No Request Case

IN THE SUPREME COURT OF FLORIDA

LIBERTY MUTUAL INSURANCE COMPANY,

Petitioner/Appellant

vs.

LONE STAR INDUSTRIES, INC.

Respondent/Appellee

CASE NO. 80,899

REPLY BRIEF OF LIBERTY MUTUAL INSURANCE COMPANY

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I. INTRODUCTION

Despite Lone Star's efforts in its Answer Brief to confuse and complicate this case, the issue before this Court is a narrow one. The sole question before this Court is whether the decision of the Third District Court of Appeal, which was based entirely on Dimmitt I, conflicts with Dimmitt II.[1/] Because the answer to this question is clearly "yes", Lone Star attempts to cloud this proceeding with a host of irrelevant facts and issues which have no place in this case.[2/]

Lone Star has briefed a variety of issues which are not properly before this Court. Lone Star contends that it may "comprehensively address the merits of this case". (Lone Star brief at p.16). This bald assertion flies in the face of this Court's order of April 5, 1994 specifically denying Lone Star's request to brief the merits of this case beyond the narrow issue presented in Liberty Mutual's petition. Accordingly, Lone Star's discussion of these issues is improper and should be disregarded.

[1/] 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).

[2/] For example, Lone Star's recitation of Liberty Mutual's handling of Lone Star's claim is entirely irrelevant to any issue before this Court. Moreover, Lone Star's "chart" of Liberty Mutual's investigation is based on extra-record facts. For these reasons, the chart and the other "facts" relating to Liberty's claims handling should be disregarded and stricken.

To the extent that facts involving the parties' course of conduct have any bearing, numerous documents (submitted by Lone Star in its appendix) establish that Lone Star failed to provide Liberty Mutual with the information it needed to conduct its investigation.

Lone Star refuses to restrict itself to the sole issue before this Court because it knows that it cannot deny that the decision of the Third DCA conflicts with Dimmitt II. Indeed, Lone Star does not even attempt to argue that this conflict does not exist. As was shown in Liberty Mutual's initial brief, because the decision below is clearly in conflict with Dimmitt II, it must be reversed. However, as Lone Star has sought to raise extraneous issues, Liberty Mutual is compelled to respond to Lone Star's arguments and, thus, offers the following Reply Brief. Even if the Court considers all of the issues raised by Lone Star, the judgment of the Third DCA still must be reversed and an Order entered declaring that Liberty Mutual has no obligation to defend Lone Star from the Miami Wood Actions.

II. THE "UNDERGROUND SEEPAGE" EXCEPTION TO THE POLLUTION EXCLUSION DOES NOT APPLY TO THIS CASE

Lone Star attempts to escape the effect of the pollution exclusion by invoking an exception to the exclusion for situations in which the release of pollutants "results from an underground seepage of which [Lone Star] is unaware". This argument should be rejected for two reasons. First, Lone Star characterizes releases to the surface of the soil as "underground seepage", a result that distorts the plain language of the policy. Second, Lone Star ignores the clause "of which [it] is unaware" in the "underground seepage" exception. Since the surface releases were well-known to Lone Star, the exception does not apply.

Contrary to Lone Star's argument, the relevant inquiry under the plain language of the "underground seepage" clause is not whether contaminants migrated beneath the ground after being released above ground, but whether the contamination at issue "result[ed] from" underground seepage (such as a leak from an underground storage tank). For the exception to apply, the underground seepage must be the cause of the contamination, not the result of a release of pollutants.

In this case, it is clear that the release of pollutants did not result from "underground seepage". None of the Miami Wood Actions suggests that Lone Star had any operations which caused underground seepage. Rather, these Actions allege that Lone Star's operations caused "dripping and spilling onto certain soils" at the site (Liberty Mutual Appendix at G ("LM App.") ¶13 emphasis added); that chemicals were "stored and discharged upon the property" and that "by draining the chemicals into the land, injury has been caused to the plaintiff" (LM App. F, ¶18).[3/] The Miami Wood Actions thus allege that the discharges of pollution at issue

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[3/] Lone Star relies upon facts beyond those contained in the Miami Wood Actions in support of its argument that it is entitled to a defense. (See page 17 of Lone Star's brief). Given that Lone Star has repeatedly contended that facts beyond those contained in the complaints against it are irrelevant to a determination of the duty to defend (see e.g., Lone Star brief at 20), Lone Star's reliance upon these extrinsic facts is unwarranted. Were this Court to consider a balanced presentation of facts beyond those alleged in the Miami Wood complaints, it would find that the releases at the site were intentional, known (even quantified) by Lone Star and that they were caused by daily dripping of chemicals from treated lumber onto the surface of the soil over the course of many years. See pages 3-8 of the Initial Brief of Liberty Mutual filed with the Third DCA, entry number 4 in the Index of Record.

"resulted from" above ground releases of pollutants not underground seepage. Accordingly, the "underground seepage" clause does not apply to this case.

Lone Star also argues that any secondary "dispersal" of contamination caused by an above-ground release of pollution invokes the underground seepage exception. Lone Star is wrong. In order to avoid the effect of the pollution exclusion, Lone Star must show that the initial release of pollution, not any subsequent migration or dispersal, was sudden and accidental[4/] or resulted from underground seepage of which it was unaware:

> It is clear that the discharge, dispersal, release, or escape to which both the [pollution] exclusion and the ["sudden nd accidental"] exception refer is the initial discharge, dispersal, release, or escape into the atmosphere and not the subsequent migration. In Travelers Indemnity Co. v. Dingwell, 414 A.2d 220, 225 (Me. 1980), the Supreme Court of Maine held that "[t]he behavior of the pollutants in the environment, after release, is irrelevant to [the application of the pollution exclusion]." (Emphasis in original.) Similarly, in Technicon Electronic Corp. v. American Home Assurance Co., 74 N.Y.2d 66; 544 N.Y.S.2d 531; 542 N.E.2d 1048 (1989), the Court of Appeals of New York upheld the finding of the Supreme Court, Appellate Division, that "the logical and proper application of the pollution exclusion depends solely upon the method by which the pollutants entered the environment . . . ." Technicon Electronics Corp. v. American Home Assurance Co., 141 A.D.2d 124, 144; 533 N.Y.S.2d 91 (1988). See also Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 662 F. Supp. 71, 75 (E.D. Mich. 1987), ("[a]pplication of the pollution exclusion depends exclusively upon the process by which

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[4/]The "sudden and accidental" exception to the pollution exclusion is discussed below.

> pollutants entered the environment"). We agree.
>
> Applying this logic to the facts of this case, we conclude that the application of the pollution exclusion depends exclusively on the discharge, dispersal, release, or escape of the pesticide into the atmosphere. The behavior of the pesticide in the environment, after this initial release, is irrelevant.

Protective Nat'l Ins. Co. v. City of Woodhaven, 438 Mich. 154, 476 N.W.2d 374, 377 (1991) (emphasis in original).

For the underground seepage clause to apply, the initial discharge, release or dispersal of pollutants must result from underground seepage. Subsurface migration, or dispersal, following an above-ground release is not "underground seepage". Indeed, a determination that post-release, underground migration of contamination fell within the underground seepage exception would entirely swallow the pollution exclusion. Frequently, when a pollutant is released onto the surface of the ground, there is secondary dispersal with gradual migration of contamination into the soil. If the Court were to give the underground seepage clause the reading advocated by Lone Star, it would effectively read the pollution exclusion out of the policies in violation of basic rules of contract construction. See Florida East Coast Railway Co. v. City of Miami, 79 So. 682 (Fla. 1918); Jerry's Inc. v. City of Miami, 591 So. 2d 100 (Fla. 3d DCA 1991). The only reasonable reading of the underground seepage clause requires a showing that the pollution was caused by underground seepage and was not merely the secondary result of an above-ground release of pollutants which migrated through the ground.

The "underground seepage clause" is also inapplicable here because the contamination did not result from an underground seepage "of which the insured is unaware". Lone Star ignores this portion of the "underground seepage" clause in its brief. In this case, the Miami Wood Actions contain allegations that the contamination at issue was "willful" and "known" to Lone Star.[5/] "Known" is the antithesis of "unaware." Consequently, the underground seepage clause has no application to this case.

III. THE ALLEGATIONS OF THE MIAMI WOOD ACTIONS ESTABLISH THAT LIBERTY MUTUAL HAS NO DUTY TO DEFEND LONE STAR

In its initial brief, Liberty Mutual demonstrated that, under Florida law, it has no duty to defend Lone Star from the Miami Wood Actions because these actions fail to allege facts which would bring Lone Star's claim within the scope of coverage provided by its policies with Liberty Mutual. National Union Fire Ins. Co. v. Lenox Liquors, Inc. 358 So. 2d 533 (Fla. 1977). Under Florida law, where an allegation of an essential element of coverage is missing, an insurer has no duty to defend. Transcontinental Ins. Co. v. Ice Systems of America, 847 F. Supp. 947 (M.D. Fla. 1994) (absence of allegation of "sudden and accidental" damage to property meant that insurance company was not required to provide a defense under exception to exclusion); Commercial Union Ins. Co. v. R.H. Barto Co, 440 So. 2d 383 (Fla. 4th DCA 1983)(same).

In this case, Lone Star has pollution coverage only for releases which are "sudden and accidental" or which are caused by

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[5/]See, e.g., Clemente amended complaint at p. 28.

underground seepage of which Lone Star was unaware. As Liberty Mutual demonstrated in its initial brief, the Miami Wood Actions do not allege either. Therefore, the actions fail to allege an essential element of coverage and Liberty Mutual has no duty to defend Lone Star. Indeed, not only do the Miami Wood Actions fail to allege a "sudden and accidental" release, they affirmatively allege the opposite -- that the releases of contamination at the Lone Star site were on-going, continuous, gradual, willful and known.

For example, the Davidson complaint alleges:

> at all times pertinent to this case, the chemical treatment process resulted in hazardous substances, including compounds of chromium, mercury, copper and arsenic, dripping and spilling onto certain soils at 7000 Coral Way. The cumulative effect of the dripping and spilling resulting from the operations of the Miami Wood Treating company contaminated soils at the site ....

The Davidson complaint also alleges that Lone Star operated the Wood Treating plant from 1968 until 1979 "during which time hazardous materials... were released, spilled and dripped upon the ground." (LM App. G ¶13, 14, 23).

The Futura Realty complaint alleges that the plaintiff was damaged as a result of the defendants "draining the chemicals into the land" and that the defendants "knowingly allowed the property to be used as a dump or repository of dangerous chemical waste." (LM App. F ¶16, 19)

The DER complaint alleges that from 1942 until 1981:

> a pressure wood treating and preserving facility has been operated on the property.

> Wood products were treated with solutions containing creosote, chromated zinc chloride, and chromated copper arsenic (CCA). As a result of these operations, soils on the property have been contaminated with hazardous waste.

(LM App. E ¶15-16) This complaint goes on to allege that the defendants (including Lone Star) operated a "solid waste disposal area" and that they violated applicable law "by failing to obtain a permit and by placing solid waste in or on the land or waters located within the state..." (¶33, 34 emphasis added)

Finally, contrary to Lone Star's argument, the Clemente complaint (and the amended complaint)[6/] alleges knowing conduct by Lone Star over a long period of time. The complaint alleges that the defendants (including Lone Star) violated applicable law "by throwing, draining, running, or otherwise discharging" hazardous chemicals "associated with and from the operation of the aforesaid wood treating facility" and that these violations "occurred, continued to occur, and will continue to occur until abated, remedied and corrected." (Clemente Complaint, and Amended Complaint at pages 18, 19, 20, 21). These allegations are all entirely inconsistent with a "sudden and accidental" release of pollutants. Each of the complaints clearly alleges that Lone

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[6/]Nothing in the amended Clemente complaint alters the conclusion that Lone Star is not entitled to a defense. While the amended complaint contains extensive additional allegations about the parties and their relationships, specifically as regards the elements of successor liability, none of the allegations regarding Lone Star's operations of its wood treating plant differs from the original Clemente complaint. Nothing in this complaint alleges either a sudden or an accidental release of pollutants or underground seepage of which Lone Star was unaware.

Star's releases of pollution were part of its ordinary, routine and on-going operations over the course of many years and that the contaminants "dripped" into the soil as part of these operations. There are simply no allegations of a "sudden and accidental" release.[7/]

Lone Star ignores the controlling Florida law relied upon by Liberty Mutual which shows that Lone Star is not entitled to a defense (see Liberty Mutual's Initial Brief at p. 9-16), instead citing this Court to a number of New York cases. Not only are these cases not controlling in this Court, they also fail to support Lone Star's position. For example, in Technicon Elect. Corp. v. American Home Assurance Co., 542 N.E. 2d 1048 (N.Y. App. 1989) the court found that there was no duty to defend a policyholder against complaints, like those in the present case, that alleged that its discharge of waste "has been made and is being made knowingly". Id. at 1049. Likewise, in EAD Metallurgical, Inc. v. Aetna Cas. & Sur. Co., 905 F.2d 8, 11 (2d

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[7/]The allegation in the DER complaint, relied on by Lone Star, that Lone Star failed "to take any actions to minimize the unplanned sudden or non-sudden release of hazardous waste constituents" is not enough to entitle Lone Star to a defense. The DER complaint does not allege that any "unplanned sudden" releases actually took place. To the contrary, the complaint alleges throughout that Lone Star operated a "hazardous waste facility" (which it defines as "any site at which hazardous waste is disposed of, stored or treated") and that Lone Star violated relevant statutes "by placing solid waste in or on the land or waters ...." (emphasis added). The only fair reading of the entire DER complaint is that it alleges that Lone Star intentionally and routinely "placed" its waste upon the ground in the course of operating a hazardous waste facility for many years. This is not a "sudden" release under Dimmitt II.

Cir. 1990), the Court found that there was no duty to defend the policyholder where the underlying complaint alleged that it "willfully" released contaminants. As is shown above, the allegations against Lone Star in the Miami Wood actions are that releases of pollutants were "wantonly" and "willfully" made by Lone Star. Thus, even under the cases cited by Lone Star, Liberty Mutual has no duty to defend Lone Star.

IV. LONE STAR IS NOT ENTITLED TO A DEFENSE MERELY BECAUSE IT CONTAMINATED GROUNDWATER AS WELL AS SOIL

The pollution exclusion applies to a release or discharge of contaminants or pollutants "into or upon land, the atmosphere or any watercourse or body of water..." Lone Star argues that the pollution exclusion does not apply where groundwater is contaminated because, in its view, groundwater is neither a "watercourse" nor a "body of water". In addition to ignoring this Court's decision in Dimmitt II, Lone Star's argument distorts both common sense and the English language. In Dimmitt II, this Court adopted the Court of Appeals' statement of facts that "chemicals from the sludge [disposed of by the policyholder] then leached into the soil and groundwater." 636 So. 2d at 701 In Dimmitt II, as in this case, there were allegations of contamination to both soil and groundwater. The Court in Dimmitt II still found that the pollution exclusion barred coverage even though contaminated groundwater was at issue, recognizing that groundwater falls within the language of the pollution exclusion. Thus, Dimmitt II forecloses Lone Star's tortured argument that the pollution

exclusion does not apply to groundwater contamination. This result is consistent with both the language of the policies and common sense.

The plain language of the pollution exclusion refutes Lone Star's argument. The wording of the pollution exclusion clearly reflects an intent to encompass all elements of the environment -- air, earth, and water. Groundwater is no less a watercourse or body of water because it is located beneath (as opposed to on) the surface of the ground.[8/] Further, courts that have considered this issue have rejected Lone Star's argument that the pollution exclusion does not apply to contaminated groundwater. The Court in Time Oil Co. v. Cigna Prop. & Cas. Ins. Co., 743 F. Supp. 1400, 1411 (W.D. Wash. 1990) found:

> The language used in [the pollution exclusion] clearly and unequivocally reflects an intent to exclude cleanup of any and all water. The Court concludes that this language cannot reasonably support the limitations suggested by [the policyholder].

Similarly, in Mapco Alaska Petroleum, Inc. v. Central Nat. Ins. Co. of Omaha, 795 F. Supp. 941, 945 (D. Alaska 1991), the Court held:

[8/]Websters Third New International Dictionary (Unabridged) (1966), defines "groundwater" as "water within the earth that supplies wells and springs." The Random House Dictionary (1966) defines "groundwater" as "water beneath the surface of the ground."

> Groundwater is a watercourse or body of water, and to find otherwise would require the court to twist the ordinary meaning of words.[9/]

While Lone Star argues (incorrectly) that groundwater is not a "watercourse",[10/] it fails to provide any support for its assertion that groundwater is not a "body of water". Lone Star cites Black's Law Dictionary as listing a river, a lake or an ocean as examples of a "body of water" (Lone Star brief at p.30), but cites no authority for its implicit argument that these examples constitute an exhaustive list of bodies of water. There is no reason that an underground body of water, such as an aquifer, spring, underground stream, lake or other form of groundwater is not a "body of water".[11/] Indeed, Black's Law Dictionary cites a subterranean lake as a "body of water". Black's Law Dictionary, supra, at 1591.

[9/]Lone Star relied upon a third case, State v. Travelers Indem. Co. of R.I., 120 A.D.2d 251, 508 N.Y.S.2d 698 (App. Div. 1986). The pollution exclusion in that case, however, was narrower than the one in Lone Star's policies. The exclusion in State v. Travelers applied only to releases to a "body of water" and not to "any watercourse or body of water." The Travelers court found that the particular water at issue in that case was not a "body of water".

[10/]The Black's Law Dictionary definition, upon which Lone Star relies, includes underground streams in its definitions of both "groundwater" and "watercourse." Black's Law Dictionary 6th Ed., 704, 1951 (1990) Thus, groundwater can clearly be a "watercourse."

[11/] Lone Star's reliance on a Minnesota case that noted, in dicta, that streams, ponds or lakes are "indicative" of a "watercourse or body of water" is misplaced. "Indicative" is a far cry from "exhaustive".

"Body" is defined, in relevant part, as "a separate physical mass or quantity" (Random House) and "a mass or portion of matter... " (Websters). This is an extremely broad definition which encompasses water below, as well as above, ground. Significantly, the DER Complaint against Lone Star alleges that the "groundwater flowing beneath the area in which the site is located... [is] a potable water supply...." (LM App. E ¶19) This allegation establishes both that the groundwater at issue is "flowing" like a "watercourse", and that it is present in sufficient quantities to be pumped and consumed (potable). If groundwater has these qualities, it must be a "body" of water.

The Clemente action alleges that Lone Star polluted "the waters of Dade County". (LM App. D. p.3, p.11) Nothing suggests that these "waters" are neither a "body of water" nor a "watercourse". Lone Star offers no support for its contention that the groundwater alleged to be contaminated in the Miami Wood Actions is neither a "watercourse" nor a "body of water" other than its assertion -- clearly refuted by dictionaries -- that groundwater can <u>never</u> be a watercourse or body of water. As a result, the pollution exclusion applies to the groundwater at issue in this case.

V. LIBERTY MUTUAL IS NOT ESTOPPED TO RELY UPON THE POLLUTION EXCLUSION

A. The Estoppel Issue Has Already Been Rejected By This Court and Is Not Properly Presented In This Case.

Lone Star's estoppel argument must be rejected for a number of reasons. First, this Court had ample opportunity to consider this

argument and recently rejected it in Dimmitt II. Lone Star cites no changed circumstances or other reason why this Court should depart from its rejection of this argument in Dimmitt.

In addition, no view of the record before this Court justifies Lone Star's contention that its regulatory estoppel argument is properly presented. This argument was not considered or ruled upon by either the trial court or the Third DCA. Given that this issue has not been considered or decided by either lower Court, it is not properly before this Court.[12/]

The improper presentation of this issue to this Court is only highlighted by the "facts" or "record" upon which Lone Star bases its argument. Many of the "facts" relied upon by Lone Star are nowhere to be found in the record of this case. Indeed, in its recitation of "facts" at pages 36 through 38 of its brief, Lone Star relies on assertions contained in briefs filed by policyholders in other cases and articles written by counsel for policyholders as "authority" for its arguments. Liberty Mutual has had no opportunity to either challenge these "facts" or to develop

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[12/]The fact that Lone Star "proffered" a memorandum on estoppel issues in the trial court does not change this conclusion. There is nothing in the record to indicate that the trial court considered, much less ruled upon, this issue.

In addition, many of the alleged "facts" cited in Lone Star's estoppel brief to the trial court were challenged by Liberty Mutual on evidentiary and other grounds. Since the trial court did not address Lone Star's estoppel proffer, it also did not rule upon Liberty Mutual's objections or opposition. In short, this issue is improperly framed for consideration by this Court since neither the legal, factual, nor procedural issues it implicates have been decided by either court that has dealt with the present case.

and present a complete factual record that would form the basis of a well-informed decision by this Court.

B. Lone Star Has Not Established The Elements Of An Estoppel.

Even if the estoppel issue were properly presented, it must still fail as Lone Star has not established the elements of an estoppel. In order to establish an estoppel under Florida law, Lone Star must show: (1) a promise which the promisor should reasonably expect to induce substantial action or forbearance on the part of the promisee; (2) reliance on that promise; and (3) a change in position detrimental to the party claiming estoppel, caused by the promise and reliance thereon. Pinnacle Port Community Ass'n, Inc. v. Orenstein, 872 F.2d 1536, 1543 (11th Cir. 1989) (applying Florida law); Crown Life Ins. Co. v. McBride, 517 So. 2d 660, 662 (Fla. 1987). In the context of coverage issues, Florida law requires allegations of affirmative, specific misrepresentations on the part of the insurer. Crown Life Ins. Co., 517 So. 2d at 661-662; Tradewinds Construction v. Newsbaum, 606 So. 2d 708, 709 (Fla. 1st DCA 1992); Blue Cross and Blue Shield v. Ming, 579 So. 2d 771, 772-73 (Fla. 5th DCA 1991).

Nowhere has Lone Star established, or even alleged, that Liberty Mutual represented to it that the policies covered pollution claims such as those involved here. Lone Star has certainly failed either to allege or prove that it detrimentally relied upon any such representation. Rather, Lone Star's estoppel

argument is based on alleged statements of which it was not even aware and upon which it could not possibly have relied.[13/]

C. Liberty Mutual Has Not Made Any Misrepresentations.

Fundamental to an estoppel argument is a showing that the party to be estopped made a false statement or misrepresentation that induced detrimental reliance. In addition to the reasons set forth above, Lone Star's estoppel claim must also fail because neither Liberty Mutual, nor any agent of Liberty Mutual, made a misrepresentation that would support an estoppel.

This Court lacks a proper record upon which to evaluate Lone Star's estoppel argument. Nonetheless, on the "record" which is available, it is clear that the position taken by Liberty Mutual in this case is entirely consistent with the position taken by the MIRB (Mutual Insurance Rating Board) in 1970.[14/] In this case, Liberty Mutual argues that known and gradual events are not "sudden and accidental." This position is consistent with the MIRB's explanation in 1970.[15/]

[13/]Even Masonry v. Miller Constr., 558 So. 2d 433 (Fla. 1st DCA 1990), relied upon by Lone Star, required a showing of 1) detrimental reliance 2) by a party seeking to invoke coverage. Lone Star fails both of these requirements. Lone Star has not alleged or shown that it was aware of, much less that it relied upon any alleged misrepresentations.

[14/] See the Amicus brief filed by the IELA in this case for additional support for this argument, including evidence that insurance regulators in Florida and elsewhere understood the plain meaning of the pollution exclusion in 1970.

[15/]In addition, Liberty Mutual disputes that the MIRB's statements are binding on it.

Lone Star's argument derives primarily from a portion of a May 11, 1970 submission to the West Virginia Insurance Commissioner, which it claims is inconsistent with Liberty Mutual's current position. (Lone Star Brief at 38). This excerpt states in relevant part:

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

Lone Star S.R. 22 (emphasis added). Even though this excerpt clearly states that the purpose of the pollution exclusion was to "avoid any question of intent", Lone Star (and its amicus, New Farm) argues that the exclusion bars coverage only when the pollution harm is intended by the insured. (See, New Farm brief at p. 1) This argument flies in the face of the language of the MIRB submission.

This submission shows that the goal of the MIRB in proposing the pollution exclusion was to establish a standard for pollution coverage which did not require examination of the state of mind of an insured. Damage which was "expected or intended" by the insured was already excluded from coverage under the "occurrence" definition. Recognizing the difficulty of establishing whether an insured "expected or intended" injury, the MIRB proposed a pollution exclusion which had a neutral, objective standard. This approach avoided the question of intent by focusing on the nature

of the releases of pollution themselves, not on the state of mind of the insured or any other person. This concept, that coverage is provided for releases which are sudden and accidental, and that any question of intent was to be avoided, was repeatedly expressed in various submissions to the insurance commissioner.[16/]

Lone Star in effect asks this Court to rule that the pollution exclusion is of no effect at all -- that it restates the definition of "occurrence" to such a degree that the exclusion has no independent meaning and is mere surplusage. This argument ignores established rules of contract construction which require every word in a contract to be given effect. Moreover, this argument ignores the plain language of the pollution exclusion itself.[17/]

The exclusion was indeed a clarification of the IRB and MIRB's understanding and intent that only sudden and accidental releases of pollution were covered under existing coverage. However, recognizing that proof of the insured's state of mind would be

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[16/]Even prominent lawyers for industrial insureds have acknowledged that this is what the MIRB's submissions mean:

> the insurance industry argued that the clause was necessary to avoid the question of subjective intent in cases involving gradual pollution.

Chesler, Rodburg & Smith, Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability, 18 Rutgers L.J. 9, 36 (1986).

[17/] IELA has shown that, prior to 1970, the insurance industry had increased coverage without a premium increase (IELA brief at 28-29). Thus, the fact that the pollution exclusion may have restricted coverage without a rate decrease is not probative of Lone Star's contention that the pollution exclusion has no meaning and that it did not alter existing coverage in any way.

difficult, the IRB and MIRB sought in the pollution exclusion to focus on the nature of the release itself, not on the insured's state of mind.

What the IRB and MIRB did not contemplate in 1970 was a situation which may arise today whereby an insured is held liable for damage caused by pollution which takes place gradually over time (i.e. non-"sudden") but which occurs without intentional or willful polluting behavior by the insured. They could not have foreseen the enactment of legislation, such as CERCLA, which imposes liability for pollution-caused damage irrespective of the fault or intent of the policyholder. Thus, now, in contrast to what was contemplated by the IRB and MIRB in 1970, gradual but unintentional pollution may indeed take place and be the subject of liability for an insured. Such pollution, while arguably within the definition of "occurrence," is nonetheless excluded by the pollution exclusion because it is not "sudden." It is illogical to suggest, as Lone Star does, that the MIRB misled it or anyone else, or that the pollution exclusion is somehow vitiated, because no one in 1970 anticipated such gradual, unintended pollution as a basis of liability.[18/]

As a result, on the facts of this case, even if the Court considers the issue, there is no basis upon which to impose an estoppel.

[18/]See also the brief of the IELA at p.36-39, observing that public policy disfavors placing an extra contractual burden of unanticipated environmental liability on the insurance industry.

VI. CONCLUSION

For the foregoing reasons, and those set forth in Liberty Mutual's Initial Brief, the decision of the Third DCA should be reversed.

Respectfully submitted,

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Dated: September 19, 1994

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Liberty Mutual Insurance Company was served by U.S. Mail upon the persons listed on the attached this 19th day of September, 1994.

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