (S.R. 2).

In relevant part, Paragraph 11 of Count I of the Clemente Complaint alleges:

> Each and all of the aforesaid Defendants have violated Section 24-11(1)(a)(b) and (c) of the Code of Metropolitan Dade County, Florida, by throwing, draining, running, or otherwise discharging organic and inorganic matter into the waters of Dade County, Florida and by causing, permitting, or suffering to be thrown, run, or drained, or allowed to seep, or otherwise discharged into the waters of Dade County, Florida, organic and inorganic matter . . .

The remainder of Count I alleges that the defendants caused or allowed "a nuisance and/or a sanitary nuisance" (Paragraph 12); that the defendants violated the Code by "discharging industrial wastes" (Paragraph 13); that the defendants caused, permitted and/or otherwise allowed potable water supplies to become polluted (Paragraph 14); and, that the defendants failed to restore the waters of Dade County, Florida "to the condition existing before said pollution occurred." (Paragraph 15). (S.R. 2).

Count II simply realleges the relevant allegations of Count I in Paragraph 2, making reference to the "aforesaid violations." Finally, in Paragraph 6 of Count III, the County makes boiler-plate

punitive damage allegations of wanton and willful conduct.[8] There are no allegations in this initial Complaint to describe the duration, timing or manner of any discharges of wastes during the time that Lone Star operated at the site.

The Amended Clemente Complaint

In December 1986, Clemente filed an Amended Complaint, which Liberty totally ignores, essentially breaking the allegations of Count I of the original Complaint into separate Counts. (S.R. 3). Counts I through VI of the Amended Complaint each accuse the defendants, including Lone Star, of "throwing, draining, running or otherwise discharging" substances into the waters of Dade County. For example, Paragraph 12 alleges violations of the Code of Metropolitan Dade County by "throwing, draining, running or otherwise discharging into the waters of this County and by causing, permitting or suffering to be thrown, run, drained, allowed to seep, or otherwise discharged into such water, organic and inorganic matter." Likewise, Paragraph 2 of Count II claims that Lone Star, among other defendants, violated the Code by "discharging industrial wastes and other wastes . . . into the waters of this County." Counts VII

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[8] Unlike many complaints, the Clemente Complaint does not set forth general allegations and then reincorporate them into succeeding counts. Rather, each count stands alone, with Counts II and III realleging only the facts in Count I. Only one portion of one paragraph of 27 paragraphs contains any allegation, applicable to all Defendants, of willful action to pollute the Miami Wood site. Liberty seizes upon the language in Count III, choosing to ignore the allegations of Counts I and II upon which Lone Star also seeks defense and indemnity.

through X seek civil penalties, compensatory damages, investigative and cleanup costs, and punitive damages.[9] (S.R. 3).

The DER Action

In July, 1983, Lone Star was also named as a defendant in an action brought by the then - Florida Department of Environmental Regulation (DER). (S.R. 4). The DER alleges that the defendants, including Lone Star, violated State groundwater regulations, failed to obtain water pollution permits, failed to obtain solid waste disposal permits, and failed to obtain a permit to close a hazardous waste disposal facility. As with the Clemente Complaint, the DER Complaint does not describe or discuss the manner in which chemicals may have been dispersed, discharged, released or escaped. For example, Paragraph 16 of the Complaint alleges:

> As a result of these operations, soils on the property have been contaminated with hazardous wastes. This contamination is reasonably likely to also have contaminated the groundwater in the form of a leachate plume containing carcinogenic and toxic substances.

In a like vein, Paragraph 35 alleges that the defendants placed "solid waste in or on the land or waters located within the State in a manner not approved by the Department." The DER Complaint significantly alleges that the defendants had failed to comply with the Florida Administrative Code "by failing to take any actions to minimize the unplanned sudden or non-sudden release of hazardous

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[9] Liberty has previously claimed that the Amended Complaint was not tendered to it for defense or indemnity. Liberty is mistaken, because the Amended Complaint was attached as an exhibit to the Complaint served on Liberty in this action over seven years ago, in February, 1987.

waste constituents." There are no allegations of intentional, willful or continuous discharges or dispersals of pollutants. (S.R. 4).

The Futura Action

Also in July, 1983, Futura instituted an action for contribution and indemnity against Davidson, Lone Star, and Seaboard in the Circuit Court of Dade County, Florida. (S.R. 5). The only Count relating to Lone Star is Count III, which alleges that Lone Star caused chemicals to be stored and discharged on the property. There are no allegations of continuous dispersals or releases of pollutants or of known underground seepages of pollutants.

The Davidson Action

Last, Davidson, a defendant in the Clemente and Futura actions, filed a Complaint against Lone Star in Federal Court pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9601 et. seq., seeking a declaration of the parties' respective rights and obligations in the Clemente and Davidson actions, as well as for contribution and indemnity. (S.R. 6). The only allegations of this Complaint which discuss the manner of release or dispersal of chemicals are Paragraphs 13 and 23, which allege that hazardous materials were dripped and spilled onto the soils, or released, spilled and dripped upon the ground.[10]

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[10] On October 19, 1983, the three State court actions - Clemente, DER, and Futura - were consolidated into a single action. (S.R. 24). Thus, if Liberty has a duty to defend one action, it must defend all three.

Notice To Liberty And Its Response

Lone Star was served with the Clemente action on May 27, 1983. By letter dated June 3, 1983, Lone Star notified Liberty of the Clemente action, and requested that Liberty engage in a count-by-count review of the Complaint. (S.R. 26). On July 5, 1983, Liberty responded. (LS App. 3). In relevant part, Liberty admitted that it had examined the Complaint in conjunction with one of its insurance policies. Liberty further admitted that the Clemente Complaint **"does not allege when the damage took place . . ."**, and **"is also not specific as to how the discharge of waste occurred."** (LS App. 3). Liberty then indicated that once it had completed its investigation, it would advise Lone Star of its final position on indemnity. (LS App. 3).

Thereafter, Liberty circulated an internal memorandum stating that "[w]e should move quickly to obtain all the facts." (LS App. 5). While Liberty and the IELA claim in their Briefs that Liberty conducted an investigation, as it promised to do, no investigation ever ensued. Liberty's internal memoranda repeatedly complain that no investigation was undertaken. (LS App. 5). For example, a memorandum dated February 26, 1985 (almost two years after Lone Star's June 3, 1983 letter) reports: "we have had this file for almost two years and we have really done very little." (Id.). Not until six months later, on August 6, 1985, did Liberty finally

approve counsel for Lone Star and agree to pay defense costs then owed to Lone Star. (Id.).[11]

Liberty admits that it never took the statements of any of the people that worked at the facility while it operated; never tested the soil, subsurface soil, surface water or groundwater; took no photographs of the site; and, despite the passage of 9 years, has not taken a single deposition. (S.R. 22). One of the persons with the most knowledge concerning the site and how it was operated, Tord Walden, the plant manager, passed away long after Lone Star placed Liberty on notice of this claim, and without any effort having been made by Liberty to preserve his testimony or take a statement from him. (LS App. 4, 5).

On October 15, 1985, and without an investigation of the facts, Liberty cavalierly denied coverage and withdrew its defense of Lone Star. (S.R. 32). Liberty conceded that its decision to withdraw defense and deny indemnity was not based on any amendment of the pleadings in the underlying actions, and that as of October 15, 1985, none of the Complaints in the Miami Wood actions had been amended, including the Clemente Complaint (S.R. 22). This lawsuit ensued.

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[11] A chart detailing the history of Liberty's non-investigation is included in the Appendix at LS App. 4.

SUMMARY OF ARGUMENT

The trial court's Judgment, which holds that Liberty breached its duty to defend Lone Star in the Miami Wood actions must be affirmed. First, and foremost, the pollution exclusion contained in Lone Star's policies is not a standard-form pollution exclusion. In addition to the standard language, it contains an expansively worded exception to the operation of the exclusion for underground seepage, of which Lone Star was unaware. Allegations of underground seepage are contained in the Complaints in the Miami Wood actions. Dictionary definitions, as well as caselaw governing the broad duty to defend under Florida law, support the conclusion that Liberty breached its insurance policies when it withdrew its defense of Lone Star and denied coverage.

Second, Liberty is obligated to defend Lone Star, even if the underground seepage exception to the pollution exclusion is ignored. The first exception to the pollution exclusion, as interpreted by this Court in Dimmitt, provides coverage for the sudden and accidental releases, discharges or dispersals of pollutants. The complaints in the Miami Wood actions do not describe how or when the pollution allegedly caused by Lone Star occurred: a fact conceded by Liberty in a letter it wrote in July, 1983 to Lone Star. Thus, and since the duty to defend is broader than the duty to indemnify, Liberty has a contractual duty to defend Lone Star despite this Court's decision in Dimmitt.

Third, in order to be effective to bar coverage, the discharge or dispersal or release or escape of the pollutant must, under the

words used in the pollution exclusion, be into or upon land, the atmosphere or any watercourse or body of water. Since the underlying complaints in the Miami Wood actions allege dispersals of pollutants to groundwater, and, since groundwater is not land, atmosphere, a watercourse or body of water, the pollution exclusion does not relieve Liberty of its duty to defend. Lone Star's interpretation is supported by numerous cases, as well as dictionary definitions.

Last, and consistent with the decision of the Supreme Court of New Jersey in Morton International, Inc. v. General Accident Ins. Co. of America, 629 A.2d 831 (N.J. 1993), cert. denied, ___ US ___, 114 S.Ct. 2764, 62 U.S.L.W. 3857 (June 27, 1994), Liberty is estopped from interpreting the pollution exclusion in a manner which is inconsistent with the promises and representations made by it to the Insurance Commissioner of the State of Florida. The estoppel recognized by the Supreme Court of New Jersey in Morton, is wholly consistent with principles of Florida law, including this Court's decision in Crown Life Ins. Co. v. McBride, 517 So. 2d 660 (Fla. 1987). Simply put, promissory estoppel should be applied so as to hold Liberty to the promises of coverage that it made in 1970, so as to obtain use of the pollution exclusion in Florida without a concomitant rate decrease.

ARGUMENT

I. THE TRIAL COURT'S JUDGMENT HOLDING THAT LIBERTY MUST DEFEND LONE STAR IN THE MIAMI WOOD ACTIONS MUST BE AFFIRMED.

The trial court's Judgment holding that Liberty breached its duty to defend Lone Star in the Miami Wood actions must be affirmed notwithstanding this Court's decision in Dimmitt, inter alia because of two critical and undisputed distinctions between this case and Dimmitt: The pollution exclusion contained in the policies at bar is worded differently, because it expressly does not apply to underground seepage, of which the insured is unaware; and, this case arises on appeal solely as to the duty to defend, and not the more narrow duty to indemnify. Furthermore, the correct interpretation of the pollution exclusion, narrowly construed as it must be under principles of Florida law, reveals that the exclusion is not applicable to claims for groundwater contamination, such as those alleged in the Miami Wood actions. Since groundwater is not a watercourse or body of water -the language used in the exclusion - the exclusion would have to be rewritten so as to expand its scope beyond the plain meaning of the words used.

The Scope Of This Court's Review

Liberty contends that the proceedings before this Court "are limited solely to the question of whether the Third District's decision conflicts with Dimmitt II." Liberty Brief at 4. Liberty is incorrect. As this Court has previously stated,

> It is usual that when this Court assumes jurisdiction of a cause because of conflict in decisions, the Court will go further and determine the merits.

D'Agostino v. State, 310 So. 2d 12 (Fla. 1975). See also Kelly v. Scussel, 167 So. 2d 870, 872 (Fla. 1964); Tyus v. Apalachicola N. R.R. Co., 130 So. 2d 580 (Fla. 1961). Accordingly, this Brief will not limit itself to the singularly narrow issue raised by Liberty in rhetorical terms in its Brief, but will comprehensively address the merits of the case to prove that the Third District reached the correct result, albeit for the wrong reason.

A. The Judgment Appealed Must Be Affirmed, Notwithstanding This Court's Decision In Dimmitt, Because Liberty's Policies Provide Coverage For Releases Or Dispersals Or Escapes Or Discharges Of Pollutants Resulting From An Underground Seepage Of Which Lone Star Was Unaware

> If there was underground seepage, and LONE STAR was not aware of it, why isn't LIBERTY paying LONE STAR's claim where the policy provides coverage for underground seepage of which the insured is unaware?

Paragraph 24 of Lone Star's Statement of Material Issues of Fact Which are in Dispute, submitted in opposition to Liberty's Motion for Summary Judgment in the trial court. (S.R. 30).

Liberty's pollution exclusion is different from the pollution exclusion construed by this Court in Dimmitt, because it contains an additional exception to the standard-form language for discharges or dispersals or releases or escapes which "results from an underground seepage of which [Lone Star] is unaware." (S.R. 1). There is no dispute that the underlying actions allege underground seepage. Liberty handily **admits** this at page 13 of its Brief, wherein it notes that the Clemente Complaint alleges, "that Lone Star allowed

contaminants **'to seep'** into the waters of Dade County (Paragraph 11; App. 8)."[12]

The terms "underground seepage" and "unaware" are not defined, and under Florida law must be interpreted according to their common everyday usage. Security Ins. Co. of Hartford v. Commercial Credit Equip. Corp., 399 So. 2d 31, 34 (Fla. 3d DCA 1981). Florida courts commonly adopt the plain meaning of words as defined in non-legal dictionaries. See, e.g., Government Employees Ins. Co. v. Novak, 453 So. 2d 1116, 1118 (Fla. 1984). Websters New Universal Dictionary of the English Language at pages 1993, 1643, and 1989 (1976) defines the key words in this exception to the pollution exclusion as follows:

> Underground: Beneath the surface of the earth.
>
> Seepage: The act or process of seeping; and oozing; also, the liquid that seeps. (as a verb, the word seep is defined so as to include "to flow through pores; to ooze gently.")
>
> Unaware: Without thought; inattentive; heedless.

Application of these definitions to the exception proves that Lone Star is, at minimum, entitled to a defense. The Complaints in the Miami Wood actions, Liberty's internal memoranda, and the various environmental studies performed at the site, reflect the existence of underground contamination of the earth as well as groundwater

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[12] Since it is beyond cavil that the pollution exclusion in Lone Star's policies does not apply to underground seepage, and because expressly, or by fair implication, allegations of underground seepage are pled in all of the underlying Complaints, Liberty and the IELA attempt to bury the issue. For example, the IELA claims, incongruously, that the underground seepage exception "is not at issue in this case." IELA Brief at 5, n.5. Liberty devotes an entire page and a half at the tail end of its Brief to the underground seepage argument Lone Star has raised throughout this case and on appeal. Liberty Brief at 17, 18.

contamination. (LS App. 5). This contamination could only have resulted from seepage beneath the surface of the earth. The Complaints in the Miami Wood actions do not allege that Lone Star was aware of the underground seepage of CCA or creosote - a chemical never used by Lone Star in its operations. (S.R. 33).

So as to avoid these arguments, Liberty attempts to argue that underground seepage must relate to the original release. Liberty Brief at 17. Yet, the pollution exclusion includes an exception for "dispersal" which results from underground seepage. Dispersal may arise from the initial release of a contaminant or its migration. See Farm Family Mut. Ins. Co. v. Bagley, 409 N.Y.S.2d 294 (N.Y. App. Div. 1978) (stating that "'[d]ischarge' clearly refers to the original release of the toxic chemicals. . . . However, the word 'dispersal' may refer to the original release or it may to a secondary dissemination after the original release."). Moreover, given the manner in which Liberty chose to draft this language, and since the policy uses the word "or", if the discharge or the dispersal or the release or the escape can result from an underground seepage, it is not included within the narrow scope of the pollution exclusion.[13]

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[13] Aside from contradicting the language of the policy itself, Liberty's argument violates a rule of construction that Liberty and the IELA itself relies upon in this case. In its Brief at pg. 13, the IELA states, "principles of contract construction requir[e] that each word in a contract be given effect wherever possible". By eliminating the words discharge, dispersal or escape from the pollution exclusion, Liberty violates that rule of construction. See Midwest Mut. Ins. Co. v. Santiesteban, 287 So. 2d 665 (Fla. 1973); United States Fire Ins. Co. v. Morejon, 338 So. 2d 223 (Fla. 3d DCA 1976).

Liberty's game plan is clear. Since the Complaints against Lone Star allege at least that the dispersal of the contaminants "results from an underground seepage", Liberty attempts to rewrite the policy language. However, as the IELA confesses at page 38 of its Brief:

> 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 to its clear language and not distorted . . . .[14]

Liberty's effort to rewrite the underground seepage language so as to narrow its scope, is thwarted by its own admissions, and by the principles of Florida law described above. The Judgment appealed must be affirmed.

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[14] Liberty's argument further ignores its own internal documents.

> The insured has a pollution exclusion on their policy which contains an extra clause that says in part that the release or escape of pollutants must be sudden and accidental or result "from an underground seepage of which the insured is unaware."
>
> I reviewed the underwriting folder and was fortunate in finding some old correspondence related to the original writing of this coverage. **There are references to the insured wanting pollution coverage. We were attempting to duplicate the coverages provided by the prior carrier and they had provided some form of pollution coverage.** In the end, we offered this modified endorsement in lieu of blanket coverage.

Liberty's "current underwriter" then concedes, that while the "most common" application for the clause would relate to a leak from an underground storage tank, there must be other, "uncommon" applications of the underground seepage language. (LS App. 5).

B. Liberty Is Still Obligated To Defend Lone Star, Even If The Underground Seepage Exception To The Pollution Exclusion Is Ignored

Liberty is still obligated to defend Lone Star, and the Judgment appealed must be affirmed, even if the broad underground seepage exception to the pollution exclusion is ignored. Unlike Dimmitt, the issue before this Court is an insurance company's duty to defend its policyholder. Since the Complaints in the Miami Wood actions cannot foreclose the possibility that the discharges or dispersals or releases or escapes of the pollutants were sudden and accidental, as Liberty concedes in its July 5, 1983 letter to Lone Star (LS App. 3), a duty to defend exists despite the "true facts", which might have been disclosed had Liberty conducted an investigation.[15] (S.R. 26).

An insurance company's duty to defend is distinct from, and broader than, the duty to indemnify the policyholder. Marr Investments, Inc. v. Greco, 621 So. 2d 447 (Fla. 4th DCA 1993); Morgan Int'l Realty, Inc. v. Dade Underwriters Ins. Agency, Inc., 617 So. 2d 455 (Fla. 3d DCA 1993); Florida Ins. Guar. Ass'n v. Giordano, 485 So. 2d 453, 456 (Fla. 3d DCA 1986); Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810 (Fla. 1st DCA 1985).

Liberty's duty to defend is determined entirely from the allegations of the underlying Complaints in the Miami Wood actions, and from no other source.

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[15] This important letter is quoted in relevant part at page 11 of this Brief, and is separately bound in Lone Star's Appendix to this Brief at LS App. 3.

> The duty of an insurer to defend is determined **solely** by the allegations of the complaint against the insured, not by the actual facts, nor the insured's version of the facts or the insured's defenses.

Marr, 621 So. 2d at 449 (quoting Reliance Ins. Co. v. Royal Motorcar Corp., 534 So. 2d 922, 923 [Fla. 4th DCA 1988], rev. denied, 544 So. 2d 200 [Fla. 1989]); Baron, 490 So. 2d at 814; Kings Point West, Inc. v. North River Ins. Co., 412 So. 2d 379 (Fla. 2d DCA 1982); See also Trizec Properties, Inc. v. Biltmore Constr. Co., 767 F.2d 810 (11th Cir. 1985) (holding that the insurer has a duty to defend if the complaint alleges facts within the policy coverage even if later facts demonstrate that there is no coverage); Tampa Elec. Co. v. Stone & Webster Eng'g Corp., 367 F. Supp. 27 (M.D. Fla. 1973) (holding that the duty to defend is determined when the action is brought, not when it is reduced to judgment).[16] The insurance company must defend its policyholder if the allegations in the Complaint may potentially be covered by the insurance policy. Morgan, 617 So. 2d at 458; Grissom v. Commercial Union Ins. Co., 610 So. 2d 1299 (Fla. 1st DCA 1992). Liberty must defend the entire suit even if the complaint alleges facts partially within and partially without the coverage of the policy. Id. at 1307. Indeed, Liberty must defend

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[16] Liberty has previously argued that it is entitled to rely on its non-existent investigation and upon two cases, Capoferri v. Allstate Ins. Co., 322 So. 2d 625 (Fla. 3d DCA 1975) and Consolidated Mut. Ins. Co. v. Ivy Liquors, Inc., 185 So. 2d 187 (Fla. 3d DCA 1966), to relieve it of its defense obligation. (R. 20). As the cases cited above demonstrate, the fruits of Liberty's phantom investigation are irrelevant to the duty to defend. Furthermore, Capoferri and Consolidated simply stand for the proposition that where the complaint against the policyholder contains no allegations possibly within coverage, no duty to defend exists. In this case, Liberty has conceded in its July 5, 1983 letter that the facts are otherwise. (LS App. 3).

the action even if the true facts later show that there is no coverage. Grissom, 610 So. 2d at 1307.[17] Any doubt about whether Liberty has a duty to defend must be resolved in favor of Lone Star. Id. at 1304; Marr, 621 So. 2d at 449.

The allegations against Lone Star in the Complaints in the Miami Wood actions reflect a potential for coverage under Liberty's policies, even under the sudden and accidental exception to the pollution exclusion construed by this Court in Dimmitt, 636 So. 2d at 701. While Liberty argues that the narrow construction of the pollution exclusion adopted by this Court in Dimmitt forecloses even a duty to defend, cases from other jurisdictions which have adopted

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[17] Because of Liberty's failure to investigate, the "true" facts may never be known. Liberty may well be estopped under applicable law to now contend that its belated withdrawal of a defense was justified, because Liberty never investigated the claim for coverage, and unilaterally withdrew its defense of Lone Star after agreeing to provide a defense. Estoppel can be invoked against an insurance company when its conduct has been such as to induce the policyholder to rely upon it. Mutual of Omaha Ins. Co. v. Eakins, 337 So. 2d 418, 419 (Fla. 2d DCA 1976). See also Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1204 (11th Cir. 1982) (stating that "[t]he law is not tender toward those who fail in their responsibility to exercise the necessary good faith in their dealings with others."); Doe v. Illinois St. Med. Inter-Insurance Exchange, 599 N.E.2d 983 (Ill. App. Ct. 1992); Admiral Ins. Co. v. Columbia Casualty Ins. Co., 486 N.W.2d 351 (Mich. Ct. App. 1992); First United Bank of Bellevue v. First Am. Title Ins. Co., 496 N.W.2d 474 (Neb. 1993); American Gen. Fire & Cas. Co. v. Progressive Cas. Co., 799 P.2d 1113 (N.M. 1990); American Home Assurance Co. v. Ozburn-Hessey Storage Co., 817 S.W.2d 672 (Tenn. 1991). A chronology of Liberty's lack of investigation is included in Lone Star's Appendix at LS App. 4. If the trial court ultimately determines Liberty's conduct prejudiced Lone Star, "[o]nce established, the amount of prejudice, whether large or small, becomes irrelevant when determining the applicability of the doctrine of estoppel." Florida Physicians Ins. Co. v. Stern, 563 So. 2d 156, 160 (Fla. 4th DCA 1990).

a Dimmitt-like interpretation of the pollution exclusion belie this contention.

For example, the courts in New York have long followed a coverage-restrictive interpretation of the pollution exclusion. Technicon Elec. Corp. v. American Home Assurance Co., 542 N.E.2d 1048 (N.Y. 1989); Powers Chemco, Inc. v. Federal Ins. Co., 548 N.E.2d 1301 (N.Y. 1989). Nonetheless, courts in New York have not hesitated to apply settled rules governing the duty to defend, to find that insurers have a duty to defend notwithstanding a narrow interpretation of the pollution exclusion. See, e.g., New York v. Blank, Nos. 1092, 1093, 1094, 93-7952, 93-9002, 93-9004, 1994 WL 262350 (2d Cir. 1994); Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200 (2d Cir. 1989); Petr-All Petroleum Corp. v. Fireman's Ins. Co. of Newark, N.J., 593 N.Y.S.2d 693 (N.Y. App. Div. 1993); Gaservice Maintenance Corp. v. American Casualty of Redding, Pa., Vol. 5, No. 22 Litig. Rep. - Ins. (Mealey) B-1 (N.Y. Sup. Ct. 1991) (LS App. 6).

The decision of the Second Circuit in Avondale is instructive. In Avondale, the complaints charged Avondale with "insufficient" containment measures; "generating" hazardous wastes; with "knowledge" of the presence of toxins; and, with culpability for the "escape" of hazardous materials. Avondale, 887 F.2d at 1205. Notwithstanding, and applying New York law, the Second Circuit held:

> None of these conclusory assertions "clearly negate" the possibility that [the] discharge or escape was "sudden and accidental." Hence, it seems plain that the New York Court of Appeals' affirmance of the Technicon did nothing to cast doubt on the district court's conclusion. Travelers therefore has a duty to defend the private actions.

Id. at 1205-06. See also Paxar Corp. v. Lumberman's Mut. Casualty Co., No. 90 Civ. 8059 (KTD), 1993 WL 126705 (S.D.N.Y. 1993).

Courts in other jurisdictions have done the same. For example, in In Re: Acushnet River, 725 F. Supp. 1264 (D. Mass. 1989), several insurance companies also claimed that the pollution exclusion clauses in their insurance policies relieved them of their duties to defend. Since it suited their goal of restricting coverage, the insurance carriers attempted to persuade the Court that the term "sudden" unambiguously means "abrupt". While the Court recognized "abrupt" as one of the definitions of "sudden", id. at 1268, the Court disagreed with the insurance companies' conclusion that they had no duty to defend.

> The sovereign's allegations that PCBs have caused and continue to cause property damage are "reasonably susceptible of an interpretation that they state or adumbrate a claim covered by the policy terms." Nothing in the complaint alleges that all the releases were both non-[abrupt] and non-accidental. Therefore, the insurers must undertake the defense of the insured unless they can conclusively prove that every single release was non-[abrupt] and non-accidental. [I]f there is even one release that was [abrupt] and accidental then . . . each insurer must defend its insured.

Acushnet, 725 F. Supp. at 1269 (citation omitted).

The cases cited by Liberty at page 11 of its Brief do not require a different result, because they are all based on factors not present in this case. For example, in at least five of the cases, the courts relied on the fact that the policyholder continued to pollute even after receiving repeated complaints and notices of violation. See United States Fidelity & Guaranty Co. v. Star Fire Coals, Inc., 856 F.2d 31 (8th Cir. 1988); United States Fidelity &

Guar. Co. v. Korman Corp., 693 F. Supp. 253 (E.D. Penn. 1988); American Motorists, Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987); American Mut. Liab. Ins. Co. v. Nevel Chemistry Co., 650 F. Supp. 929 (W.D. Penn. 1987); Grant-Southern Iron & Metal Co. v. CNA Insurance Co., 669 F. Supp. 798 (E.D. Mich. 1986). In Technicon, the Court found it critical that the policyholder admitted that it had intentionally polluted. 542 N.E.2d at 1048. Lone Star first learned of any environmental problem years after it ceased operations at the site. All of the courts in the cases relied upon by Liberty based their decisions on the fact that the complaints under review contained specific allegations as to the manner in which the discharge occurred and the duration of the polluting activity. See EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co., 905 F.2d 8 (2d Cir. 1990) (underlying complaint expressly alleged a continuous discharge to sewer lines "from March 1977 through 1983"); United States Fidelity & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617 (M.D. Tenn. 1988) (noting that discharge of pollutants was "alleged to have occurred over a six year period").

Interpreting New York law, the Second Circuit Court of Appeals recently distanced itself from the cases relied upon by Liberty in Blank, 1994 WL 262350 at *5. Dismissing arguments identical to those made by Liberty in this case, the Second Circuit observed:

> The State's complaint in this case is not expressly limited to allegations of intentional conduct. . . . The complaint does not describe precisely how the discharge of pesticides occurred. Rather, the complaint is couched in the general terms appropriate for a complaint brought pursuant to CERCLA's strict liability provisions. . . .

> These general allegations stand in marked contrast to allegations that have been held by the New York Court of Appeals to fall with the standard pollution exclusion clause. In Technicon Elec., 74 N.Y.2d at 73, 544 N.Y.S.2d at 533, 542 N.E.2d at 1049, the New York Court of Appeals held that allegations that "[t]he discharge by defendants of toxic wastes. . . has been made and is being made knowingly" fell within a pollution exclusion clause. (Citations omitted). Similarly, the allegations are different from those held by this Circuit to fall within the standard pollution exclusion clause. For example, in EAD Metallurgical, Inc. v. Aetna Casualty and Sur. Co., 905 F.2d 8, 11 (2d Cir. 1990), we held that a pollution exclusion clause relieved an insurer of its duty to defend where the underlying complaint alleged that "EAD. . . did wrongfully, willfully and illegally commit waste on, and damage to, [the] premises. . . by causing, implementing, creating, generating, injecting and inflicting radioactive contamination. . . ." See also New York v. Amro Realty Corp., 936 F.2d 1420, 1427 (2d Cir. 1991) (holding that allegations of a complaint fell within the terms of a pollution exclusion clause where the complaint alleged that "during some thirty years, [the defendant in the underlying action] 'disposed' of its hazardous manufacturing waste by methods which the defendants 'knew or should have known . . . resulted in their release into the environment,'" and specified that "the wastes were 'disposed of. . . in several places on the site, including: the parking lot, sinks which discharged into septic systems on the site, and drains which discharged through sewage pipe into a drainage ditch. . .").
>
> * * *
>
> We find that the insurers have not met their burden of demonstrating no reasonable possibility of coverage for the damages and conduct alleged in New York's complaint. The complaint's broad, general allegations admit of the possibility that property damage was caused, if even in part, by the "sudden and accidental" discharge of pesticides. We conclude, therefore, that the pollution exclusion clauses do not relieve the insurers of their duty to defend Abalene and Blank.

Blank, 1994 WL 262350 at *5.

Thus, Liberty has a contractual duty to defend Lone Star in the Miami Wood actions, despite this Court's decision in Dimmitt. As Liberty admits in its July 5, 1983 letter, the allegations of the

Complaints against Lone Star are not specific as to how or when the releases occurred. (LS App. 3). Ergo, the possibility of covered "abrupt" releases exists, and Liberty has an obligation to defend Lone Star. See Marr, 621 So. 2d at 447 and cases cited therein.[18]

C. Liberty Must Defend Lone Star, Because The Miami Wood Actions Allege Dispersals And Seepages Of Pollutants To Groundwater, Which Is Not Within The Scope Of The Pollution Exclusion.

Liberty must prove that the allegations of the Complaints in the Miami Wood actions fall exclusively within the language of the pollution exclusion. In determining whether the exclusion applies at all,

> [W]e must construe the policy terms liberally, in favor of the insured, so as not to defeat the insured's claim unnecessarily. Words in an insurance contract are normally defined in terms of their common usage, and any ambiguous term is to be construed against the insurer as drafter of the policy.

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[18] In the Third District, Liberty attempted to rely on the decision of that court in Seaboard Sys., R.R., Inc. v. Clemente, 467 So. 2d 348 (Fla. 3d DCA 1985), as justifying Liberty's belated withdrawal of Lone Star's defense in the Miami Wood actions. (R. 20). This argument is meritless. First, Seaboard was decided seven months before Liberty withdrew its defense. Second, as the trial court implicitly found, the Third District's decision in Seaboard reviewed the grant of a temporary injunction, which is not a decision on the merits, and is not conclusive as to any issues raised. Miami Beach v. State, 49 So. 2d 538 (Fla. 1950). Third, the interpretation and applicability of Liberty's insurance policies was neither briefed, argued nor decided in Seaboard. The trial court's findings were specifically limited to those required on an application for preliminary injunctive relief. See, e.g., Sackett v. Coral Gables, 246 So. 2d 162 (Fla. 3d DCA 1971); 29 Fla. Jur. 2d Injunctions §5 (1981) and cases collected therein. Last, since the injunction sought to restrain further violations of the environmental codes, and as Lone Star had ceased operating at the site years before the Clemente proceedings incepted, Lone Star had little interest in contesting the entry of the injunction.

Airmanship, Inc. v. United States Aviation Underwriters, Inc., 559 So. 2d 89, 91 (Fla. 3d DCA 1990); Security Ins. Co. of Hartford v. Investors Diversified Ltd., Inc., 407 So. 2d 314, 316 (Fla. 4th DCA 1981) (stating that "[if the insurance company intended the exclusion to apply in only certain instances,] then the policy should unequivocally say so instead of employing ambiguous language"). Furthermore, when an insurance company relies upon a policy exclusion to relieve it of its duty to defend, the insurance company has the burden of demonstrating that the allegations in the underlying complaint or complaints are solely and entirely within the policy exclusion, and are subject to no other interpretation. Blank, 1994 WL 262350 at #6; Avondale, 887 F.2d at 1200.

Since none of the words in the pollution exclusion are defined terms under the policies, the words used must be construed as they would be understood by the man on the street. Fountainbleu Hotel Corp. v. United Filigree Corp., 298 So. 2d 455, 459 (Fla. 3d DCA), cert. denied, 303 So. 2d 334 (Fla. 1974), disapproved on other grounds in LaMarche v. Shelby Mut. Ins. Co., 390 So. 2d 325 (Fla. 1980). In this regard, it is appropriate to look to recognized dictionaries for definitions of the undefined terms. Braley v. American Home Assurance Co., 354 So. 2d 904, 905 (Fla. 2d DCA 1978); Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co., 855 P.2d 1263 (Cal. 1993).

The pollution exclusion is quoted in full at pages 5-6 of this Brief. In order for the pollution exclusion to be applicable, the liability claimd against Lone Star must result from the discharge or

dispersal or release or escape of a pollutant "into or upon land, the atmosphere or any watercourse or body of water." Since the underlying Complaints in the Miami Wood actions allege dispersals of pollutants to groundwater, and since groundwater is not "land", "atmosphere", a "watercourse", or a "body of water", Liberty cannot sustain its burden of proving that the allegations in the underlying Complaints are solely and entirely within the intendment of the pollution exclusion.

Recognized Dictionaries Devastate Any Claim That The Pollution Exclusion Was Intended To Exclude Claims For Groundwater Contamination

The proper interpretation of the pollution exclusion, as illuminated by dictionary definitions, reflects that it does not exclude from the coverage in a Comprehensive General Liability policy, claims for groundwater contamination. For present purposes, the operative terms to be considered are "watercourse" and "body of water". Black's Law Dictionary defines a watercourse as,

> A running stream of water; a natural stream fed from permanent or natural sources, including rivers, creeks, runs and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed or banks, and usually discharges itself into some other stream or body of water. **. . . Water flowing underground in a known and well-defined channel is not "percolating water" [i.e., groundwater], but constitutes a "watercourse" . . . .**

Black's Law Dictionary 1592 (6th ed. 1990) (citation omitted). Likewise, the Waters' Dictionary of Florida Law at page 727 (1991), defines a watercourse as "the bed and banks through which water usually flows in a certain direction along a regular channel, whether or not the course sometimes is dry." Last, the American Heritage

Dictionary at page 1366 (1983), defines a watercourse as "1. A waterway. 2. The bed or channel of a waterway."

These plain-English definitions, which comport with common sense and understanding, are supported by numerous cases. See, e.g., Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663 (Fla. 1979) (comparing and contrasting various classifications of water passing over or through lands in distinct categories); Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896) (stating that a watercourse consists of bed, banks and water; water must flow in a certain direction and by a regular channel with banks or sides and must have a substantial existence); Atchison, T. & S. F. Ry. Co. v. Hadley, 35 P.2d 463 (Okla. 1934); Bull v. Siegrist, 126 P.2d 832 (Or. 1942); C. & W. Coal Corp. v. Salyer, 104 S.E.2d 50 (Va. 1958). Thus, a watercourse is defined, consistently, as something with defined banks, with a regular channel and, more often than not, a substantial flow.

The term "body of water" is defined by its context when used in common parlance. For example, Black's Law Dictionary defines water as "it may designate a body of water, such as a river, a lake, or an ocean, or an aggregate of such bodies of water." Black's Law Dictionary 1591 (6th ed. 1990). Bodies of water - e.g., Lake Okeechobee, the Gulf of Mexico, Biscayne Bay - share a singular characteristic: they each have defined banks and boundaries, subject to a set of legal rights in their ownership, maintenance, enjoyment, and use distinct from percolating water or groundwater.

Black's Law Dictionary defines groundwaters as "those which pass through the ground beneath the surface of the earth without any definite channel, and do not form a part of the body or flow, surface or subterranean, of any watercourse." Black's at 1591. See also Tequesta, 371 So. 2d at 666 (defining groundwater as "subsurface waters which, without any permanent, distinct, or definite channel, percolate in veins or filter from the lands of one owner to those of another." (quoting Tampa Waterworks, 20 So. at 782)). In fact, watercourses are spoken of in terms of being the antonym to percolating or groundwaters. See, e.g., Bull, 126 P.2d at 832, (stating that water flowing underground in a known and well-defined channel is not percolating water, but constitutes a watercourse and is governed by the law applicable to surface streams and not by the law applicable to percolating waters).

Case Authorities Support Lone Star's Interpretation Of The Pollution Exclusion, As Not Precluding Defense Obligations Where Pollution Of Groundwater Is Alleged.

Caselaw also supports Lone Star's common sense interpretation of the pollution exclusion. For example, the Supreme Court of Minnesota recently interpreted the first portion of the pollution exclusion in Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am., Nos. C1-93-24, C8-93-36, C5-93-186, 1994 WL 264756 (Minn. 1994). The issue presented to the Minnesota Supreme Court was whether the release of asbestos in a building was excluded from coverage by the pollution exclusion. The Supreme Court engaged in the same analysis as Lone Star, readily concluding that the word "atmosphere" as used within the pollution exclusion, did not include air in a building.

> "Atmosphere" (in its ordinarily understood physical sense) is another name for "air," but - and this is what is important - it is air thought of as being in a particular place. We would not say that the atmosphere in a room is stuffy, but rather that the air is stuffy. We think of atmosphere as the air surrounding our planet, as when Hamlet spoke of "this most excellent canopy, the air." (Act II, Scene ii.) So it is that we speak of releasing a balloon into the atmosphere but letting the air out of a tire.

Id. Likewise, you might consider going for a swim in a watercourse or body of water, but not groundwater. A person would have to collect groundwater, as by a well, so as to create a pond or body of water. Like air, groundwater is water in a particular place, but not found in a watercourse or body of water. The Supreme Court of Minnesota found it significant, that:

> [T]he pollution exclusion does not use the generic term "water" but rather the phrase "any watercourse or body of water," a description indicative of water in streams, ponds or lakes.

Id. See also New York v. Traveler's Indemnity Co., 508 N.Y.S.2d 698 (N.Y. App. Div. 1986) (holding that an exclusion for discharge of petroleum derivatives into any body of water did not apply, because the discharge and dispersal was to groundwater, "in the nature of percolating water"). But see Time Oil Co. v. Cigna Property & Casualty Co., 743 F. Supp. 1400 (W.D. Wash. 1990) (holding otherwise without extensive analysis or discussion); MAPCO Alaska Petroleum, Inc. v. Central Nat'l Ins. Co. of Omaha, 795 F. Supp. 941 (D. Alaska 1991) (following Time Oil).[19]

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[19] Lone Star's interpretation is consistent with the history of the exclusion, as its drafting was precipitated by a series of disasters, resulting in the discharge of quantities of pollutants directly into watercourses and bodies of water. Hourihan, Insurance Coverage for Envtl. Damage Claims, 15 Forum 551, 553 n. 2 (1980).

Each of the Complaints in the Miami Wood actions allege discharges or dispersals to groundwater. For example, the Complaint in the Clemente action alleges that Lone Star, along with the other defendants, violated the Dade County Code by discharging pollutants "into the waters of Dade County", and by allowing potable water supplies to breach certain values for pollutants set forth in the Code. (S.R. 2). The DER action goes one step further, defining groundwater in paragraph 14.F. as including "water beneath the surface of the ground within a zone of saturation, whether or not flowing through known and definite channels", and by general allegation claims a likelihood of contamination of this groundwater. (S.R. 4). Count I of the DER Complaint specifically alleges such a threat.

Since the duty to defend is based solely upon a review of the underlying complaints, and as those complaints include claims of discharges or dispersals to groundwater, Liberty has a duty to defend, because it is reasonable to interpret the pollution exclusion as not encompassing claims for groundwater contamination. Alternatively, the exclusion is ambiguous as it applies to claims of groundwater contamination, and under settled Florida law, that ambiguity must be resolved against Liberty as the drafter of the policy. Meister v. Utica Mut. Ins. Co., 573 So. 2d 128 (Fla. 4th DCA 1991); Tropical Park, Inc. v. United States Fidelity and Guar. Co., 357 So. 2d 253 (Fla. 3d DCA 1978); 13 John A. Appleman, Insurance Law and Practice §7403 (1976).

II. LIBERTY IS ESTOPPED FROM ADVANCING AN INTERPRETATION OF THE POLLUTION EXCLUSION WHICH IS INCONSISTENT WITH THE PROMISES AND REPRESENTATIONS OF COVERAGE MADE TO INSURANCE REGULATORS

Consistent with the decision of the Supreme Court of New Jersey in Morton International, Inc. v. General Accident Ins. Co. of America, 629 A.2d 831 (N.J. 1993), cert. denied, ___ US ___, 114 S.Ct. 764, ___ L.Ed. ___ (1994), Liberty is estopped from interpreting the pollution exclusion in a manner which is inconsistent with the promises and representations made to insurance regulators nationally, and to the insurance commissioner of the State of Florida.[20] Liberty, through its agent, the Mutual Insurance Rating Bureau, represented at the time it sought approval to use the pollution exclusion as an amendatory endorsement to its Comprehensive General Liability policies, that the pollution exclusion was merely intended as a clarification of the occurrence definition. The exclusion would not operate to restrict coverage from that otherwise afforded by Comprehensive General Liability policies prior to the advent of the pollution exclusion in 1970.

It has long been established under Florida law that an insurance company may be estopped from denying coverage it has promised to provide. "[T]he form of equitable estoppel known as promissory estoppel may be utilized to create insurance coverage where to refuse to do so would sanction fraud or other injustice." Crown Life Ins. Co. v. McBride, 517 So. 2d 660, 662 (Fla. 1987). Florida courts have invoked the doctrine of promissory estoppel to require insurance

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[20] Liberty was a defendant in Morton.

companies to provide the coverage they have told policyholders they would provide. See, e.g., Emanuel v. United States Fidelity & Guar. Co., 583 So. 2d 1092 (Fla. 3d DCA 1991); United Self Insured Services v. Faber, 561 So. 2d 1358 (Fla. 1st DCA 1990).

The promise of coverage need not have been made to the person seeking to recover under the policy. For example, in Atlantic Masonry v. Miller Constr., 558 So. 2d 433 (Fla. 1st DCA 1990), Liberty, the defendant in this action, provided workman's compensation coverage to a subcontractor, Atlantic. It then cancelled the policy for nonpayment of premiums, but erroneously sent a renewal policy and declarations page to Atlantic. Atlantic then used the declarations page as proof of insurance in order to obtain work from the general contractor, Miller. When an Atlantic employee was injured on the job, Liberty denied coverage for the injury.

Miller's insurance company, FEISCO, paid the injured worker's claim, and sued Liberty for reimbursement. Liberty argued that the doctrine of promissory estoppel could not applied, because its promise of coverage had been made to Atlantic, and not to Miller or FEISCO. In affirming the decision of the judge of compensation claims, the District Court rejected Liberty's argument, in part relying upon the Restatement (Second) of Contracts § 90(1) (1979):

> A promise which the promissor should reasonably expect to induce action or forbearance on the part of the promissee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for a breach may be limited as justice requires.

Masonry, 558 So. 2d at 434; See also Criterion Leasing Group v. Gulf Coast Plastering & Drywall, 582 So. 2d 799 (Fla. 1st DCA 1991).

Likewise, an insurance company will also be bound by promises or representations made by persons or entities authorized to act on its behalf. Warren v. Department of Administration, 554 So. 2d 568 (Fla. 5th DCA 1990) (holding that under the doctrine of promissory estoppel, the State of Florida would be required to provide the coverage Blue Cross promised if "Blue Cross had the apparent authority to bind the Department"). In Warren, the Court found that Blue Cross had the apparent authority to bind the State of Florida, reasoning that "[t]he insurer is bound by the acts of its agent if they are within the scope of the agent's apparent authority and the insured is not aware of any limitation." Warren, 554 So. 2d at 571.

The history of the Comprehensive General Liability policy, as well as the drafting history is well known to this Court, and to numerous courts elsewhere as well. See, e.g., Claussen v. Aetna Cas. & Sur. Co., 754 F. Supp. 1576 (S.D. Ga. 1990); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W.Va. 1992); Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990). It was detailed for this Court in the amicus submittals of the State of Florida in Dimmitt, and is also described in detail in the amicus brief of New Farm, Inc., submitted on Lone Star's behalf in these proceedings. Recently, it was exhaustively discussed in the Supreme Court of New Jersey's opinion in Morton, 629 A.2d at 847-55.

Distilled to its essence, the drafting history establishes beyond peradventure the following:

A. The occurrence-based policy first used by the insurance industry in October of 1966 was intended to cover gradually occurring

events, such as pollution damages. Just, 456 N.W.2d at 574. Robert N. Sayler & David M. Zolensky, Pollution Coverage and the Intent of the CGL Drafters, The Effect of Living Backwards, Litig. Rep. - Ins. (Mealey) 4,425 (1987) (S.R. 14);

B. Pollution of the environment was specifically considered by, and given as an example of a covered "occurrence" by the policy's drafters, as well as industry spokesmen such as Liberty's employee, G. L. Bean. Just, 456 N.W.2d at 574; G. L. Bean, New Comprehensive General and Automobile Program -- The Effect on Manufacturing Risks (Mutual Ins. Technical Conference, Nov. 15-16, 1965) (S.R. 12); Richard Elliot, The New Comprehensive General Liability Policy, Liability Insurance Disputes at 4 (S. Schreiver ed. 1968).

C. The pollution exclusion was drafted, in part, by Richard Schmaltz, a Liberty employee who employed language formerly used in boiler and machinery policies (sudden and accidental) which he understood would embrace gradually occurring events; Memorandum in Support of Plaintiff, the Boeing Co's Motion for Partial Summary Judgment at 12-13, n. 7 in Boeing Co. v. Aetna Casualty & Sur. Co., 1991 WL 575712 (W.D. Wash 1991) (S.R. Ref. 5);

D. During 1970, the insurance industry trade organizations of which Liberty was a member made explanatory filings in the 49 states (other than Louisiana) designed to secure approval of the pollution exclusion as an amendatory endorsement to the Comprehensive General Liability policy.[21] Just, 456 N.W.2d at 574-75. Steven G. Bradbury,

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[21] It was later added to the body of the policy in 1973 as exclusion "F".

Original Intent Revisionism, and the Meaning of the CGL Policies, 1 Envir. Claims J. 279, 283 (Spring 1989).

E. The explanatory filings universally informed state regulators, including the Insurance Commissioner, State of Florida, that:

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

(S.R. 22).

F. That based upon these representations, the pollution exclusion was adopted for filing and use in the State of Florida; Brief of amicus curiae, the State of Florida, filed in Dimmitt (S.R. Ref. 3); Morton, 629 A.2d at 848; and,

G. The promises contained in these regulatory filings are inaccurate, misleading, and untrue if Liberty and other insurance companies are allowed to prevail on their present assertions that the pollution exclusion was intended as a drastic restriction on coverage.

The Morton court found the explanatory memoranda, just like the ones submitted to the State of Florida to be "misleading", "untrue", "indefensible", "perilously close to deception", "inaccurate", "astonishing", "lacking in candor", "not straightforward", and "paradigms of understatement". Morton, 629 A.2d at 852-54. To be sure, these filings satisfy all of the requisites under Florida law to invoke the doctrine of promissory estoppel against Liberty, so as

to preclude it from asserting a coverage-restrictive interpretation of the pollution exclusion, contrary to the representations made to the Florida State Insurance Commissioner, and as confirmed by its own documents.[22] As the Supreme Court of New Jersey appraised the issue,

> The critical issue is whether the courts of this state should give effect to the literal meaning of an exclusionary clause that materially and dramatically reduces the coverage previously available for property damage caused by pollution, under circumstances in which the approval of the exclusionary clause by state regulatory authorities was induced by the insurance industry's representation that the clause merely "clarified" the scope of prior coverage.

Morton, 629 A.2d at 872.

The answer must be "no". As in New Jersey, the State of Florida's regulatory review of the pollution exclusion clause was incidental to the authority of the Commissioner of Insurance to determine the reasonableness of rates for insurance coverage. Sections 627.031(1)(a) and (2) Fla. Stat. (1993). Concededly, there was no rate change sought in connection with the submission of the pollution exclusion clause. Morton, 629 A.2d at 851.

Under the circumstances presented, promissory estoppel in the form adopted by the Supreme Court of New Jersey should be applied to Liberty, so as to prevent it from taking advantage of the misrepresentations made to the State of Florida, and elsewhere. The Judgment appealed should be affirmed.[23]

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[22] Liberty's internal documents "coincidentally" employ the same language as the regulatory filings to describe the intended operation of the exclusion. See S.R. 17 at p. 19.

[23] While not asserted as an affirmative defense below, Liberty Mutual may well be estopped to assert a coverage-restrictive interpretation of the pollution exclusion because it has previously

CONCLUSION

The trial court's Judgment, holding that Liberty had breached its duty to defend Lone Star in the Miami Wood actions, and awarding Lone Star damages as a result must be affirmed. Under Florida law, the duty to defend is distinct from and broader than the duty to indemnify. Because the allegations of the Complaints in the Miami Wood actions are couched in general terms, the possibility of coverage under either the underground seepage or the sudden and accidental exceptions to the pollution exclusion exists.

In addition, because the Miami Wood actions expressly allege dispersals of pollutants to groundwater, and as the pollution exclusion does not expressly, or by implication, exclude coverage for dispersals of pollutants to groundwater, the pollution exclusion does not relieve Liberty of its duty to defend.

Last, Liberty should be held to the promises it made to the Insurance Commissioner, State of Florida, when seeking approval to use the pollution exclusion as being consistent with, as opposed to vastly more restrictive than the definition of occurrence contained

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(Footnote Continued)

litigated this precise issue and lost before the Supreme Courts in West Virginia and New Jersey. See Morton, 629 A.2d at 831; Joy Technologies, 421 S.E. 2d at 493. All of the elements of collateral estoppel are met here. Refined Sugars, Inc. v. Southern Commodity Corp., 709 F. Supp. 1117 (S.D. Fla. 1988). Since Liberty filed a counterclaim below, there is no bar to the defensive use of collateral estoppel consistent with this Court's opinion in Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989). However, neither Joy Technologies nor Morton had been decided at the time this case began the process of appellate review. Thus, Lone Star should be permitted an opportunity to present this argument to the trial court on remand, should this Court's opinion require further litigation in that forum.

in Liberty's policies. Promissory estoppel should be applied so as to hold Liberty to the promises of coverage that it made in 1970.

Lone Star respectfully requests that the Third District's opinion be quashed, with directions from this Court to affirm the trial court's Judgment for the reasons expressed above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Lone Star Industries, Inc. has been served by mail this 25th day of July, 1994, to all parties listed on the attached Service List.

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Florida Supreme Court Case No. 80,899

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