IN THE SUPREME COURT OF FLORIDA

DENI ASSOCIATES OF FLORIDA, INC.,

Petitioner,

vs.

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

Respondent.
_____/

CASE NO. 89,115

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT

AMICUS BRIEF OF THE FLORIDA DEPARTMENT OF INSURANCE

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INTEREST OF THE AMICUS

The Florida Department of Insurance (the "Department") is responsible for regulating the insurance industry and protecting the insurance-buying public. The Department's interest in this matter is assuring insurance products allow both the policyholder and insurer to have certainty as to what coverage is provided and what coverage is excluded.

INTRODUCTION

In State Farm Fire & Casualty Insurance Company v. Deni Associates of Florida, Inc., 678 So.2d 397 (Fla. 4th DCA 1996), the Fourth District Court of Appeal certified the following question to the Court:

> Where an ambiguity is shown to exist in a CGL policy, is the court limited to resolving the ambiguity in favor of a coverage, or may the court apply the doctrine of reasonable expectations of the insurer to resolve ambiguities in CGL policies?

The Fourth District indicated the question was framed to enable the Supreme Court to decide the issue of ambiguity and consider the doctrine of reasonable expectations. Thus, there are two levels to the question before the Court: 1) Is there an ambiguity? and 2) If there is an ambiguity, should the doctrine of reasonable expectations be applied?

The case before this Court involves comprehensive general liability ("CGL") policies. CGL policies are standard insurance policies developed by the Insurance Services Office, an insurance rating organization. These policies are the primary form of liability insurance coverage obtained by businesses, cities, and

municipalities throughout Florida. The Fourth District Court of Appeal found the CGL policies categorically excluded coverage for personal injuries caused by the discharge, dispersal, release or escape of pollutants. Pollution is defined as any solid, liquid, gaseous, or thermal irritant or contaminant, including vapor, soot, fumes, acids, alkalis, chemicals, and waste.

The Fourth District Court of Appeal's decision creates uncertainty of coverage for virtually every entity that uses any item that could be considered an "irritant" or "contaminant" when the substance causes personal injury.

STATEMENT OF THE CASE AND FACTS

The Department adopts the statements of the case and facts as set forth in the Fourth District Court of Appeal's opinion and in the briefs of the parties.

SUMMARY OF ARGUMENT

A CGL policy is the principal insurance coverage available to a variety of businesses for all-purpose coverage for normal business operations. A CGL policy provides coverage to businesses for all risks except those that are specifically excluded. According to the Fourth District Court of Appeal, these policies contain an absolute pollution exclusion clause. However, the Fourth District Court of Appeal's decision creates uncertainty as to what coverage will be available for commercial operations if an "irritant" or "contaminant" is involved in the claim.

The Fourth District Court of Appeal determined that the

"plain" language in the absolute pollution exclusion clause is clear and certain. However, other courts have found an absolute pollution exclusion clause to be ambiguous due to the exclusion of coverage resulting from any substance that may be an "irritant" or "contaminant." These courts have adopted a "common sense" approach to analyze whether coverage exists. Moreover, other courts have determined that the absolute pollution exclusion clause does not apply to non-environmental accidents.

This Court should apply the well-established rules of construction to determine whether the pollution exclusion clause is absolute or coverage exists. Therefore, it in not necessary for this Court to consider the doctrine of reasonable expectations.

ARGUMENT

EVOLUTION OF COMPREHENSIVE GENERAL LIABILITY POLICIES' POLLUTION EXCLUSION CLAUSE

Until the 1970's, standard CGL policies provided insurance coverage per occurrence. The term "occurrence" was defined as an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended by the insured. See, South Central Bell Telephone Co. v. Ka-Jon Food Stores of Louisiana, Inc., 644 So.2d. 357, 362 (La 1994).

In the 1970's the insurance industry changed its CGL policies to include a pollution exclusion clause. The pollution exclusion clause was originally added to the CGL policies to allow the insurers to specifically exclude damages resulting from

intentional discharges of pollutants and contaminants from coverage. See, Sandbom v. BASF Wyandotte, Corp., 674 So. 2d 349 (La.App. 1. Cir. 1996). The insurance industry justified the pollution exclusion clause by representing that it was not drafted it to reduce coverage, but to ensure that an insured who recklessly and intentionally polluted or who failed to take reasonable precautions to prevent pollution would not be afforded coverage. To achieve its purpose, the pollution exclusion clause contained an exception for "sudden and accidental" occurrences. South Central, at 362.

The purpose of the pollution exclusion clause was simply to clarify that intentionally committed pollution would not be covered. The insurance industry's intent is evidenced by its correspondence to the Florida Department of Insurance, dated May 28, 1970, stating:

> Coverage for pollution or contamination is not provided in most cases under present policies because 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 . ...

Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corn., 636 So.2d 700 at 714 (Fla. 1993).

Moreover, a bulletin used by insurance agents and brokers in interpreting policy provisions stated:

> In one important respect, the exclusion simply reinforces the definition of occurrence. That is, the policy states that it will not cover claims where the damage was expected or intended by the insured and the exclusion states, in effect, that the policy will cover incidents which are sudden and accidental-unexpected and not intended.

Dimmitt, at 709.

The pollution exclusion clause generated a tremendous amount of litigation to determine the meaning of "sudden and accidental." Many courts' decisions expanded the "sudden and accidental" exception and allowed coverage for gradual pollution and even cleanup costs. Additionally, in the early 1980's the federal government and states enacted legislation that subjected both individuals and corporate entities to significant liability for their pollution- causing activities and waste disposal practices. See, The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9601. Many policyholders were held liable for environmental pollution damages and then passed or attempted to pass on their liabilities to their CGL policy insurers. South Central, at 362.

The insurance industry responded to the coverage litigation, courts' diverse interpretations of the terms "sudden and accidental," and to the environmental cleanup expenses mandated by CERCLA by creating an absolute pollution exclusion clause. South Central, at 363. The absolute pollution exclusion clause eliminated the "sudden and accidental" exception and clearly stated that environmental cleanup expenses were not covered. According to the insurance industry:

> This pollution exclusion, designed for use with the present policy forms, is made available for optional use by insurers. It enables underwriters to make a deliberate analysis of each insured's pollution exposure to determine the coverage it wishes to provide. Insurers can make pollution coverage decisions based on marketing and underwriting philosophies, responsive to their capacity and

> reinsurance restrictions, without affecting the essential liability insurance coverages required. The extent and type of coverage available to the insured will ultimately be a function of the insured's risk characteristics [sic] (and the degree to which an insurer is willing to accept, and the insured willing to pay for the 'transfer' of this risk of loss).

GL 85-085PO Pollution Exclusion Endorsement (GL 21 33).

The history of the absolute pollution exclusion clause sheds light on its purpose, design and intent, as well as to the equities involved in its creation. The absolute pollution exclusion clause evolved from insureds exploiting insurance coverage to clean up environmentally harmful conditions caused by pollution activities.

THE EXCLUSION FOR "IRRITANTS" OR "CONTAMINANTS" IS CONTRARY TO THE INTENT OF THE CGL POLICY

Construction of the pollution exclusion clause as absolute with regard to "irritants" or "contaminants" is contrary to the CGL policy's intent. Policyholders purchase a CGL policy to protect themselves from accidents and incidental business risks. An absolute pollution exclusion clause for bodily injury resulting from "irritants" or "contaminants" eviscerates the coverage offered. The Fourth District Court of Appeal's interpretation of the absolute pollution exclusion for "irritants" or "contaminants" precludes coverage of any business accident wherein an irritating or contaminating substance is involved. To take extreme examples, would coverage for bodily injury be excluded if an employee negligently sprayed Windex with ammonia into a person's eye while cleaning the office? Or if a worker negligently dropped a contaminating substance into food at

a restaurant and patrons became sick? The pollution exclusion for "irritants" or "contaminants" being interpreted as absolute is contrary to both the CGL policy's objective and its primary purpose, which is to insure policyholders against accidents and incidental business risks, as apposed to "pollution."

To resolve this issue, some courts have adopted a "common sense" approach determine whether the absolute pollution exclusion clause excludes coverage for everyday activities involving "irritants" or "contaminants". See, Island Associates, Inc. v. ERIC Group, Inc., 894 F. Supp. 200 (W.D.Pa. 1995); Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992). In Island, the court had to decide whether fumes from a cleaning compound, which had not been identified as hazardous or toxic and confined to a small area within a worksite, were a pollutant. The Island court stated although fumes from any substance could fall within a broad reading of the definition of pollution, they must invoke a "common sense" approach to determine the scope of an absolute pollution exclusion clause. Island, at 203. Thus, the Island court found the pollution exclusion clause was ambiguous as applied to the underlying claim and allowed coverage for the insured's claim. Island, at 204.

A "common sense" approach should be used when analyzing the definition of pollution. The Fourth District Court of Appeal stated that the term pollutant is clearly defined as the dispersal of any chemical irritant. Deni, at 402. Therefore,

the Fourth District Court of Appeal determined that both trial courts erred in finding that the absolute pollution exclusion clause was ambiguous. However, the trial court's reasoning merits further consideration. The trial court in Deni, found that "the definition of pollution had stretched the definition of pollutant beyond what a reasonable person placed in the position of the insured would have understood the word to mean." Deni, at 399. Likewise, the trial court in the Fogg case found that the definition of pollution was unclear because "a broad reading of 'irritant or contaminant' as being any substance that might cause injury or bother would include virtually every substance in existence." Deni, at 399-400.

In deciding that the terms "irritant" and "contaminant" rendered the absolute pollution clause ambiguous, the trial court in Fogg relied on the well-reasoned opinion in Westchester Fire Insurance Co. v. Citv of Pittsburg, Kansas, 768 F. Supp. 1463 (D.Kan. 1991), *affirmed*, 987 F.2d 1516 (10th Cir. 1993). The Westchester court stated:

> The terms 'irritant' and 'contaminant', however, cannot be read in isolation, but must be construed as substances generally recognized as polluting the environment. In other words, a 'pollutant' is not merely any substance that may cause harm to the 'egg shell plaintiff', but rather it is a toxic or particularly harmful material which is recognized as such in industry or by governmental regulators.

Westchester, at 1470.

Courts have held that the pollution exclusion clause does not define the terms "irritant" or "contaminant". See. Resent Insurance Co. v. Holmes, 835 F.Supp. 579 (D.Kan. 1993). The

Regent court stated that the terms "irritant" and "contaminant":

> admit no natural or ordinary interpretation because it is unclear whether they refer to substances which ordinarily irritate or contaminate, substances which have in fact irritated or contaminated under these particular circumstances, regardless of their tendency to irritate or contaminate under most circumstances, or both.

Regent, at 582.

Moreover, the Resent court quoted definitions of "irritant" and "contaminant" from *Webster's Third New International Dictionary(1986).* Webster's defined "irritant" as something that irritates or excites and as an agent by which irritation is produced. Similarly, *Webster's* defines "contaminant" as something that contaminates.

The Fourth District Court of Appeal claims that the language contained in the absolute pollution exclusion clause contains simple words of ordinary use. Deni, at 400. The Fourth District Court of Appeal reasons that because the words combined together "completely eliminate an entire area of potential coverage does not render [the absolute pollution exclusion clause] unclear." Deni, at 400. Nonetheless, a literal application of the absolute pollution exclusion clause deviates from the original intent of the pollution exclusion clause. Furthermore, a literal application of the absolute pollution exclusion clause can lead to absurd consequences.

A "common sense" approach creates certainty of coverage for both the policyholders and the insurance companies. The Island and Pipefitters cases offer well-reasoned insight as to how this Court should deal with the absolute pollution exclusion clause.

This Court should use the "common sense" approach utilized by the Island and Pipefitters courts to determine if a particular activity should be excluded from coverage due to an absolute pollution exclusion clause.

THE ABSOLUTE POLLUTION EXCLUSION CLAUSE HAS BEEN HELD NOT TO APPLY To NON-ENVIRONMENTAL DAMAGE

Other courts have refused to expand the scope of the absolute pollution exclusion clause to deny coverage for non-environmental damage. See, West American Ins. v. Tufco Flooring East Inc., 104 N.C. App. 312, 409 S.E.2d 692 (N.C.App. 1991), *review denied, 332* N.C. *479, 420* S.E. 2d 826 (N.C. 1992). In West American, the court found that the operative policy terms of the pollution exclusion clause imply that there must be a discharge into the environment before coverage can be properly denied. West American, at 699. Relying on the definitions of "discharge" and "release" in the Resource Conservation and Recovery Act and CERCLA, the West American court reasoned that the alleged pollutant had to be released into the environment to trigger the absolute pollution exclusion clause. West American, at 699-700. Thus, the West American court found that the policy contained a "pollution exclusion, not an exclusion for all damages that may result due to Tufco's use of chemicals in the installation of industrial flooring."

Moreover, courts in other states have found that the absolute pollution exclusion clause is intended to exclude coverage only for active industrial polluters or when business

knowingly emitted pollutants over an extended period of time. See, Avery v. Commercial Union Insurance Co., 621 So.2d 184, 190 (La. App. 3d Cir. 1993). In Thompson v. Temple, 580 So.2d 1133 (La. App. 4th Cir. 1991), the court analyzed whether a residential carbon monoxide gas leak was covered due to an absolute pollution exclusion clause. The Thompson court determined:

> pollution exclusion clauses are intended to exclude coverage for active industrial polluters, when businesses knowingly emitted pollutants over extended periods of time . . . . That situation is totally different from a leaking gas heater within a home . . . .

Thompson, at 1134-5.

Additionally, the court in West v. Board of Commissioners of the Port of New Orleans, 591 So. 2d 1358 (La. App. 4th Cir. 1991), developed a test to determine whether an entity is a "polluter" within the meaning of the absolute pollution clause. If damages were incidental to the handling, transportation or storage of the material then the entity is not a polluter within the meaning of the absolute pollution exclusion clause. West, at 1360. However, if the damage was due to the production and release of the pollutant that was a known consequence of the business operations, then the entity is a polluter within the meaning of the absolute pollution exclusion clause. See, Crabtree v. Haves-Dockside, Inc., 612 So.2d 249 (La. App. 4th Cir. 1992).

Here, the Fourth District Court of Appeal adopted a broad reading of the absolute pollution exclusion clause, which in

essence renders certainty of coverage impossible. Typical activities that must occur daily to run a business will not be covered under the Fourth District Court of Appeal's ruling. The adoption of the Fourth District Court of Appeal's reasoning would eradicate any reasonable certainty as to what coverage is truly available in the marketplace.

THE DOCTRINE OF REASONABLE EXPECTATIONS SHOULD NOT BE CONSIDERED RATHER TRADITIONAL INSURANCE CONTRACT CONSTRUCTION GUIDELINES SHOULD BE UTILIZED

Because of the controversy surrounding the absolute pollution exclusion clause, the Fourth District Court of Appeal has requested this Court consider the reasonable expectations doctrine. It is not necessary for this Court to consider the reasonable expectations doctrine because Florida law requires this Court to construe the insurance policy in a way that provides a reasonable, practical, and sensible interpretation consistent with the intent of the parties. See, U.S. v. Pepper's Steel and Alloys, Inc., 823 F. Supp. 1574 (S.D. Fla. 1993). Moreover, Florida law requires that terms in an insurance policy should be read considering the skill and experience of ordinary people. See, Brill v. Indianapolis Life Ins. Co., 784 F.2d 1511 (11th Cir. 1986).

It is also well established that exclusion clauses in an insurance contract must be narrowly construed. See, Michigan Millers Mutual Ins. Corp. v. Benfield, 902 F. Supp. 1509 (M.D. Fl. 1995). Furthermore, exclusion clauses should be construed more strictly than coverage clauses. See, Allstate Ins. Co. v.

Shofner, 573 So.2d 47 (Fla. 1st DCA 1990).

Based on the well-established principles of contract construction in Florida, this Court should construe the absolute pollution clause for "irritants" or "contaminants" narrowly to provide a reasonable, practical, and sensible interpretation. The use of traditional construction guidelines comports with Florida's well-established law and the intent of the CGL insurance policy. Moreover, Florida's longstanding rules of construction enable this Court to evaluate the language in insurance policies without considering the doctrine of reasonable expectations.

The Fourth District Court of Appeal correctly states that to apply the doctrine of reasonable expectations, the court must find an ambiguity. Deni, at 402. If this Court does not find an ambiguity, there is no occasion to apply the reasonable expectation doctrine. If this court does find an ambiguity, Florida law already provides a method to resolve contracts with ambiguities. If this Court interprets the insurance policies in a reasonable, practical, and sensible manner consistent with the intent of the parties and finds that the absolute pollution exclusion clause is ambiguous, it must uphold coverage for the insured. Therefore, there is no reason for this Court to consider the doctrine of reasonable expectations.

Under the doctrine of reasonable expectations, if the insurer or its agent creates a reasonable expectation of coverage in the insured which is not supported by policy language, the

expectation will prevail over the language in the policy. See, Max True Plastering v. U.S. Fidelity & Guaranty Co., 912 P.2d 861 (Okl. 1996). Several courts have rejected the reasonable expectation doctrine, because its operation is not well-defined and the traditional contract construction guidelines were sufficient to resolve any conflicts. See, Allen v. Prudential Property & Casualty Ins. co., 839 P.2d 798 (Utah 1992); American Country Ins. Co. v. Cash, 524 N.E.2d 1016 (Ill.App 1 Dist. 1988); Meckert v. Transamerica Ins, Co., 701 P.2d 217 (Idaho 1985); Sterling Merchandise Co. v. Hartford Ins. Co., 506 N.E.2d 1192 (Ohio App. 1986).

The Allen court declined to adopt the reasonable expectations doctrine because it was "not clear why estoppel, waiver, unconscionability, breach of the implied duty of good faith and fair dealing and the rule that ambiguous language is to be resolved against the drafter . . . are insufficient to protect against overreaching insurers when applied on a case-by case basis." Allen, at 805-806.

The Sterling court also refused to adopt the reasonable expectations doctrine and held that:

> ... the reasonable expectation doctrine requires a court to rewrite an insurance contract which does not meet popular expectations. Such rewriting is done regardless of the bargain entered into by the parties to the contract . . . .

Sterling, at 1197.

The Sterling court also reject the argument that the reasonable expectations doctrine had been implicitly adopted. The Sterling court stated that is was possible to adopt rules of

construction which favor the insured in an insurance contract without implicitly adopting the reasonable expectations doctrine. Sterling, at 1196.

Moreover, the reasonable expectations doctrine has created inconsistent decisions. As the Allen court noted a "number of states have struggled with the doctrine's scope, leaving a trail of inconsistent decisions and creating an obviously uncertain future of the doctrine in those states." Allen, at 802. As courts in various states have attempted to massage the reasonable expectation doctrine into a legal rule, different versions of the reasonable expectations doctrine now exist. Allen, at 801.

Here, this Court should adhere to the well-established rules of construction that provide coverage for the insured if there is an ambiguity. Adopting the reasonable expectations doctrine will negate the traditional construction guidelines and create greater uncertainty. This Court should not resort to the reasonable expectations doctrine because it will only spawn more litigation to determine the parties' expectations.

CONCLUSION

The original intent of the pollution exclusion clause was that polluters should not be indemnified for their wanton acts which caused injury to the environment and innocent people. The pollution exclusion clause is necessary to allow an insurance company to perform its traditional function as the insurer of unexpected events or happenings. However, this policy provision should not be construed to produce the absurd result that any

personal injury resulting from "irritants" or "contaminants" is excluded from coverage as "pollution." Contrary to the Deni court's assertion that the language in the absolute pollution exclusion clause is clear, unambiguous and has only one meaning, other courts have found that the absolute pollution exclusion clause is susceptible to interpretation.

This Court can apply traditional rules of construction and "common sense" to determine whether the absolute pollution exclusion for "irritants" or "contaminants" is ambiguous. If this Court finds that the absolute pollution exclusion clause is ambiguous, it should reject considering the reasonable expectations doctrine and apply traditional rules of construction to determine coverage. The reasonable expectations doctrine will only lead to more litigation to resolve the parties' expectations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to all parties on the attached service list this 10th day of December, 1996.

ELIZABETH G. ARTHUR, ESQ.

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