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IN THE SUPREME COURT OF FLORIDA

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DEN1 ASSOCIATES, INC.,

Petitioner,

vs.

CASE NO. 89,115
D.C.A. CASE NO. 94-2354

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

Respondent.
_____/

BRIEF OF AMICUS
ASSOCIATED BUILDERS AND CONTRACTORS, INC.

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INTEREST OF THE AMICUS

Associated Builders and Contractors of Florida, Inc., is a Florida corporation not-for-profit which represents the interests of Florida businesses involved in the commercial building and construction trades. The Association's approximately 1500 members include general contractors, subcontractors and suppliers.

The District Court of Appeal's ruling will have a very serious impact upon the Association's members, most of whom rely for liability coverage on CGL policies that include a "pollution exclusion" clause similar or identical to the one under review.

In their normal course of business, the Association's members supply, use or apply numerous products and substances such as paint, turpentine, glue, insulation, cleaning agents, cement mix, asphalt, fertilizer and sand (used as fill and as an abrasive). Many of these products are also in common household use. These products have economic value, and when used or applied in their ordinary lawful manner, are either incorporated as useful improvements to real estate or dissipate without harmful residue. They are not commonly described as "pollutants." In many cases, the entire insured business consists of the supply, use or application of one or more such products.

The CGL policy coverage would be illusory if normal usage of the insured's product or service constitutes "pollution" for which no coverage exists. The exclusion would defeat the purpose for the policy. For many businesses, and their employees, customers and claimants, this unexpected absence of coverage is a disaster.

STATEMENT OF THE CASE AND FACTS

Amicus Associated Builders and Contractors adopts the statements of the case and facts in the briefs of the Petitioners Deni and **Fogg,** with the following supplement.

The Insurance Services Office (ISO), a trade association of insurers, prepared and submitted the pollution exclusion clause to the Florida Insurance Commissioner for approval in 1984. IS0 explained that it simply intended to eliminate the former "sudden and accidental" exception to the pollution exclusion clause. IS0 summarized the purpose and effect of its revision as follows:

> The new language totally excludes the insured's bodily injury and property damage liability arising out of pollutants introduced at or from particular locations or through certain activities. Specifically, pollution damages at or from premises owned by or rented to the named insured or any premises used for the handling, storage, disposal, etc. of waste are totally excluded. Pollution damages are also totally excluded if they result from the transportation or handling of waste in any manner. In addition, pollution damages arising out of any operations performed by or on behalf of the insured to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants are totally excluded. (Fogg R at 2270; copy at App. 1).[1]

The insurance industry never told state regulators about any intent to redefine the term "pollutant" to exclude coverage for injuries arising from normal usage of common products that are not generally called "pollutants".

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[1] Although this regulatory explanation is in the record in Foss only, it may be judicially noticed in Deni as the record in a companion case, see Stark v. Freyer, 67 So.2d 237 (Fla. 1953).

SUMMARY OF THE ARGUMENT

The purpose of the pollution exclusion clause is to exclude coverage for ecological disasters like petroleum spills and chemical waste dumpsites. This purpose is carried out if the term "pollutant" is applied in its ordinary sense. The clause was never intended to deprive unsuspecting businesses of coverage for their useful products or services that in the course of normal use do not create a "pollution" hazard in any ordinary sense of the word.

The whole purpose for general liability coverage is to protect an insured business from the ordinary risks that its product or service entails. The insurer cannot negate this purpose simply by defining its insured's product or service, when sold or used in the normal manner, to be a "pollutant." Such an exclusion cannot be given effect if it is so inconsistent with the policy's purpose as to render the essential coverage illusory.

In these circumstances many courts find ambiguity based on the exclusion clause's inconsistency with other policy provisions. Others cite the insured's objectively reasonable expectation of coverage, or the avoidance of absurd results. By analogy to the common law of sales, an insurer, like any other merchant, should impliedly warrant its product's fitness for expected usage.

The regulatory history of the pollution exclusion clause makes application of these principles all the more appropriate here. The insurance industry never disclosed to the state regulators the interpretation contended here; it should be bound by the limited interpretation that it used to obtain regulatory approval.

ARGUMENT

INTRODUCTION

The CGL form policy is an adhesion contract. Most insurers use the same standard form or a variant of this form.[2]

Insurers do not compete through product differentiation, but by advertising that invites the insured's trust and confidence. Insurance advertising typically depicts worried insureds who do not know what coverage they have, and helpful claims representatives who reassure that coverage is in place. Many insurers reinforce this trustworthy image with a jingle, e.g., "like a good neighbor".

Insurers encourage reliance ontheirtrustworthiness, superior knowledge and accurate labelling of policies to warranty requested coverage. Insurers market CGL coverage as appropriate liability coverage for normal business operations.

Before underwriters issue a CGL policy, they require the applicant to make full disclosure of its normal products or services, so that they can select appropriate policies for that business and set premiums. The application becomes part of the policy by law. Section 627.419(1), Florida Statutes. Once its application and premium are accepted, the insured business expects that the policy will cover liabilities of the type that normally

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[2] See Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 966-68 (1970); and Ballard and Manus, Clearing the Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion, 75 Cornell L. Rev. 610, 621 and nn. 41-42 (1990), discussing the insured's lack of bargaining power, understanding or choice in insurance purchases,

arise from its disclosed product or service, and does not search the form for hidden definitions that may make coverage illusory.

The clause at issue here is frequently located in fifth or sixth place in the list of policy exclusions, and is universally called the "pollution exclusion" clause. The clause begins with a disclaimer of coverage for the "discharge, dispersal, release or escape of pollutants." This topic sentence provides no hint that these terms have any meaning different from common usage.

The definition of "pollutants" is inconspicuously buried, either at the end of a long list of specifically excluded activities and locations that involve "pollutants", as in Fogg; or in a completely different section of the policy, as in Deni. Neither location is calculated to attract the policyholder's attention. This critical definition reads:

> pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste....

The CGL policy does not define "contaminant" or "irritant." Funk and Wagnalls New Standard Dictionary of the English Language defines the three significant root words as follows:

> pollute - 1. to make physically unclean, especially offensively, or so unclean as to be dangerous to health; render foul or impure; defile; stain; soil. Id. at 1921.
>
> contaminate - To make impure by contact or admixture; taint; defile; pollute; as to contaminate food. Id. at 567.
>
> irritate - 1. To excite ill temper or impatience in; make petulant; fret; exasperate; as, to be irritated by the prattle of children. 2. To excite physically; inflame

> or cause reaction by stimulation; as, to irritate the skin by electricity or friction. 3. Physiol. To stimulate artificially; cause to contract. Id. at 1297.

Standing alone, "irritant" means any stimulus, even the "prattle of children." If "irritant" were construed literally to mean any annoying stimulus, then the words "pollutant" and "contaminant" would be superfluous. To avoid absurd results, "irritant" must be confined to mean materials that act like "pollutants" or "contaminants." See generally Smedley Co. v. Emp. Mut. Liab. Ins. Co., 123 A.2d 755, 758 (Conn. 1956) (applying noscitur a sociis rule to insurance policy).

If the insurance industry had wanted to exclude injuries from normal usage **of common household and** business products, its expert **drafters** certainly **would have chosen some word other than** "pollutant" to express that purpose.

Insurers should know that insureds will attach a limited meaning to the term "pollutant", and would never purchase the policy if the insurers disclosed the interpretation contended here. In these circumstances the parties are deemed to adopt the meaning attached by the insured. See Restatement 2d of Contracts § 211(3):

> Section 211. Standardized Agreements
>
> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.
>
> * * *

Comment f:

> Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.... A party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the asreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. (e.s.)

Accord, see Restatement 2d of Contracts § 201(2) :

> (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
>
> (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
>
> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

The unusual definition of "pollutant" at issue here is exactly the kind of buried clause that insurers should know would never be acceptable to the insureds if the current interpretation were disclosed, and is not given effect under the Restatement rule.

I. THE POLLUTION EXCLUSION CLAUSE IS AMBIGUOUS IF IT IS INCONSISTENT WITH THE POLICY'S PURPOSE

It is well established that the policy must be considered as a whole to effectuate its purpose, and that an exclusion (or a definition within an exclusion) cannot be used to nullify essential coverage that the policy is intended to provide. See, e.g., Psychiatric Assocs. v. St. Paul Fire & Marine Ins. Co., 647 So.2d 134, 138 (Fla. 1st DCA 1994) (exclusionary clause is strictly construed in insured's favor, and cannot emasculate entire policy); Tire Kinsdom, Inc. v. First Southern Ins. Co., 573 So.2d 885, 889 (Fla. 3d DCA 1990), review denied, 589 So.2d 290 (Fla. 1991) (same); Robertson v. United Services Auto Ass'n, 330 So.2d 745 (Fla. 1st DCA 1976), cert. denied, 342 So.2d 1104 (Fla. 1976) (insurer cannot use an obscure term to defeat the policy's purpose); Bralev v. American Home Assur. Co., 354 So.2d 904, 906 (Fla. 2d DCA 1978), cert. denied, 359 So.2d 1210 (Fla. 1978) (same); Nu-Air Mfg. Co. v. Frank B. Hall & Co., 822 F.2d 987, 992 (11th Cir. 1987), cert. denied, 485 U.S. 976 (1988) (same).

In the only other reported Florida case to address the current pollution exclusion clause, the Second District held that the clause is ambiguous because the insured homeowner could not have expected his policy not to cover damage from a sewage backup. Florida Farm Bureau Ins. Co. v. Birge, 659 So.2d 310 (Fla. 2d DCA 1994), rev. denied, 659 So.2d 271 (Fla. 1995).

The construction industry is particularly vulnerable to insurers' abuse of the pollution exclusion clause, because many products used in construction can cause bodily injury, e.g., during

an application or curing interval, but ultimately do not cause any pollution injury because they either dissipate or become fixtures to real estate. In these circumstances many courts have held that products or substances used in or resulting from construction are not "pollutants" as defined in the pollution exclusion clause, For examples, "pollutants" does not mean toxic lead fumes resulting from welding on steel coated with lead paint;[3] fumes from styrene resin used in floor resurfacing;[4] paint spray;' fill dirt and muddy water;[6] lead paint;' or fumes from a muriatic acid solution used to treat a concrete floor[8].

Many of these rulings acknowledge that the product may actually have an "irritant" or "contaminant" effect, but reject a hyperliteral interpretation that would encompass virtually every substance used in construction or household maintenance. Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992), summarized this concern:

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[3] Consolidated Am. Ins. Co. v. Ivey's Steel Erectors, Inc., Case No. 90-205-CIV-ORL-19 (M.D. Fla. 1992) (copy at App. 2).

[4] West Am. Ins. Co. v. Tufco Flooring, Inc., 409 S.E.2d 692 (N.C. Ct. App. 1991).

[5] A-l Sandblasting & Steamcleanins Co., Inc. v. Baiden, 632 P.2d 1377 (Or. Ct. App. 1981), aff'd, 643 P.2d 1260 (Or. 1982).

[6] Molton, Allen, Williams, Inc. v. St. Paul Fire & Marine Ins. co., 347 So.2d 95 (Ala. 1977).

[7] Atlantic Mutual Ins. Co. v. McFadden, 595 N.E.2d 763 (Mass. 1992) and Sullins v. Allstate Ins. Co., 667 A.2d 617 (Md. 1995).

[8] Sargent Const. Co. v. State Auto Ins. Co., 23 F.3d 1324 (8th Cir. 1994) (Missouri law).

> The terms "irritant" and "contaminant," when viewed in isolation, are virtually boundless, for "there is virtually no substance or chemical in existence that would not irritate or damage some other person or property." Westchester Fire Ins. co. v. City of Pittsburg, 768 F.Supp. 1463, 1470 (D.Kan. 1991). Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. Id. at 1043.

The Court approved the reasoning of Citv of Pittsbursh, and A-1 Sandblasting and McFadden nn. 5 and 7, above, saying:

> The bond that links these cases is plain. All involve injuries resulting from everyday activities gone slightly, but not surprisingly, awry. There is nothing that unusual about paint peeling off of a wall, asbestos particles escaping during the installation or removal of insulation, or paint drifting off the mark during a spraypainting job. A reasonable policyholder, these courts apparently believed, would not characterize such routine incidents as pollution. Id. at 1044.

Many decisions also recognize that the insurers' use of terms like "discharge," "dispersal," "release" and "escape", which normally describe environmental pollution, suggest that only environmental pollution was excluded from coverage.[9]

Synthesizing the reasoning of these cases, the status of a product as a "pollutant" cannot be determined exclusively from its chemical properties. The circumstances of its usage must also be considered. Specifically, a product is not a "pollutant" if it has

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[9] See Bituminous Cas. Co. v. Advanced Adhesive Technolosv, Inc., 73 F.3d 335 (11th Cir. 1996); Technical Coating Applicators, Inc. v. U.S.F. & G. Co., Case No. 5099 CV 221 RH (N.D. Fla. Nov. 1, 1996) (copy at App. 2); Iufco, 409 S.E.2d at 699; McFadden, 595 N.E.2d at 764; Sullins, 667 A.2d at 622-23.

economic value and is being used or applied in a manner reasonably calculated to realize that economic value, i.e., is not waste or disposed of as waste. This usage element is critical to distinguish, for example, a bodily injury incident to an abnormal petroleum spill along a pristine coastline, which would normally be understood as a pollution event; and a bodily injury incident to a routine spill at the gas pump, which would not be considered pollution.

II. FLORIDA COURTS HAVE OFTEN CONSIDERED THE INSURED'S OBJECTIVELY REASONABLE EXPECTATIONS, AND THIS VIEWPOINT SHOULD BE CONSIDERED HERE.

Judge Warner, the decisive vote in Deni below, expressed her concern that the doctrine of reasonable expectations had appeal in that case, but she was apparently persuaded that the absence of precedent foreclosed her from considering the doctrine. 678 So.2d at 406. However, neither her opinion nor Judge Farmer's plurality opinion accurately explained the doctrine, or recognized its approved usage in these circumstances.

Professor Robert Keeton recognized the doctrine at work in court decisions before the courts themselves were aware of it. He viewed the doctrine as the natural outgrowth of the economic context in which insurance is sold (described at pp. 4-7 above). Keeton summarized the principle as follows:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study

> of the policy provisions would have negated those expectations.

Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970). This objective standard produces certainty and predictability of application; and achieves equity both between the insurer and its insured, and among different insureds whose premium contributions are tapped to pay judgments. Id. at 968.

Professor Keeton perceptively observed that the doctrine of reasonable expectations is the true underlying rule of decision in many decisions that strain to find ambiguity under the contra proferentum rule. The strained finding of ambiguity creates unnecessary confusion and the misimpression of judicial prejudice against insurers. The better rationale for these decisions is that the courts do not allow insurers to render reasonably expected coverage illusory through coverage exclusions, no matter how clearly worded, unless the insurer calls the explicit qualification to the policyholder's attention at the time of contracting or renewal. Id. at 968-73.

Many Florida decisions expressly invoke the insured's reasonable expectations as a basis for their decisions, even if they do not announce the adoption of a doctrine to that effect. See, e.g., Florida Farm Bureau Ins. Co. v. Birse, above, 659 So.2d at 311 (pollution exclusion clause case); McDaniel v. Lawyers Title Guar. Fund, 327 So.2d 853, 865 (Fla. 2d DCA 1976) (Grimes, J.); Nu-Air Mfs. Co. v. Frank B. Hall & Co., 822 F.2d 987, 992 (11th Cir. 1987), cert. den., 485 U.S. 976 (1988)("legitimate expectation of

coverage "). See also Spengler v. State Farm Fire & Cas. Co., 568 So.2d 1293, 1295 (Fla. 1st DCA 1990) (adopting reasoning of Louisiana court), rev, denied, 577 So.2d 1328 (Fla. 1991); Galinko v. Aetna Cas. & Sur. Co., 432 So.2d 179, 182 (Fla. 1st DCA 1983) (adopting reasoning of North Carolina court); and Valdes v. Smalley, 303 So.2d 342, 345 (Fla. 3d DCA 1974) (adopting reasoning of New Jersey court). The Fourth District itself applies the standard of what a "reasonable person would have understood." See cases cited by Judge Farmer below, 678 So.2d at 401-02. Other decisions apply the contra proferentum rule to avoid nullifying expected coverage, see citations p. 9 above, as Keeton predicted.

The plurality below cite no contrary precedent. Gendzier v. Bielecki, 97 So.2d 604 (Fla. 1957), held only that the parties' objective external signs control over what they subjectively mean or understand. The doctrine of reasonable expectations applies the same objective standard. See 2 Couch Cyclopedia of Insurance Law § 15.87 text at n. 12 (1984), ("courts...use this rule to liberally find for the insured where the objective expectations are reasonable"); Keeton article, above, 83 Harv. L. Rev. at 967-68.

Commentators perceive Florida as undecided on this issue. See Henderson, The Doctrine of Reasonable Expectations in Insurance Law After Two Decades, 51 Ohio St. L. J. 823, 834-36, n. 73 (1990) (only one state has expressly rejected doctrine); and Max True Plastering Co. v. U.S.F.& G. Co., 912 P.2d 861, 863-64 nn. 5 and 6 (Okla. 1996) (only four states have rejected doctrine).

The Max True decision analyzed the range of options from other jurisdictions across the nation, and adopted the reasonable expectations doctrine in Oklahoma, a previously undecided state, in specific limited circumstances. The doctrine should apply where exclusions are masked by technical or obscure language or hidden in the policy's provisions. Id. at 868-70. The Court held this application would not disturb any Oklahoma precedent, nor would it disturb any Florida precedent.

A similar "reasonable expectations" principle applies in other commercial sales contexts. At common law, merchants were held to impliedly warrant their products' fitness for ordinary use and fitness for particular uses disclosed by the purchaser. See e.g., Smith v. Burdines, Inc., 198 So. 223, 227-28 (Fla. 1940), and Florida Comments to UCC 2-314 and 2-315, 19 Fla. Stat. Ann. 250-51 and 271, analyzing the common law of sales. These implied warranties are given effect despite an unambiguous disclaimer, unless the purchaser could not reasonably have expected them. In Manheim v. Ford Motor Co., 201 So.2d 440 (Fla. 1967), the Court held that the manufacturer's express written warranty which negatived implied warranties did not preclude a purchaser's suit on an implied warranty. The rule in Restatement 2d of Contracts §§ 201(2) and 211(3) above reflects similar reasoning.

If merchants generally are held to this standard, why not sellers of insurance products? See C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975), citing inter alia the predecessor of Restatement 2d of Contracts § 211, above.

The Court analogized the insurer's implied warranty obligation to the implied warranty of fitness for specific use in sales contracts at common law. Id. at 177-79. The court concluded that an obscure definition cannot be used to defeat the policy's essential purpose.

This analysis, fully consistent with Florida law, presents a compelling rationale for protecting the insured with an implied warranty of coverage for incidents involving the normal usage of its product or service, similar to the implied warranties that merchants are deemed to give purchasers under common law. The pollution exclusion clause does not override impliedly warranted coverage for the normal usage of the insured's product or service, where such coverage constitutes the purpose for the policy.[10]

III. THE REGULATORY HISTORY OF THE POLLUTION EXCLUSION CLAUSE FORECLOSES THE INSURERS' PRESENT CONSTRUCTION

The insurance industry is required to submit proposed policy provisions to the Department of Insurance under § 627.410, Florida Statutes. The industry must fairly explain its purpose if the Department's approval is to have any legal effect.

ISO's explanation of the pollution exclusion clause to the Department in 1984 (App. 1) never suggested that the clause was intended to apply to routine business or household accidents of the

[10] Under the UCC, a merchant's disclaimer of implied warranties may be given effect only if clear and conspicuous. Section 672.316(2), Florida Statutes. Since the definition of "pollutant" in the CGL policy is neither clear nor conspicuous, it would not negate the implied warranty of essential coverage.

type presented here. ISO's explanation specifically limits the clause's scope to four situations:

(1) pollution damages at premises owned by or rented to the insured;

(2) pollution damages at premises used for the handling, storage, disposal, etc., of waste;

(3) pollution damages resulting from the transportation or handling of **waste;** and

(4) pollution damages arising from testing, monitoring, cleanup, removal, containment, treatment, detoxification or neutralization of pollutants.

As to incidents occurring at sites not owned or rented by the insured, such as construction sites, ISO represented that the clause applies only to incidents involving waste. The term **waste** cannot mean useful products incorporated into improvements to real property or used in that process. Subsequent revisions of the clause have carried forward this definition of "pollutant".

The Fourth District **may** have felt constrained to disregard the regulatory history because of this Court's ruling in Dimmitt Chevrolet, Inc. v. Southeastern Fid. Ins. Co., 636 So.2d 700 (Fla. 1993). Dimmitt involved an EPA CERCLA action to remediate **a** site polluted by waste oil, which was indisputably pollution. The dispute concerned only the "sudden and accidental" exception in the former pollution exclusion clause.

The Dimmitt majority opinions did not hold the regulatory history to be categorically irrelevant, but explained that the

phrase "sudden and accidental" was not sufficiently ambiguous in the circumstance presented to justify considering external evidence. 636 So.2d at 705 and 706. Three Justices dissented, observing that the insurance industry had misrepresented the clause's purpose to regulators, id. at 708-09; and deceived the public to obtain windfall premiums for coverage not provided, id. at 711-12, citing the comprehensive discussion of filings in various states in Morton Int'l, Inc. v. General Acc. Ins. Co., 629 A.2d 831 (N.J. 1993). Accord, Stempel, Interpretation of Insurance Contracts § T1.6 at 70 (Supp. 1995) ("insurers did not expect the broadly worded pollution exclusion clause to be enforced literally") (copy at App. 3). The Court should consider the regulatory history to explain the meaning of the clause in cases where the insurer attempts to extend the clause to incidents not normally regarded as pollution.

The pollution exclusion clause should be given no greater effect than IS0 claimed in its regulatory filing. The insurance industry suffers no unfairness if the courts treat its representations to the State as a regulatory estoppel, see Morton, above, 629 A.2d at 872-76; or at least as an agent admission that the insurer has ratified.

CONCLUSION

The decision below should be reversed with directions to reinstate the trial court decisions in favor of Petitioners.

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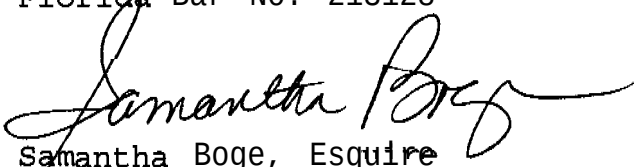

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I hereby certify that a true and accurate copy of the foregoing has been furnished by U.S. Mail to the counsel listed below this 9 day of December, 1996.

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