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# ***Dimmitt Chevrolet v. Southeastern Fidelity Insurance Corp.*: Florida Interprets the “Sudden and Accidental” Clause**

## I. INTRODUCTION

In *Dimmitt Chevrolet v. Southeastern Fidelity Insurance Corp.*,<sup>1</sup> the Florida Supreme Court, in a four to three decision, held that the “sudden and accidental” language used in the pollution exclusion clause of comprehensive general liability (“CGL”) insurance contracts is capable of more than one meaning and is therefore ambiguous.<sup>2</sup> The court then held that so long as environmental contamination is unexpected and unintended on the part of the insured, coverage is not excluded under a CGL insurance policy by the pollution exclusion clause.<sup>3</sup> The court, by first determining that the sudden and accidental language was ambiguous and then analyzing the drafting history to determine the intent of the parties, reached the correct decision on this contract interpretation issue.

## II. PROCEDURAL HISTORY OF THE CASE

The insurer, Southeastern Fidelity Insurance Corporation (“Southeastern”), brought a declaratory judgment action in the United States District Court for the Middle District of Florida against Dimmitt Chevrolet (“Dimmitt”) asking the court to determine whether a CGL insurance policy covered claims by the Environmental Protection Agency (“EPA”).<sup>4</sup> The district court granted Southeastern’s motion for summary judgment and held that the pollution exclusion clause was not ambiguous.<sup>5</sup> Dimmitt filed a motion to alter or amend that was denied.<sup>6</sup> Dimmitt then appealed to the Eleventh Circuit Court of Appeals.<sup>7</sup> The court of appeals certified the following question: “Whether, as a matter of law, the pollution exclusion clause contained in the comprehensive general liability insurance

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1. No. 78293, 1992 WL 212008 (Fla. Sept. 3, 1992) *motion for reh'g filed*.

2. *Id.* at \*7.

3. *Id.*

4. *Id.* at \*2.

5. *Id.* *Industrial Indemnity Ins. Co. v. Crown Auto Dealership, Inc.*, 731 F. Supp. 1517 (M.D. Fla. 1990).

6. 1992 WL 212008 at \*2; 731 F. Supp. at 1522.

7. 1992 WL 212008 at \*2.

policy precludes coverage to its insured for liability for the environmental contamination that occurred in this case."<sup>8</sup> This was an issue for first impression for the Florida Supreme Court.<sup>9</sup>

### III. FACTUAL STATEMENT

Appellants Dimmitt Chevrolet, Inc. and Larry Dimmitt Cadillac, Inc. sold used crankcase oil generated by two automobile dealerships to Peak Oil Company ("Peak") from 1974 through 1979. Peak recycled used oil for resale at its plant in Hillsborough County, Florida from 1954 to 1979. In 1983, the EPA determined that extensive soil and groundwater pollution had occurred at the Peak site as a result of Peak's recycling operations. Chemicals had seeped into the soil and groundwater from unlined storage ponds where Peak placed waste oil sludge.<sup>10</sup>

In July 1987, the EPA notified Dimmitt that it was a potentially responsible party ("PRP") for the cost of the investigation and clean up of the hazardous substances released at the Peak site.<sup>11</sup> Dimmitt, without conceding liability, agreed to participate in remedial measures at the site and entered into two administrative orders with the EPA.<sup>12</sup>

Southeastern provided CGL insurance to Dimmitt from 1972 to 1980.<sup>13</sup> CGL insurance policies are the primary type of insurance used by businesses. These are standard policies created by insurance industry trade associations.<sup>14</sup> Dimmitt's policy provided coverage:

for all sums which the INSURED shall become legally obligated to pay as DAMAGES because of A. BODILY INJURY or B. PROPERTY DAMAGE to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the INSURED seeking DAMAGES on account of such BODILY INJURY or PROPERTY DAMAGE, even if any of the allegations of the suit are groundless. . . .<sup>15</sup>

The policy defined an occurrence as "'an accident including continuous or repeated exposure to conditions, which result in BODILY INJURY or

8. *Id.* at \*1.

9. *Id.*

10. *Id.*

11. Although *Dimmitt* was not involved in the activity that caused the damage, its liability was not at issue. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), imposes liability on anyone who "generates, transports, or disposes of hazardous waste." *Id.* (citing 42 U.S.C. §§ 9601-9675 (1988)).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

PROPERTY DAMAGE neither expected nor intended from the standpoint of the INSURED. . . .”<sup>16</sup> The policy also contained a “pollution exclusion” clause that excluded coverage for:

BODILY INJURY or PROPERTY DAMAGE arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials . . . into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. . . .”<sup>17</sup>

Southeastern contended that it had no duty to defend or indemnify Dimmitt because the “sudden and accidental” language in the pollution exclusion clause limited coverage for pollution damage to only abrupt, instantaneous, and accidental pollution. Since the pollution at the Peak site occurred over several years, Southeastern denied coverage.<sup>18</sup> The district court agreed with Southeastern and defined “accident” as “an event which is unexpected or unintended and does not take place within the usual course.”<sup>19</sup> The district court concluded that the damage was excluded from coverage since the pollution occurred gradually and as a normal result of Peak’s business operations.<sup>20</sup>

Dimmitt appealed claiming that the “sudden and accidental” clause was ambiguous and therefore should be construed in favor of the insured.<sup>21</sup> Dimmitt also claimed that the drafting history of the exclusion and statements made by the insurance industry showed that the intent of the industry was that the “sudden and accidental” clause was not to exclude coverage for damage that was “unexpected and unintended” by the insured.<sup>22</sup>

#### IV. THE COURT’S OPINION

The court had to decide whether the term “sudden and accidental” was ambiguous before it could address the issue of intent. The court began its analysis of the possible ambiguity by noting that there are multiple deci-

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16. *Id.* at \*2.

17. *Id.*

18. *Id.*

19. 731 F. Supp. at 1520.

20. *Id.* at 1521.

21. Although not discussed by the court, Florida follows the rule that ambiguous language in insurance contracts is interpreted in favor of the insured. *E.g.*, *Triano v. State Farm Mutual Auto. Ins. Co.*, 565 So. 2d 748, 749 (Fla. Dist. Ct. App. 1990).

22. 1992 WL 212008 at \*3.

sions in support of both parties' positions.<sup>23</sup> Numerous courts have found the clause to be unambiguous and held "sudden" to have a temporal meaning.<sup>24</sup> An equally significant number of courts have concluded that "sudden and accidental" has more than one meaning including "abrupt and immediate" and "unexpected and unintended."<sup>25</sup>

The court then looked to dictionary definitions noting the Wisconsin Supreme Court's point that different dictionaries offered different meanings.<sup>26</sup> The Supreme Court of Georgia, in *Claussen v. Aetna Casualty & Surety Co.*,<sup>27</sup> noted the differences in each dictionary's primary and secondary definitions of "sudden" and determined that it had more than one meaning.<sup>28</sup> The Florida Supreme Court agreed with the line of cases holding that the clause is ambiguous, taking into account the vast differences among jurisdictions and the fact that even dictionaries show discrepancies as to the meaning.<sup>29</sup> The most notable evidence of ambiguity was the insurance industry's own definition as used in its presentations to regulatory agencies.<sup>30</sup>

The court followed the evolution of the exclusion and the industry's adoption of "sudden and accidental" to determine the intent of the parties.<sup>31</sup> The court examined the CGL policy language prior to 1966. These CGL policies covered property and personal injury damage caused by "accident."<sup>32</sup> Because these policies did not define the term "accident"

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23. *Id.* The court stated that in regard to the question of whether the term "sudden and accidental" is ambiguous there are in excess of fifty cases that support each conclusion. *Id.*

24. *Id.* (citing *UpJohn Co. v. New Hampshire Ins. Co.*, 438 Mich. 197, 476 N.W.2d 392 (1991); *Lumbermens Mutual Casualty Co. v. Belleview Indus.*, 407 Mass. 675, 555 N.E.2d 568 (1990)).

"Temporal" is defined as "of or relating to a sequence of time or to a particular time." WEBSTERS'S NEW COLLEGIATE DICTIONARY (1977).

25. 1992 WL 212008 at \*3 (citing *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 157 Wis. 2d 507, 456 N.W.2d 570 (1990); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991); *Claussen v. Aetna Casualty & Surety Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989)).

26. *Id.* at \*4.

27. 259 Ga. 333, 380 S.E.2d 686 (1989). For a thorough analysis of this case see Elizabeth Gray, *Claussen v. Aetna Casualty & Surety Company: Coverage For Gradual Pollution Under The Comprehensive General Liability Policy In Georgia*, 41 MERCER L. REV. 1041 (1990).

28. 1992 WL 212008 at \*4. The Georgia Supreme Court, noting the different definitions stated, "But, on reflection one realizes that even in its popular usage, 'sudden' does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death." *Id.* (citing 259 Ga. at 335, 380 S.E.2d at 688).

29. *Id.*

30. *Id.*

31. *Id.* at \*4-6.

32. *Id.* at \*5 (citing *Broadwell Realty Servs., Inc. v. Fidelity & Casualty Co. of N.Y.*, 528 A.2d 76, 84 (N.J. Super. 1987); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 574 (1990)).

they were subject to different interpretations by the courts as to what damages were included.<sup>33</sup> However, most courts held that the policies covered damage caused by events that were unintentional or unexpected.<sup>34</sup>

The court then reviewed the modifications made to CGL policies in 1966. The insurance industry adopted "occurrence-based" language in an attempt to clarify the confusion caused by the previous "accident-based" CGL policies.<sup>35</sup> This language is the "occurrence" definition included in the policy between Southeastern and Dimmitt.<sup>36</sup> The insurance industry intended to draw a distinction between "accidental means" and "accidental results."<sup>37</sup> The drafters did not intend the new language to preclude coverage for damages caused by continued exposure, but to limit coverage to damages "neither expected nor intended from the standpoint of the insured."<sup>38</sup>

The next revision of the CGL policies occurred in 1970.<sup>39</sup> The insurance industry proposed the pollution exclusion clause that contains the term "sudden and accidental."<sup>40</sup> At the time of the proposal, the insurance industry claimed this clause to prevent insured who "recklessly and intentionally" polluted or failed to take reasonable precautions from seeking coverage.<sup>41</sup> The insurance industry also implied that the clause was not meant to reduce coverage.<sup>42</sup> In a statement by the Insurance Rating

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33. *Id.* (citing 456 N.W.2d at 574).

34. *Id.*

35. *Id.* (citing KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 155 (1991)).

36. *Id.* See *supra* note 16 and accompanying text.

37. 1992 WL 212008 at \*5 (citing Grand River Lime Co. v. Ohio Casualty Ins. Co., 289 N.E.2d 360, 364 (Ohio Ct. App. 1972)).

38. *Id.* (quoting 528 A.2d at 84). The court also quoted Lyman Baldwin, Secretary-Underwriting, Insurance Company of North America as stating:

"Let us consider how this would apply in a fairly commonplace situation where we have a chemical manufacturing plant, which, during the course of its operations, emits noxious fumes that damage the paint on buildings in the surrounding neighborhood. Under the new [occurrence-based] policy, there is coverage until such time as the insured becomes aware that the damage was being done."

*Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at \*6. The court quoted The Fire, Casualty & Surety Bulletin, a trade publication used to help brokers and agents interpret policies, as saying:

"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."

*Id.*

Board and a bulletin used by agents and brokers, the industry represented the clause as making a distinction between damage caused by accident and damage that is expected or intended.<sup>43</sup> The court found statements and affirmations made by the insurance industry to state insurance commissioners assuring them that the "sudden and accidental" language would not reduce coverage, but would only preclude coverage for intentional polluters, particularly persuasive.<sup>44</sup>

Based on the drafting history of the "occurrence" based CGL policies and the circumstances surrounding the addition of the pollution exclusion clause, the court concluded that the insurance industry intended the term "sudden and accidental" to include damage caused by events that are "unexpected and unintended" on the part of the insured.<sup>45</sup> The evolution of this clause and representations made by the industry indicate that the intention of the drafters was to exclude from coverage those insured who were responsible for damage caused by intentional acts.<sup>46</sup>

Finally, the court rejected the argument that holding "sudden and accidental" to include acts which are "unexpected and unintended" would duplicate the definition of occurrence, therefore rendering the pollution exclusion clause worthless.<sup>47</sup> The court looked to the distinction between the two provisions pointed out in *Claussen*.<sup>48</sup> The Georgia Supreme Court explained in *Claussen* that the pollution exclusion clause concentrated on whether the "discharge, dispersal or release" was "unexpected and unintended" while the occurrence language is concerned with whether the damage was "unexpected and unintended."<sup>49</sup> The Florida Supreme Court reasoned that the pollution exclusion clause prevents coverage to parties whose damage causing activities are intentional although the resulting

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43. *Id.* The Supreme Court of Georgia noted that the Insurance Rating Board represented to Georgia's insurance commissioner that the pollution exclusion clause would only preclude coverage to intentional polluters and would have no effect on the majority of risks. *Id.* (citing 259 Ga. at 337, 380 S.E.2d at 689).

44. *Id.* At a hearing requested by West Virginia's Insurance Commissioner, insurance companies seeking approval of the exclusion clause represented in writing, that the clause was intended to clarify existing coverage already defined and limited by the term "occurrence." The Commissioner requested the hearing because of concern that the clause would decrease coverage without a subsequent reduction in rates. *Id.* (citing *In re Pollution & Contamination Exclusion Findings*, W. Va. Dep't of Ins. Order 70-4 (August 19, 1970)). The State of Florida filed an amicus curiae brief stating that had insurers not made similar representations to its Insurance Commission office at the time the clause was proposed, it would probably not have approved the clause without a rate reduction. *Id.*

45. *Id.* at \*7.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* (citing 259 Ga. at 336, 380 S.E.2d at 688).

damage was unexpected and unintentional.<sup>50</sup> Before the addition of the pollution exclusion clause, the definition of "occurrence" would allow coverage under those circumstances. Therefore, holding that "sudden and accidental" includes damage that is "unexpected and unintended" does not deprive the pollution exclusion clause of its intended significance.<sup>51</sup>

#### V. ANALYSIS

The meaning of the "sudden and accidental" clause has been a highly litigated issue yielding inconsistent decisions.<sup>52</sup> Critics of the cases holding the term "sudden and accidental" ambiguous have valid points. When insurance provisions are interpreted by the courts to expand coverage, insurance companies are faced with the uncertainty created regarding future losses.<sup>53</sup> Since these provisions come before the court only after the policy has been issued, the drafters cannot anticipate the extent to which they will be required to indemnify their insured.<sup>54</sup> These concerns are especially true regarding the pollution exclusion clause. CGL policies included this clause from 1970 to 1985. It would be an impossible task for the insurance industry to locate all the potential sites where pollution damage might have occurred during those fifteen years and then determine how many of their insured would be PRP's. Add to the logistics problems the fact that most pollution damages involve high clean-up costs, and it becomes evident that insurers have no way to determine their potential liability.

Another argument posed by the proponents of the narrower interpretation is that increased coverage will result in reduced incentives for the insured to research and implement less polluting or damaging processes in their operations.<sup>55</sup> The court's decision in *Dimmitt*, however, should not have the effect of reducing this incentive. Although this decision extends coverage to damage caused gradually over a period of time, the insured cannot intentionally or recklessly pollute and then seek indemnity. The court determined that the meaning of the exclusion added to the

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50. *Id.*

51. *Id.*

52. See *Industrial Indemn. Ins. Co. v. Crown Auto Dealerships, Inc.*, 731 F. Supp. 1517 (M.D. Fla. 1990); *W.C. Hayes, Jr. v. Maryland Casualty Co.*, 688 F. Supp. 1513 (N.D. Fla. 1988) (not allowing coverage); *contra* *Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co.*, 668 F. Supp. 1541 (S.D. Fla. 1987); *Payne v. United States Fidelity & Guar. Co.*, 625 F. Supp. 1189 (S.D. Fla. 1985) (allowing coverage).

53. See Sharon M. Murphy, *The "Sudden and Accidental" Exception to the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies: The Gordian Knot of Environmental Liability*, 45 VAND. L. REV. 161, 176-78 (1992).

54. *Id.*

55. *Id.* at 169-70.

definition of "occurrence."<sup>56</sup> The definition of "occurrence" went to the ends, unexpected and unintentional damages; while the court's interpretation of "sudden and accidental" describes the unexpected and unintentional means. Since the insured will still be responsible for their own actions, the incentives for them to seek pollution reducing means will not be dissipated.

Policy arguments aside, the court reached the right decision for another reason. The drafting history shows that the insurance industry knew of the existence of their potential liability and took steps to define the boundaries of their policy coverage.<sup>57</sup> The insurance industry could have drafted these policies to be more restrictive at the time of the revision, but it seems evident that the insurance companies were careful not to reduce coverage and risk not gaining approval by insurance commissioners without reducing rates.<sup>58</sup> The persuasiveness of the drafting history is illustrated by the fact that every appellate court that has considered and discussed the issue has held that the insured was covered.<sup>59</sup>

The decision by the supreme court also makes sense from an economist's viewpoint. The formation of contracts between parties is a matter of risk allocation.<sup>60</sup> The important issue is determining which party intended to assume the risk.<sup>61</sup> In *Dimmitt* the court noted that the insurance industry, at the time the pollution exclusion clause was proposed, did not offer an accompanying reduction in premiums.<sup>62</sup> One commentator has stated that the insurance industry increased premiums when the switch was made from "accident" based to "occurrence" based CGL contracts in 1966, because the industry intended broadened coverage to include gradual pollution damage that was "unexpected or unintended."<sup>63</sup> The increase in premiums in 1966 shows that the parties to the contracts intended for the insurance companies to bear the risk of gradual pollution damage. Since there was no corresponding reduction in rates when the pollution exclusion was adopted, one can infer that no shift in risk allocation was contemplated by the parties.

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56. See *supra* text accompanying notes 45-51.

57. See *supra* notes 32-44 and accompanying text.

58. See *supra* note 44.

59. Carl A. Salisbury, *Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. L. 357, 376 n.52 (1991).

60. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.5 (1992).

61. *Id.*

62. See *supra* note 44.

63. Salisbury, *supra* note 59, at 364 & n.21.

## VI. CONCLUSION

In *Dimmitt* the Florida Supreme Court held that the term "sudden and accidental," found in CGL insurance policies from 1970 to 1985, is ambiguous and that the pollution exclusion clause does not preclude coverage for pollution damage caused by acts that are unexpected and unintentional from the standpoint of the insured.<sup>64</sup> Relying on the drafting history of the pollution exclusion clause and representations made by the insurance industry, the court concluded it was not the intention of the drafters to preclude indemnification for pollution damage that occurred gradually.<sup>65</sup> Although this decision will increase liability for insurers, it will not reduce incentives for the insured to employ pollution reducing means. The Florida Supreme Court reached the correct decision on this contract interpretation issue.

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64. 1992 WL 212008 at \*7.

65. *Id.*

