IN THE SUPREME COURT OF THE STATE OF OREGON

ST. PAUL FIRE & MARINE INSURANCE COMPANY, INC., and ST. PAUL MERCURY INSURANCE COMPANY, INC., Plaintiffs-Respondents Respondents on Review, v. McCORMICK & BAXTER CREOSOTING CO., Defendant-Appellant, Petitioner on Review, NATIONAL CONTINENTAL INSURANCE COMPANY, successor to AMERICAN STAR INSURANCE COMPANY by change of name; CONSOLIDATED AMERICAN INSURANCE COMPANY; HARTFORD ACCIDENT & INDEMNITY COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; UNITED STATES FIRE INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY; GULF INSURANCE COMPANY, Defendants-Respondents, Respondents on Review, and SCOTTSDALE INSURANCE COMPANY; BOSTON INSURANCE COMPANY; MISSION INSURANCE COMPANY (in liquidation); MISSION NATIONAL INSURANCE COMPANY (in liquidation); NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; Defendants.	Trial Court No. A8711-07096 CA No. A71072 SC No. 541584

AMICUS CURIAE BRIEF

Amicus Curiae Brief in Support of the Defendant-Appellants Appeal of the Decision of the Court of Appeals on Appeal from the Judgment of the Circuit Court for Multnomah County The Honorable Lee Johnson, Judge

Date of Opinion:	March 9, 1994
Author of Opinion:	De Muniz, Judge
Joining in Opinion:	Rossman, Presiding Judge Leeson, Judge

Reversed in Part and Affirmed in Part

McCORMICK & BAXTER CREOSOTING CO.,

Cross-Complainant-Appellant,
Petitioner on Review,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, INC., and ST. PAUL MERCURY INSURANCE COMPANY, INC.;

Cross-Defendant Respondents,
Respondents on Review,

and

NATIONAL CONTINENTAL INSURANCE COMPANY, successor to AMERICAN STAR INSURANCE COMPANY by change of name; CONSOLIDATED AMERICAN INSURANCE COMPANY; HARTFORD ACCIDENT & INDEMNITY COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; UNITED STATES FIRE INSURANCE COMPANY; CONTINENTAL CASUALTY COMPANY; GULF INSURANCE COMPANY; NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,

Cross-Defendants-Respondents,
Respondents on Review,

and

SCOTTSDALE INSURANCE COMPANY; BOSTON INSURANCE COMPANY; MISSION INSURANCE COMPANY (in liquidation); MISSION NATIONAL INSURANCE COMPANY (in liquidation),

Cross-Defendants.

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I. PRELIMINARY STATEMENT

> The Comprehensive General Liability Policy - what is it? What does it do? In order to answer these questions fully, let's look at the terms that comprise the title -- comprehensive, general, liability -- and determine what they mean.
>
> First, Comprehensive - The word means what it says. For insurance purposes, it means that all operations, all commercial businesses, and all hazards of the commercial insured are covered. It means all-encompassing and all-inclusive. It indicates the broadest possible coverage for insureds with a variety of business exposures.[1]

For over the past fifty years, Oregon companies and municipalities have purchased comprehensive general liability insurance policies with the expectation that such policies will cover all liabilities, not specifically excluded, arising out of their ordinary business operations. Contrary to such policies' explicit language, to the fundamental rules of policy construction and to the very purpose of the policies, the Court of Appeals below ruled that liabilities arising out of "routine" or "ordinary" business practices cannot be "accidental" and therefore, are not covered under comprehensive general liability insurance policies. This ruling must be reversed.

The amici file this brief in support of the appeal filed by defendant McCormick & Baxter Creosoting Company ("M&B") of certain rulings by the Oregon Court of Appeals in St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter

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1. See Aetna Basic Policy Analysis, Comprehensive General Liability Policy at p. 4, Ex. 1.

Creosoting Co., 126 Or App 689, 870 P2d 260, modified on reconsideration, 128 Or App 234, 875 P2d 537 (1994) ("M&B").

The crux of this case is the extent of coverage for pollution liabilities under standard form comprehensive general liability insurance policies ("CGLs"). The rulings here will affect hundreds of Oregon policyholders, many of whom, including the amici here, are involved in litigation to resolve these same issues. These issues are not only of vital interest to Oregon's policyholders, but also to its taxpayers who will be left footing the bill in the many cases where the policyholder cannot afford the overwhelming costs of cleanup without the availability of their insurance assets.

At stake, is whether insurance companies can avoid their contractual and regulatory obligations requiring them to insure accidental, i.e., unexpected and unintended, environmental property damage. Insurance companies, who received millions of dollars in policy premiums in exchange for their promise to provide comprehensive liability insurance coverage, including coverage for environmental liabilities, now disingenuously assert that their CGLs do not cover environmental property damage.

Insurance companies wrongfully assert that liabilities arising out of "routine business practices" are neither "caused by accident," for purposes of CGLs sold prior to 1966, nor "sudden and accidental" for purposes of the exception to the qualified pollution exclusion, generally included in CGLs

sold after 1970. These assertions directly contradict the plain meaning of the CGLs' language, the insurance companies' understanding at the time they sold the CGLs' and their representations regarding the CGLs' scope of coverage made to state insurance regulators, policyholders and the public.

The Court of Appeals, nevertheless, disregarded this Court's rules of policy construction and standards for summary judgment, and erroneously ruled that pollution liabilities arising out of "routine business operations" are excluded under "accident-based" CGLs, i.e., policies that cover property damage "caused by accident," and under CGLs containing the qualified pollution exclusion. These rulings militate against the very purpose of comprehensive general liability insurance policies, that is, to protect the policyholder against all risks associated with the its operations. These rulings specifically are in error because:

1. The Court incorrectly interpreted "sudden" and "accidental" contrary to the plain meaning of the terms, as evidenced by dictionary definitions and the parties' own understanding of the terms;

2. The Court improperly disregarded the circumstances surrounding the sale of the CGLs --courts that have considered such evidence have ruled that the CGLs cover unexpected and unintended pollution, regardless of the duration of the pollution or whether it arose out of the policyholder's routine operations;

   * Insurers understood and courts have interpreted the term "accidental" to not have a temporal element;

   * Insurers understood and courts had interpreted the term of art "sudden and accidental" as meaning "unexpected and

unintended" before it was incorporated into the qualified pollution exclusion;

* Insurers represented to state insurance regulators and others that the exclusion only clarified existing coverage and thus, that CGLs would continue to cover unexpected and unintended pollution;

3. Dictionary definitions, the parties' pre-enforcement understanding and the numerous pro-policyholder court opinions show that M&B's interpretation that CGLs provide coverage for unexpected and unintended pollution is at least reasonable -- any ambiguity should be resolved in favor of M&B;

4. Insurers should be estopped from interpreting their CGLs contrary to their representations to state regulators and others that the CGLs cover unexpected and unintended pollution; and

5. The court misapplied summary judgment rules by ruling as a matter of law that none of the pollution was "accidental" or caused by "sudden and accidental" releases when the record shows that at least some of the pollution was unexpected, unintended, and abrupt.

II. INTEREST OF AMICI

The amici curiae here are a sample of the many Oregon policyholders who purchased comprehensive general liability insurance only to be forced to engage in expensive and protracted litigation against their insurers to recover their insurance. This Court's rulings on these issues directly will affect whether the amici and dozens of similarly-situated policyholders will receive help from their insurers in responding to their substantial pollution liabilities.

Because this Court's rulings directly will affect amici, the amici request that the Court consider the arguements made herein that are designed to supplement M&B's

arguments. This brief, which focuses on the history of CGLs with respect to pollution coverage, provides a broader context for the Court, especially with respect to the parties' pre-enforcement understanding of the scope of such coverage.

III. STATEMENT OF FACTS[2]

A. THE INSURANCE POLICIES

M&B purchased comprehensive general liability insurance policies during the entire period of time that the pollution existed at and around its facilities. These CGLs contain terms drafted by insurance industry organizations, primarily the Insurance Services Office, Inc. and its predecessors, the Insurance Rating Board ("IRB") and the Mutual Insurance Rating Bureau ("MIRB") (hereafter, "ISO"). None of the policy terms at issue was drafted by M&B. Upon information and belief, at all material times, M&B's insurers were members or subscribers of ISO and paid ISO for its services, including the drafting of policy forms and the filing of such forms with state insurance regulators, and for the right to use such forms.

B. THE "ACCIDENT"-BASED INSURANCE POLICY

Standard form CGLs originated in the 1940's "as the need for additional protection against loss from the hazards of expanding business became apparent." "Report of Committee on Casualty Insurance", Insurance Counsel Journal, July 1994, Ex. 2 at p. 8. CGLs were developed to eliminate the need to

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2. For purposes of this brief, and pursuant to ORAP 9.05(3)(d), Amici incorporate by reference the facts as stated in M&B, 126 Or App at 694-96, 870 P2d at 262-63) and in the Appellate Brief filed by M&B with this Court.

have "a number of different kinds of liability insurance policies each excluding hazards included within the coverages of the others." Id. "The Comprehensive General Liability Policy is designed to cover all liability of the insured. . . The objective has been to afford protection against liability for any hazard not excluded. To accomplish this it was necessary to give broad automatic coverage." Id. at p. 10.

> It must, to give the comprehensive coverage intended, follow all of his activities even though the nature of his business operations changes completely. The coverage therefore, applies to all operations which are not specifically excluded.

Id. (emphasis in original).

Prior to 1966, most CGLs covered property damage "caused by accident" without any exclusion for routine business practices or pollution liabilities. See Queen City Farms v. Central Nat'l Ins. Co., 827 P2d 1024, (Wash App 1992), remanded in part, aff'd in part 882 P2d 703 (Wash 1994), and corrected, 891 P2d 718 (Wash 1995) ("Queen City Farms"); Morton Int'l., Inc. v. General Accident Ins. Co., 629 A2d 831, 849 (NJ 1993) cert. denied 114 S Ct 2764 (US 1994) ("Morton"). Moreover, by the 1950s, courts had recognized that the undefined "accident" did not have a temporal element and instead, meant "an unexpected, unforeseen, or undesigned happening or consequences from either a known or an unknown cause." See, e.g., Hauenstein v. St. Paul-Mercury Indem. Co., 65 NW2d 122, 126 (Minn 1954). In fact, "[c]ourts generally construed the term 'accident' to encompass ongoing events that

inflicted injury over an extended period provided that the injury was unexpected and unintended".[3]

The "caused by accident" term also was interpreted uniformly to allow coverage for unexpected damages resulting from negligent acts. Myrtle Point v. Pacific Indem. Co., 233 F Supp 193, 197 (D Or 1963) (the insurer was obligated to provide coverage under accident-based CGL for unexpected damage resulting from "maloperation of a disposal plant").

C. THE "OCCURRENCE"-BASED POLICIES

The insurance industry acknowledged this prevailing case law and revised the standard CGL form in 1966 to provide coverage for property damage caused by an "occurrence," which the policy defined as "an accident, including injurious exposure to conditions". See, e.g., Queen City Farms, 882 P2d at 717.[4] The 1966 CGL primarily was developed to eliminate any doubt that CGLs would cover damage and injury resulting from long-term exposures, including environmental exposures. See, e.g., Morton, 629 A2d at 849 (the 1966 CGL was understood to cover pollution liability from gradual losses); New Castle County v. Hartford Accident & Indem. Co., 933 F2d 1162, 1197

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3. Morton, 629 A2d at 849. In Morton, the New Jersey Supreme Court, which exhaustively reviewed the history of CGLs, cites substantial legal authority from various jurisdictions for its ruling that prior to the change to "occurrence"-based coverage in 1966, the "caused by accident" term was interpreted to not include a temporal restriction.

4. Accord American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F Supp 1485, 1501 (SDNY 1983), aff'd as modified, 748 F2d 760 (2d Cir 1984) (insurance industry's switch from "accident" to "occurrence" based policies "[a]dopted the result reached by courts that construed 'accident' to include injuries resulting from long term exposures.").

(1991) rev'd, remanded on other grounds, 970 F2d 1267 (3d Cir 1992), cert. denied, 113 S Ct 1846 (US 1993) ("New Castle").

Moreover, insurance companies used the fact that the 1966 CGL covered long term injuries and damage to promote sales of the policy. Just v. Land Reclamation, Ltd., 456 NW2d 570, 574 (Wis), amended, reconsideration denied, 1990 Wisc. LEXIS 279 (1990)("Just"). The drafters of the 1966 CGL announced that the policy was designed to cover liabilities arising out of waste disposal from routine operations:

> At least with respect to environmental claims, contemporaneous industry commentary on the 1966 CGL policy indicates that there was no intent to avoid coverage for unexpected or unintended pollution. G.L. Bean, Assistant Secretary, Liberty Mutual Insurance Company, in a paper presented at the Mutual Insurance Technical Conference, stated: "[I]t is in the waste disposal area that a manufacturer's basic premises-operation coverage is liberalized most substantially."

Id. at 574 (citation omitted).

D. THE QUALIFIED POLLUTION EXCLUSION

The qualified pollution exclusion was introduced in 1970, originally as an endorsement added to most CGLs. In 1973, the exclusion was inserted directly into the standard CGL form. Upon information and belief, none of M&B's insurers provided any direct notice to M&B that the exclusion had been added to its CGLs. More critically, M&B's insurers did not notify M&B that the exclusion significantly reduced the CGLs'

scope of coverage.[5] M&B also was not provided with any premium reduction, which normally would have accompanied a significant reduction in coverage.

The exclusion was developed in response to the public's concern over the deteriorating condition of the environment and the increase in liability exposure from the resulting new environmental laws. Morton, 629 A2d at 850. Insurers wanted to reinforce the fact that CGLs did not provide insurance coverage to "deliberate" polluters by adding a specific policy provision to the CGL that directly excluded all expected or intended pollution. See, e.g., Queen City Farms, 827 P2d 1024, 1046 (Wash 1992) ("'the pollution exclusion was solely meant to deprive active polluters of coverage'").[6]

Thus, the exclusion clarified coverage, but did not further restrict it. The "occurrence"-based CGL expressly

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5. The qualified pollution exclusion specifically states that the exclusion does not apply to "sudden and accidental" pollution:

> It is agreed that this insurance does not apply to Bodily Injury or Property Damage arising out of the discharge, dispersal, release or escape of waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water: but the exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Gulf Insurance Co.'s Memorandum in Support of Motion for Summary Judgment (July 18, 1990) (emphasis added).

6. In articles and advertisements in national publications, including the Wall Street Journal, insurance companies announced that the exclusion ensured that "deliberate" or intentional polluters would not be able to obtain insurance for any resulting liabilities. These announcements did not refer in any way to gradual pollution; rather they stated only that deliberate or intentional pollution would not be covered. See, e.g., "Insuring Against Pollution", The Wall Street Journal, April 14, 1970, col. 1, p. 22 (editorial) (Ex. 3) (announcing that coverage will be denied "only if the company or municipality acts deliberately. 'We will no longer insure the company which knowingly dumps its wastes,' said Charles K. Cox, INA President.")

provided coverage for exposure-related liabilities, but through the "occurrence" definition, provided no coverage for expected or intended liabilities. "Contemporaneous representations by the insurance industry confirm that the drafting committee, in creating the exclusionary clause, clarified but did not reduce the scope of coverage." Just, 456 NW2d at 575.

IV.
LEGAL QUESTIONS PRESENTED AND PROPOSED RULE OF DECISION

1. Did the Court of Appeals err in affirming summary judgment in favor of certain insurers on the ground that the CGLs covering property damage "caused by accident" do not cover unintended pollution resulting from intentional acts?

RESPONSE

Yes, property damage is "caused by accident" so long as the resulting damage -- as opposed to the acts that give rise to that damage -- was neither expected nor intended by the insured. Whether the damage arose out of the policyholder's "business practices" is not relevant.

2. Did the Court of Appeals err by ruling that the qualified pollution exclusion bars coverage for all damages arising from "routine business practices?"

RESPONSE

Yes, the exclusion is ambiguous and should be construed to bar coverage only when the policyholder subjectively expected or intended the property damage, or at a minimum,

expected or intended the polluting event, i.e., the release that directly caused the property damage and not the disposal of materials into places of expected and intended containment. There is no language in the exclusion limiting coverage for damages resulting from "routine business practices."

Insurers also should be precluded from interpreting the exclusion contrary to their pre-enforcement understanding of it and to their representations to state insurance regulators, to the public and to their policyholders.

3. Did the court err in ruling that there were no genuine issues of material fact as to whether the pollution was "caused by accident," or whether the pollution resulted from "sudden and accidental" events even though M&B presented evidence that (i) it neither expected nor intended all of the pollution; (ii) it neither expected nor intended the polluting events; and (iii) at least some of the property damage resulted from discrete and instantaneous accidental events?

RESPONSE

M&B defeated the insurers' burden of establishing as a matter of law that there was no coverage by producing evidence from which a reasonable juror could conclude that the pollution (i) was "caused by accident" under the "accident"-based CGLs, and (ii) was "sudden and accidental," regardless of how that term is construed. Thus, M&B should be entitled to have a jury determine whether it subjectively expected or

intended the pollution, or at a minimum, subjectively expected or intended the polluting events.

V.
ARGUMENT

A. The Court of Appeals Erred in Ruling that Property Damages Are Not "Caused by Accident" When an Intentional Act Brings an Unexpected Result

The Court of Appeals held that there is no coverage under "accident"-based CGLs for property damage arising out of "routine business practices." 126 Or App at 705, 870 P2d at 268. This holding is in error for several reasons: (1) it contradicts the plain meaning of "accident"-based CGLs, which have no such a limitation (2) it disregards this Court's case law precedent; and (3) it defies the parties' pre-enforcement understanding of the scope of coverage under such policies.

The "accident"-based CGLs generally state:

> [Insurer agrees to] pay on behalf of the insured all sums which the insured shall become obligated to pay * * * for damages because of injuries to or destruction of property * * * caused by accident.

126 Or App at 703, 870 P2d at 267 (emphasis added). Such policies contain no provision expressly excluding pollution. Because CGLs provide coverage for all liabilities that are not specifically excluded, pollution liabilities are covered unless they were not "caused by accident."

To determine whether M&B's pollution liabilities fall within the meaning of the undefined term "caused by accident," the court needed only to this Court's previous rulings

interpreting the provision. This Court has interpreted the provision on a number of occasions and held that

> For an exclusion from insurance coverage for intentional conduct to apply, "[i]t is not sufficient that the insured's intentional, albeit unlawful, acts have resulted in unintended harm; the acts must have been committed for the purpose of inflicting injury and harm. . . ."

Ledford v. Gutoski, 319 Or 397, 401-02, 877 P2d 80, 83 (1994) (quoting Nielsen v. St. Paul Cos., 283 Or 277, 281, 583 P2d 545, 547 (1978)("Nielson"). In Ledford, this Court confirmed its prior holdings that injuries resulting from intentional acts are excluded from coverage only "when the insured intended to cause the particular injury or harm, as opposed to merely intending the act." Id. The Court left no doubt that the same subjective intent test applies to "accident"-based CGLs, by following the application of this subjective intent rule to an "accident"-based CGL in Snyder v. Nelson, 278 Or 409, 413, 564 P2d 681, 684 (1977) ("Snyder"). Id.

The court below inappropriately relied on a distinction between "accidental means and accidental results from intended means." 126 Or App at 705, 860 P2d at 268. This Court expressly abolished any such distinction in Botts v. Hartford Accident & Indem. Co., 284 Or 95, 585 P2d 657 (1978)("Botts"). Indeed, in Botts, this Court rejected the contention that a single rule of construction applies to all factual situations, and acknowledged that in some cases, "voluntary conduct which results in unforeseen and unexpected injury" will be "accidental." Id. at 102-03. Thus, the court's ruling below

that there can be no "accident" resulting from a voluntary or intentional act, is contrary to this Court's decisions in Botts, Nielsen and Ledford.

Moreover, the overwhelming majority of the cases interpreting the scope of pollution coverage under "accident"-based policies have held that unexpected and unintended pollution is covered. See, e.g., Moffat v. Metropolitan Cas. Ins. Co., 238 F Supp 165 (MD Pa 1964) (damage caused by gas releases from policyholder's coal burning banks); Employers Ins. Co. v. Rives, 87 So 2d 653 (1955), cert. denied, 87 So 2d 658 (Ala 1956) (oil leak over several months). See also Morton, 629 A2d at 849 (finding that courts have construed "accident" to encompass continuous processes resulting in unexpected and unintended damage). Thus, in ruling that M&B's pollution could not have been "caused by accident", the Court of Appeals not only disregarded this Court's precedent, but also the majority case law authority.

In addition, the court also disregarded this Court's well-founded rules of insurance policy construction. Insurance policies should be liberally construed in favor of the object to be accomplished, i.e., insurance coverage, and policy language that is undefined should be construed against the insurance company who drafted the language. Shadbolt v. Farmers Ins. Exch., 275 Or 407, 410-11, 551 P2d 478, 480 (1976); United Pacific Ins. Co. v. Truck Ins. Exch., 273 Or 283, 293, 541 P2d 448, 454 (1975) ("all policy provisions,

particularly exclusion clauses, must be strictly construed against the insurer").

Instead of following such rules of construction, the court improperly grafted onto the CGLs a "business practices" exclusion not found in the CGLs nor supported by any policy language. This judicially-created exclusion improperly eliminates coverage for much unintended pollution and most other types of unintended property damage. The ruling militates against the purpose of the policies, i.e., to provide comprehensive general liability insurance for "all hazards of the commercial insured". See Aetna Basic Policy Analysis, Ex. 1.

The fact that M&B could expect that an occasional release might occur in the routine course of business should not preclude coverage. See, e.g., Johnstown v. Bankers Standard Ins. Co., 877 F2d 1146, 1150 (2d Cir 1989) (holding that it is mishaps that are "expected" -- taken in its broadest sense -- that are insured against").[7] Recovery should be barred only if M&B expected or intended a "polluting event". See Queen City Farms, 882 P2d at 725 (Wash 1994) (holding that pollution was accidental, although it resulted from the intentional placement of wastes into an unlined pit, because "the relevant polluting event", i.e., the "escape of

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7. In the course of any business, the policyholder can "expect" accidents. For example, a truck company with hundreds of trucks can expect that truck accidents will occur -- this fact alone does not mean that the damage was not accidental. CGLs respond to all premise/operations exposures unless specifically excluded. This includes known exposures. M&B's CGLs do not include a "course of business" exclusion.

materials from a place of containment into the environment where they cause damage" was unexpected and unintended). On the record, M&B expected no such event.

B. The Court of Appeals Erred by Ruling that the Qualified Pollution Exclusion Precludes Coverage for Unexpected and Unintended Pollution

1. The Insurers had the Burden of Proving that the Coverage Claim is Barred by the Qualified Pollution Exclusion

Insurers bear the burden of showing that an exclusion bars coverage because exclusions remove the right to coverage, which already vested in the policyholder. Paxton-Mitchell Co. v. Royal Indem. Co., 279 Or 607, 569 P2d 581 (1977).

Accordingly, insurers also bear the burden of proving that the "sudden and accidental" exception to the qualified pollution exclusion does not apply. See, e.g., Federated Mut. Ins. Co. v. Botkin Grain Co., 64 F3d 537, 542 (10th Cir 1995). In perhaps the most recent case on this issue, the court ruled that insurers have the burden of showing that the pollution was not "sudden and accidental" because such an exception is merely part of the exclusion and any arguments in favor of shifting the burden are not compelling. Id.[8]

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8. The minority case law authority is fundamentally flawed and contrary to Oregon law. See, e.g., Aeroquip Corp. v. Aetna Cas. & Sur. Co., 26 F3d 893, 894-5 (9th Cir 1994). First, the public policy concern raised by insurers that the insured should bear the burden because otherwise the insured would have the incentive to ignore its pollution is a red herring. Not only do the stringent environmental laws provide sufficient incentive to respond promptly to pollution, but also, the CGLs include late notice conditions that can cause forfeiture of coverage if the insured does not promptly address its pollution. Also, claims for coverage occur after the pollution is discovered, and thus, the concern that the insured would ignore the existence of the pollution is a non-issue. Similarly, the fact that insureds "generally have the access to facts that show the discharge was sudden and unexpected" (Id. at 895) is not (continued...)

Courts with rules of policy construction similar to Oregon concur.[9] There is no compelling reason why this Court should disregard Oregon's well-founded rule. Thus, the insurers have the burden of showing that the exclusion applies, including establishing that the pollution was not "sudden and accidental."

2. The Court of Appeals Erred in Ruling that the Qualified Pollution Exclusion Precludes Liability Based on "Ordinary Business Practices".

The court below also improperly held that the qualified pollution exclusion does not cover "damages resulting from ordinary business practices." 126 Or App at 706, 870 P2d at 269. In so holding, the court departed from well-established rules of insurance policy construction by improperly creating a coverage exclusion not contained in the CGL's.

The Court of Appeals primarily relied on two of its prior decisions that addressed the exclusion, Mays v. Transamerica Ins. Co., 103 Or App 578, 799 P2d 653 (1990), review denied, 311 Or 150, 806 P2d 128 (1991) ("Mays") and Transamerica Ins. Co. v. Sunnes, 77 Or App 136, 711 P2d 212

8.(...continued)
cause to disregard the well-founded rule. Insurers have to prove the applicability of policy exclusions even though almost all exclusions have some sort of exception within them and the insured similarly would have greater access to the facts concerning the applicability of these exclusions. Thus, the same well-founded principles leading to Oregon's rule that the insurer has the burden of proving an exclusion bars coverage apply with equal force here.

9. See, e.g., New York v. Blank, 27 F3d 783, 789 (2d Cir 1994) on remand, summary judgment granted, 1994 US Dist. LEXIS 12804 (NDNY Aug. 31, 1994); Chemetron Invs. v. Fidelity & Casualty Co., 886 F Supp 1194, 1200 (WD Pa 1994); New Castle, 933 F2d at 1181-82 (3d Cir 1991); Hirschberg v. Lumbermens Mut. Casualty, 798 F Supp 600, 603-04 (ND Cal 1992).

(1985), review denied, 301 Or 76, 717 P2d 631 (1986) ("Sunnes"). The court's ruling in these cases is contrary to the policyholders' expectation of coverage under their CGLs. Queen City Farms, 126 Wash 2d, at 51-52, 882 P2d at 719 ("it is important that these policies are comprehensive general liability insurance polices, and the average purchaser would expect broad coverage for liability arising from business operations"). Those holdins, as demonstrated below, also are contrary to this Court's case law precedent.

In following Mays and Sunnes, the Court of Appeals perpetuated its earlier misinterpretations, perhaps caused by its failure to consider alternative interpretations of the exclusion's language and the circumstances surrounding the exclusion's addition to CGLs in 1970. Such essential evidence contradicts the Court of Appeals' rulings.

Moreover, the Court of Appeals failed to consider the following arguments presented herein: (1) the term "sudden and accidental" was an insurance term of art regularly interpreted to mean "unexpected and unintended" and dictionaries regularly define "sudden" and "accidental" to not have a temporal element (see, e.g., id. at 56-57, 882 P2d at 720); and (2) the regulatory history of the exclusion, which clearly shows that insurance companies represented to regulators across the country -- at the time the exclusion was introduced -- that the exclusion was not intended to reduce

existing coverage for pollution, but rather, was meant to only clarify and continue that coverage.

3. The Qualified Pollution Exclusion Only Excludes Coverage for Expected or Intended Pollution

M&B contends that the exclusion bars coverage only for expected or intended pollution. M&B's interpretation is correct given the plain meaning of the exclusion's language, the historical context surrounding the exclusion's introduction, and the pro-policyholder interpretation of the exclusion in dozens of cases.

Because the exclusion, at a minimum, is susceptible to more than one plausible interpretation, this Court should interpret it in favor of M&B, and against the insurers, the parties responsible for creating the ambiguity. See Hoffman Constr. Co. v. Fred S. James & Co., 313 Or 464, 469-70, 836 P2d 703, 706 (1992) ("Hoffman") (holding that ambiguous policy language must be interpreted against the drafter if the different interpretations remain plausible after considering the language in the context of the policy as a whole and the circumstances surrounding the purpose of the language).

a. History of the Qualified Pollution Exclusion

(1) "Sudden and Accidental" is an Insurance Term of Art

The qualified pollution exclusion was developed by ISO, which acted on behalf of its member and subscriber insurance

companies, including M&B's insurers.[10] To accomplish their goal of clarifying the extent of pollution covered under the CGLs, the insurance companies drafted the exclusion to include an exception for all "sudden and accidental" pollution.

The "sudden and accidental" term was not new to the exclusion's drafters. Rather, the language was an insurance term of art that had appeared since at least the 1950's in "boiler and machinery" insurance policies, in which the language had been interpreted to mean "unexpected and unintended," with no temporal connotation. See, e.g., New England Gas & Elec. Ass'n v. Ocean Accident & Guaranty Corp., 116 NE2d 671, 680-81 (Mass 1953); Anderson & Middleton Lumber Co. v. Lumbermen's Mutual Casualty Co., 333 P2d 938, 940 (Wash 1959).[11] By 1963, this interpretation of "sudden and accidental" was so clearly established that one of the leading insurance treatises concluded that "the word 'sudden' should be given its primary meaning as a happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for. That is, 'sudden' is not to be construed as synonymous with instantaneous." 11 G. Couch,

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10. See, e.g., Morton, 629 A2d at 874 (holding that ISO was acting as the insurers' "designated agent, in presenting the pollution-exclusion clause to state regulators."). The Morton Court also found that state insurance regulators are in effect the agents of their state's policyholders because they are charged by statute "'to protect the interests of the policyholders' and to assure that 'insurance companies provide reasonable, equitable and fair treatment to the insuring public.'" Id.

11. See also New Castle, 933 F2d at 1197 (holding that the qualified pollution exclusion is ambiguous in part because the "sudden and accidental" term regularly had been interpreted to mean "unexpected and unintended" prior to its use in the exclusion); accord Queen City Farms, 882 P2d at 725.

Couch on Insurance 2d, § 42:383 at 181 (1963) (citations omitted).[12] See also Picchetti v. Pittsburgh Plate Glass Co., 153 NE2d 209, 213 (Ohio App 1957) (sudden "does not mean instantaneous").

(2) Insurers Represented that the Exclusion Clarified Coverage

Because courts already had interpreted "sudden and accidental" to mean "unexpected and unintended," it should come as no surprise that the insurers represented that the term had the same construction when they chose to use it again in the qualified pollution exclusion:

> In statements made to state insurance regulators in the process of obtaining approval for the original polluter's exclusion in 1970, the rating organizations expressly represented the new endorsement as a clarification of intent to cover unexpected and unintended pollution-caused damage. In a standard explanatory memorandum filed with virtually all the states, [ISO] specifically represented that the new clause merely clarified existing coverage.

Queen City Farms, 827 P2d at 1047.

Thus, insurance companies confirmed that the purpose of the exclusion was to address "knowing" polluters when they submitted the exclusion for approval with state insurance regulators. They represented in explanatory memorandums attached to their regulatory filings that the exclusion did

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12. The identical language appears in the most recent edition of the treatise. 10A Couch on Insurance 2d, § 42:396 (1982).

not change the scope of coverage.[13] The explanatory memorandums attached to the filings across the country state:

> 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 questions of intent. Coverage is continued for pollution or contamination caused injuries where the pollution or contamination results from an accident.. . .".[14]

Thus, insurance companies represented to the regulators that the exclusion "was intended to exclude only intentional polluters." Claussen v. Aetna Cas. & Sur. Co., 380 SE2d 686, 689 (Ga 1989) ("Claussen II"). In addition, they represented:

> Coverage for expected or intended pollution and contamination is not now present as it is excluded by the definition of occurrence. Coverage for accidental mishaps is continued....

See, e.g., Claussen v. Aetna Cas. & Sur. Co., 676 F Supp 1571, 1573 (SD Ga 1987) ("Claussen I"), question certified, 865 F2d 1217 (11th Cir), certified question answered, 380 SE2d 686 (Ga), and rev'd, 888 F2d 747 (11th Cir 1989), on remand, 754 F Supp 1576 (SD Ga 1990).

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13. Not only does the exclusion's language make no mention of excluding gradual pollution or all discharges occurring in the "routine course of business," the filings to state regulators also do not refer in any way to such limitations as having any relevance to the existence of coverage. To the contrary, ISO represented to the regulators and to the public that coverage turns on whether the policyholder expected or intended the pollution and that all "accidental" pollution would continue to be covered. Queen City Farms, 882 P2d at 721-23.

14. Morton, 629 A.2d at 851 (emphasis supplied). The first sentence of this memorandum is false. Morton, 629 A.2d at 852. The standard, occurrence-based policy covered property damage resulting from continuing environmental damage. So long as the damage was neither expected nor intended, courts generally extend coverage to all pollution-related damage. Id. at 852 (citing New Castle, 933 F2d at 1197).

These and similar representations were made to regulators throughout the country during 1970. The regulators approved use of the exclusion based on such representations. See, e.g., Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 SE2d 493, 499 (W Va 1992) ("Joy Technologies") (holding that the West Virginia regulators expressly approved use of the exclusion in reliance on representations that the exclusion only a clarified coverage and was not a new restriction). At least one regulatory agency refused to approve the exclusion because it saw no purpose in adopting an exclusion that merely clarified coverage.[15]

When some states questioned whether the endorsement (which was not accompanied by a proposed rebate or reduction in insurance rates) actually sought to restrict coverage, ISO responded by assuring the regulators that it was merely a clarification of coverage. For example, ISO responded to the

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15. See August 4, 1970 State of Vermont Deputy Commissioner of Insurance letter to the IRB:

> Liability insurance covers damages from sudden and accidental pollution. It does not cover those cases arising from a company's knowing and willful contamination of the environment.
>
> * * *
>
> [C]ompanies making a good effort to meet pollution control standard[s] are protected by insurance from those unforeseen accidental pollution situations which may occur despite all efforts of the company to prevent pollution.
>
> [Thus] the pollution exclusion endorsements are no more than clarification endorsements.
>
> * * *
>
> [Sudden and accidental] then is the same coverage as that which is implied by the existing policy language.

Ex. 4 (emphasis added).

Georgia Insurance Commissioner's initial refusal to approve the exclusion by reiterating that:

> It is rather a situation of clarification which will make for a complete understanding by the parties to the contract of the intent of coverage. . . . Coverage for accidental mishaps is continued. . . .

Claussen I, 676 F Supp at 1583 (Appendix B thereto) (emphasis added). The Georgia Supreme Court found these contemporaneous representations of intent to be consistent with the court's non-temporal interpretation of "sudden":

> Documents presented by the Insurance Ratings Board (which represents the industry. . .) to the Insurance Commissioner when the 'pollution exclusion' was first adopted suggest that the clause was intended to exclude only intentional polluters.

Claussen II, 380 SE2d at 689 (Ga 1989).[16]

On the basis of ISO's representations and the sworn testimony of certain insurers that the proposed exclusion merely would clarify existing coverage,[17] the West Virginia Insurance Commissioner approved its use in a written order:

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16. The federal district court had observed that the state filings "if not fraudulent, certainly were not straightforward," but nonetheless had granted summary judgment in favor of the insurers. Claussen I, 676 F Supp at 1573. That ruling subsequently was reversed in light of the Georgia Supreme Court's opinion on certification that the exclusion is ambiguous and is to be construed in favor of the insured. See Claussen v. Aetna Cas. & Sur. Co., 888 F2d 747 (11th Cir 1989).

17. For example, the MIRB explained that "[i]t is in the public interest that willful pollution of any type be stopped," and noted that the endorsement "is actually a clarification of the original intent, in that the definition of occurrence excludes damages that can be said to be expected or intended." Pendygraft, Plews, Clark & Wright, *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation* 21 IND L REV 117, 154-155 (1988). Ex. 5. Similarly, after observing that many pollution injuries are "directly relatable to intention or expectation," the IRB stated that its members "fail to understand why certain [policyholder] trade associations would be against such a clarification." Id. at 156.

(1) The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverage as defined and limited in the definitions of the term occurrence, contained in the respective policies to which said exclusions would be attached;

(2) [T]o the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions.

Id. (emphasis added). Ex. 6.

The exclusion similarly was submitted to the Oregon Insurance Department. See May 18, 1970 IRB letter (Ex. 7). There was no mention in the submittal that there was any cutback in coverage. There was no request for a rate change that would normally accompany a filing of a form that restricted coverage. There also was no justification given for a proposed change of coverage. ISO always has included a justification when the proposed form was to change, i.e., restrict or broaden, coverage. See Kuizanga Affidavit at ¶ 12, Ex. 8. Based upon these regulatory filings, which provided no explicit indication of any change in coverage, the Oregon regulators approved use of the exclusion.

It was not until the early 1980's, after the Federal CERCLA legislation had been enacted that imposed vast retroactive and strict liability for pollution problems on businesses and property owners, that insurers disclosed that they now interpreted the exclusion to preclude coverage for gradual pollution as opposed to only "expected or intended" pollution. Indeed, as late as 1978, ISO meeting minutes state

unequivocally that the exclusion was intended to "serve merely as a clarification" and to preclude coverage only for "expected or intended" pollution. See ISO Memorandum and Analytical Comments dated Sept. 28, 1978, at 4012742 (Ex. 9).

Thus, the circumstances surrounding the exclusion's introduction confirm that it merely clarifies, but does not restrict, the application of the "occurrence" clause to pollution damage. See, e.g., Joy Technologies, 421 SE2d at 497 (the insurers' current interpretation of the exclusion as a reduction from then-existing coverage was "'inconsistent' with the 'studied, unambiguous, official and affirmative representations'" and therefore, against public policy.) State appellate courts that have considered this evidence uniformly have ruled that the exclusion precludes coverage only for expected or intended pollution.[18] See, e.g., Just, 456 NW2d 570 (Wis 1990); Morton, 629 A2d 831; Outboard Marine Corp. Liberty Mut. Ins. Co., 607 NE2d 1204 (Ill 1993); Joy Technologies, 421 SE2d 493 (W Va 1992); ; Queen City Farms, 882 P2d 703 (Wash 1994); Claussen II, 380 SE2d 686 (Ga 1989).

b. Extrinsic Evidence is Admissible

Evidence should be admitted to determine the meaning of insurance language when there is more than one reasonable

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18. While certain state appellate courts that have rejected the policyholders' interpretation of the exclusion were presented with the drafting and regulatory history of the exclusion, those courts did not consider the evidence because they determined that the exclusion's language was unambiguous. Such courts were restricted under their state's rules of policy construction. Dimmitt Chevrolet, Inc. v. S.E. Fidelity Ins. Corp., 636 So 2d 700 (Fla 1994).

interpretation of the meaning of the language or the language is shown to be a term of art. See Timberline Equipment Co. Inc. v. St. Paul Fire and Marine Ins. Co., 281 Or 639, 643, 576 P2d 1244 (1978)("Timberline").[19] Evidence also is admissible in considering the circumstances surrounding the entering of a contract, regardless of whether the policy's language is ambiguous. See Welch v. U.S. Bancorp Realty and Mortgage Trust, 286 Or 673, 690, 596 P2d 947, 956 (1979) (the court may consider extrinsic evidence to aid its interpretation regardless if the language is ambiguous); Hoffman, 313 Or at 469-70, 836 P2d at 707 (1992).

A recent federal decision interpreting Oregon law has concurred that the qualified pollution exclusion may be ambiguous in circumstances such as this case (Washington Cty. Unified Sewerage Agency v. Wausau Underwriters Ins. Co., CV 91-375-JO (D. Or Nov. 10, 1994) reported in Mealey's Litig.

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19. Thus, in May v. Chicago Insurance Co., 260 Or 285, 490 P2d 150 (1971), this Court admitted extrinsic evidence in an insurance action to determine if a tug boat's owner and master were covered "operators." This Court held:

> In the present case defendants offered evidence to show that the term "operators" had a generally understood meaning in maritime usage. We have held that evidence of a special meaning within the trade within which the transaction arose is always admissible, and have treated the determination of the existence of a trade customer or usage as one for the trier of fact.

Id. at 294 (citations omitted, emphasis added). The Court then upheld the admission of evidence, offered by the insurer, on the history of the term "operator" in maritime insurance.

Similarly here, at a minimum, evidence on the history and development of the exclusion as a term of art coming from "boiler and machinery" policies should be admitted. See Queen City Farms, 126 Wash 2d at 58, 882 P2d at 721 (holding that the exclusion is ambiguous in part because "sudden and accidental" as used in boiler and machinery policies regularly had been interpreted to mean "unexpected and unintended" when the term was adopted for use in the exclusion.)

Rep. Insurance, Vol. 9, No. 10, Section C, at C-4 (Jan. 10, 1995) ("Washington County"), thereby permitting the introduction of extrinsic evidence. Id.

The introduction of evidence also should be permitted to establish that the insurers improperly have asserted an interpretation of the exclusion contrary to their understanding of its scope when they sold the CGLs. The doctrine of quasi-estoppel "precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him." See, e.g., 31 C.S.J. § 107. This doctrine was included in the Restatement (Second) of Contracts (1981) ("Restatement") at § 205, which has been adopted by this Court. See, e.g., Best v. U.S. National Bank, 303 Or 557, 739 P2d 554 (1987) ("Best").

Parties to a contract that assert a contrary pre-enforcement interpretation violate the implied covenant of good faith and fair dealing. See Restatement § 205; see also Comment e of § 205, Ex. 10, (the obligation of good faith "is violated by dishonest conduct such as . . . asserting an interpretation contrary to one's own understanding"); Best, 303 Or at 562-63, 739 P2d at 557-58. Thus, the evidence submitted herein should be admissible at least to the extent it demonstrates that M&B's insurers improperly are

interpreting the exclusion contrary to their pre-enforcement understanding. Id., 303 Or at 565, 739 P2d at 559.[20]

Furthermore, contrary to the insurers' representations, the full meaning and scope of the exclusion has not been definitively resolved by the Court of Appeals. As recognized in two recent federal cases, the Court of Appeal(s) cases interpreting the exclusion have not addressed whether the term "sudden" incorporates a temporal element:

> Judge Jones ... concluded, "while it is apparent that under Oregon law, the pollution exclusion precludes coverage from intentional discharges resulting from ordinary business practices because such discharges are not 'accidents,' Oregon appellate decisions offer no guidance as to whether the term 'sudden' ... incorporates a temporal element. . . ." I agree.

Jesuit High School v. General Ins. Co., CV 95-563 RE, slip op. at 8 (D Or Aug. 21, 1995) ("Jesuit") (Ex. 11), citing Washington County. (Ex. 12) ("[N]o Oregon appellate court appears to have discussed the meaning of 'sudden' as an element separate from 'accidental' in the pollution exclusion exception clause").[21]

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20. In Best, the Court determined that it was a question of fact for the jury to determine whether evidence, including internal memoranda, showed that the defendant performed a contract provision contrary to the "reasonable expectations" of the parties to the contract and in violation of the Restatement and the "good faith doctrine."

21. Moreover, the court below, as with most courts holding in favor of, insurers on the scope of the exclusion, has not had before it all of the evidence now available as to the insurers' pre-enforcement understanding and as to the regulatory history of the exclusion. Aetna here, likely will proffer evidence concerning the exclusion's history, but conveniently, Aetna will not submit the substantial amount of contrary evidence, most of which Aetna refuses to release publicly. In fact, much of the most compelling evidence cannot be presented to this Court because of various protective

(continued...)

Judge Jones noted that while the exclusion was held to be unambiguous by the Court of Appeals given the facts of the cases before it, "the clause as a whole may be ambiguous in certain contexts, including the situation presented here." Id. (emphasis added).[22] Consequently, Judge Jones resolved the ambiguity by holding that "sudden and accidental" means unexpected, without notice, and unintended, and that there is no relevance as to the length of the release's duration; this holding also was the jury's factual determination of the meaning of the "sudden and accidental" term. Id.[23]

21.(...continued)
orders insisted on by insurers to prevent other policyholders and courts from utilizing the damaging evidence. Similarly, Respondents and their insurance company allies will cite authority rejecting the pro-policyholder interpretation of the exclusion, but will not note that many other cases have held in favor of the policyholder, including cases vacated after the insurers settled the case and required that the adverse precedent be "removed from history". See, e.g., Parloff, "Rigging the Common Law," The American Lawyer (March 1992) at 74.

22. None of the Oregon appellate decisions interpreting the "sudden and accidental" term addressed whether that phrase was a term of art that had an accepted meaning in the industry.

In Sunnes, the court noted that the exclusion is ambiguous under certain circumstances, but was "not ambiguous in the context of this case." The court only was addressing that the exclusion was unambiguous with respect to the intentional release of "acids and alkalis", which unambiguously are pollutants because they are "specially listed in the clause". The court clearly did not even address whether unintentional releases are covered by the exception to the exclusion. Instead, it merely held that intentional releases are excluded. Similarly, in Mays, the court limited its analysis to whether the exclusion is ambiguous in the context of the policy as a whole. It held that "[a]mbiguity does not necessarily result because one clause provides coverage and another clause excludes coverage under certain circumstances." Finally, the court below simply refused to overrule Sunnes and Mays, 126 Or App at 707; 870 P2d at 269 ("We . . . adhere to our earlier opinions").

23. In Washington County, the discharges at issue were discharges of effluent made in the course of the insured's operations. As here, just because the discharge occurred during the course of M&B's operation, it does not mean that the discharge was made as part of the ordinary course of M&B's business.

Upon a review of the evidence concerning the qualified pollution exclusion, this Court should rule that it only precludes coverage for expected or intended pollution.[24]

c. **"Sudden" Means "Unexpected"**

The "sudden and accidental" clause in the qualified pollution exclusion is ambiguous and thus, should be interpreted to promote coverage. Common definitions of the term "sudden" and numerous court decisions demonstrate this ambiguity and the reasonableness of M&B's interpretation. The term "sudden" can mean "unexpected." In fact, when the jury in Washington County was asked to define the term "sudden" as used in the exclusion, the jury answered "unexpected, without notice." Ex. 12 at C-7.

While some definitions of "sudden" include a temporal element, other definitions do not. In fact, this Court previously has noted that Webster's New International Dictionary of the English Language (2nd ed. Unabridged) defines "suddenly" to mean:

> 1. Happens without previous notice or with brief notice; coming or occurring unexpectedly; unforeseen; unprepared for. . .

259 Or at 179-80.

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24. When the New Jersey Supreme Court thoroughly considered such evidence, the Court found that the regulatory filings were replete with deceptive and misleading representations. Based on such unequivocal evidence, the Morton court ruled that insurers must be estopped from interpreting the exclusion contrary to the representations made to the insurance regulators throughout the country. Morton, 629 A2d at 848 (NJ 1993).

Other dictionaries also routinely include the definition of "sudden" as "happening or coming unexpectedly." See, e.g., Webster's Ninth New Collegiate Dictionary of the English Language at 1215 (1985) (first definition of "sudden" is "[h]appening without warning: unforeseen: a sudden storm").[25] Similarly, a leading insurance law treatise, in editions published both before and after the development of the exclusion, has observed:

> [T]he word "sudden" should be given its primary meaning as a happening without previous notice, or as something coming or occurring unexpectedly, as unforeseen or unprepared for. That is, "sudden" is not to be construed as synonymous with instantaneous.

11 G. Couch on Insurance 2d, § 42:383 (1963) (emphasis added); accord 10 A. Couch on Insurance 2d, § 42:396 (rev. ed. 1982).

A federal district court for the district of Oregon has also held that the term "sudden" may be defined as meaning "unexpected" in the insurance context. Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp., 256 F Supp 145, 150 (D Or 1966). The Georgia Supreme Court thoroughly addressed the various meanings of "sudden" and concluded:

> [E]ven 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. Even when used to describe the onset of an event, the word has an elastic temporal connotation that varies with expectations: Suddenly, it's

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25. See also Webster's Dictionary, Third College Edition at 1388 (1988) ("happening or coming unexpectedly . . . [i.e.,] sudden turn in the road"); Black's Law Dictionary at 1284 (5th ed. 1979). Synonyms include "unexpected," "unforeseen," "unanticipated," "unprepared for," and "unpredictable." Roget's International Thesaurus § 540.10 (4th ed. 1977).

> spring. . . . Thus, it appears that "sudden" has more than one reasonable meaning.

Claussen II, 380 SE2d at 688; accord Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 NE2d 1204 (Ill 1992) ("Outboard Marine") (emphasis added).

This Court should determine that the exclusion is ambiguous even without considering any extrinsic evidence as to the parties' understanding of the scope of coverage provided by the exclusion or as to the history of the exclusion. As evidenced by dictionary definitions and common usage of the words alone, M&B's interpretation of "sudden and accidental" as meaning "unexpected and unintended" is at least reasonable. See Queen City Farms, 882 P2d at 720 ("There is, however, wide recognition that carious dictionaries define the word 'sudden' both as 'unexpected,' and in terms connoting a temporal idea of abrupt.")

The fact that "sudden" is used in the context of the conjunctive "sudden and accidental" does not change the outcome. Id. at 721-722 ("We do not agree that the term is unambiguous in the context of these policies"); Outboard Marine, at 1220 (rejecting insurers' surplusage argument and holding "insurance policies are filled with words which overlap and complement each other"); accord New Castle, 933 F2d at 1194.[26] The exclusion itself is laden with redundancy.

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26. The insurers' surplusage argument states that because "sudden" is used with the term "accidental," it must mean "abrupt" or it will have no significance. This argument belies the fact that "sudden and accidental" had been a term of art regularly interpreted to mean "unexpected and unintended". (continued...)

Id.[27] For example, the exclusion lists four terms "that convey the same basic idea: "discharge, dispersal, release or escape." Id.[28]

Numerous courts have held that the qualified pollution exclusion is ambiguous and must be interpreted to bar coverage for only expected and intentional pollution. See, e.g., Greenville County v. Ins. Reserve Fund, 443 SE 2d 552, 553 (SC 1994); Just, 456 NW2d 570 (Wis 1990); Outboard Marine, 607 NE2d 1204 (Ill 1992); Queen City Farms, 882 P2d 703 (Wash 1994); Claussen II, 380 SE2d 686 (Ga 1989). These decisions themselves are evidence of ambiguity and warrant the application of M&B's interpretation. See Jones v. Ins. Co. of N. Am., 264 Or 276, 282, 504 P2d 130, 133 (1972) (differing court interpretations of contract language is a strong indication that the language is ambiguous); see also New Castle, 933 F2d at 1197 (the exclusion is ambiguous and the

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26.(...continued)
It also belies the fact that the insurance policies are replete with redundancy. To accept the insurers' "surplusage" argument would only result in improperly rewarding the drafters of the policy who easily could have avoided this issue by using more explicit terms.

27. Insurance policy drafters are no strangers to surplusage and redundancy. See Queen City Farms, 822 P2d at 721 ("We do not agree that the term is unambiguous in the context of these policies . . . "accidental" has independent effect as 'unintended'. Moreover . . . insurance policies often use words which have similar meanings, such as in the qualified pollution exclusion where all the words 'discharge, disposal, release or escape "are all used to describe possible polluting events.")

28. Moreover, a "dispersal" "is the process of spreading from one place to another." Webster's Ninth New Collegiate Dictionary at 365 (1988) (emphasis added). Thus, the term by its very nature must mean gradual. An event such as 'dispersal' cannot be both 'gradual' and 'sudden' in the temporal sense. But an event such as 'dispersal' can be both 'gradual' and 'unexpected'."

fact that so many courts and respected justices have had such varied opinions is compelling evidence of its ambiguity).

It defies logic to hold that the exclusion is not ambiguous when hundreds of courts have grappled over the meaning of the exclusion and dozens, if not hundreds, of different judges have found the exclusion to be ambiguous. Clearly a policyholder's interpretation that has been endorsed by so many learned judges should not be considered unreasonable. Thus, M&B's interpretation is at least reasonable and the exclusion should be construed as applying only to pollution that was expected or intended.[29]

d. Even Insurers have Interpreted the Exclusion to not Preclude Coverage for Unexpected or Unintended Pollution Liabilities

While selling CGLs with the qualified pollution exclusion, many insurance companies understood and interpreted such CGLs to provide coverage for liabilities imposed because of unexpected and unintended pollution. Remarkably, a Travelers Insurance Company vice-president unequivocally has acknowledged that the exclusion is ambiguous and should only apply to expected or intended pollution. See, e.g., January

29. The court's ruling below holds that the exclusion applies to the discharge of a pollutant, and not to resulting property damage, and that a discharge happening during the routine business operations will preclude coverage, even if the property damage was wholly unintended. Because the exclusion was represented as a "clarification" of the "occurrence" definition and it was approved for use on the basis of such representations, it should be construed to apply only to expected or intended property damage. See, e.g., Just, 607 NE2d 1204. In any event, because neither the alleged discharge of pollutants nor the alleged property damage was expected nor intended by M&B, the exclusion is inapplicable regardless of whether the focus is on the discharge or the resulting consequences.

13, 1982 Travelers letter to New York State Insurance Department, Ex. 13 ("There is nothing in the term 'sudden and accidental' which requires the elimination of gradually occurring events from the collective.").

The insurers intent and understanding of the narrow scope of the exclusion also is evidenced through their past marketing of their CGLs. The insurers only represented that their CGLs precluded coverage only for "willful polluters". See CNA advertisement, Ex. 14. Not surprisingly, there are no such advertisements from the same time period representing that gradual pollution or pollution arising out of "routine business practices" is excluded. Moreover, the insurer's underwriters and agents generally never informed policyholders that their CGLs did not provide coverage for gradual pollution or discharges arising out of routine business operations. See, e.g., Transcript ("Tr.") of Jackie O'Connor Deposition ("Dep."), dated May 5, 1994 at 110. Instead, insurance companies often have acknowledged that the exclusion was ambiguous. See Travelers Letter, infra, Ex. 13.

Moreover, the insurers' underwriters understood that the exclusion does not exclude coverage for unexpected and unintended pollution liabilities and that "sudden" does not necessarily have a temporal element.[30] Similarly, the Fidelity

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30. See, e.g., O'Conner Tr., Ex. 15 at 217-18:

Q. (by General Metals Counsel): I'm not asking you to look at whether or not the discharge was accidental. I'm just asking you to determine, to your understanding, is a discharge that lasts 10 minutes sudden?
(continued...)

Casualty & Surety ("FC&S") bulletins used by CGL underwriters to give "clarity to the verbiage that was found in various policies",[31] also explains that the exclusion reinforces the definition of "occurrence" by providing coverage for unexpected and unintended pollution:

> In one important respect, the exclusion simply references 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.

1971 FC&S Bulletin, "Contamination or Pollution Exclusion" Ex. 17 at 230. Finally, claim handlers interpreted the exclusion to only preclude coverage for unexpected and unintended pollution until the insurers' exposure became too extensive. For example, Robert E. Kloth, Jr., a former claims handler for the CNA Insurance Companies testified:

> Q. (by General Metals' Counsel):
>
> Why wasn't coverage here [another earlier environmental coverage case handled by CNA] precluded by the pollution exclusion of CNA policies?
>
> CNA Counsel: Objection to the extent it calls for a legal opinion by this witness

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30.(...continued)

CNA Counsel: Objections

A. The length of the discharge would not be what would determine sudden. It's what caused the discharge, was that sudden in my opinion. That perhaps is -- is a legal thing. I don't believe the duration impacts the fact of sudden.

31. See Tr. of Michael O'Grady, CNA Vice President of underwriting, Dep. at 41, Ex. 16.

A. We didn't see any reason to deny coverage for the Western Processing people who were passive polluters.

Q. What do you mean by passive polluters?

A. People that were active, that did not cause the actual material to go to the soil in the Western Processing site . . .

* * *

Q. Would you consider the time period of the discharge, dispersal, escape or release -

A. I've heard that before.

Q. Temperately [sic] quick?

A. I don't think it made any difference in the position that we took at that time.

Q. Why is that?

A. Because it occurred off their premises. They did not cause the pollution to occur.

Q. So the issue as to discharge, dispersal, escape or release was irrelevant as to Simon?

A. At that point in time it was . . . .

Q. And therefore there was no need to inquire into how quick the discharge, dispersal, escape or release occurred at least as it pertained to your policyholder who was off premises?

A. No, that's correct . . .

Tr. of Kloth Dep., Ex. 18 at 63-65.

4. THE INSURERS SHOULD BE ESTOPPED FROM ASSERTING THEIR PRESENT INTERPRETATION OF THE EXCLUSION

Insurance companies should be estopped from interpreting the exclusion contrary to the representations made in 1970 to insurance regulators and to the public regarding the intent and meaning of the exclusion. See Morton, 629 A2d at 852-54 (the regulatory and public

representations by insurers with regard to the exclusion were "paradigms of understatement," "misleading," "indefensible," "perilously close to deception," "inaccurate," "astonishing," "camouflage," "lacking in candor" and "not straightforward").

Oregon recognizes the doctrine of judicial estoppel. Hampton Tree Farms, Inc. v. Jewett, 320 Or 599, 609, 892 P2d 683, 689 (1995); Caplener v. U.S. National Bank, 317 Or 506, 857 P2d 830 (1993);[32] Under related principles of promissory estoppel and quasi-estoppel, Oregon also bars an insurer from enforcing its policy in a manner that is inconsistent with an oral or written representation made to the insured. See, e.g., Farley v. United Pacific Ins. Co., 269 Or 549, 525 P2d 1003 (1974); see also Restatement §205, infra, (It is a violation of good faith to interpret contract language contrary to the parties' pre-enforcement understanding).

Applying estoppel principles to applicants appearing before state regulators also provides a necessary corollary to Oregon's substantive regulation of the insurance business. Because insurance policies are not negotiated agreements, the state's regulatory scheme would be thwarted if insurers were permitted to misrepresent the purpose and effect of standard form policy amendments to obtain regulatory approval, only to offer more restrictive interpretations of the same language to

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32. The doctrine of judicial estoppel "preclude[s] a party from assuming a position in a judicial proceeding that is inconsistent with the position that the same party has successfully asserted in a different judicial proceeding. Hampton, 320 Or at 609, 892 P2d at 689. The purpose of the doctrine is to prevent "'perversion of judicial machinery'" and to protect against litigants "'playing fast and loose with the courts.'" Id. (citations omitted).

deny coverage for specific claims. Handy v. Beck, 282 Or 653, 581 P2d 68 (1978) (holding that it is against public policy to allow a party to contradict its state filings; parties are entitled to rely on the truthfulness of such filings).

In Morton, the court found that insurers knowingly deceived the public and regulatory agencies concerning the scope of the exclusion if, in fact, it was to have the restrictive effect that insurers now assert. The Morton Court refused to "condone the industry's misrepresentations to regulators in New Jersey and other states concerning the effect of the clause." Id. at 848. Thus, it held that insurers are estopped from asserting that the exclusion precludes coverage for anything but intentional discharges of known pollutants. Id.; see also Jesuit, slip op. at 8.[33]

The Morton decision is supported by the decisions of the numerous courts that have found the exclusion to be ambiguous based, at least in part, upon the insurers' representations to state regulators.[34] As discussed above,

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33. In Jesuit, the Oregon federal district court permitted Jesuit, an amici here, to replead its cause of action in which it sought to estop its insurers from interpreting the exclusion contrary to their representations to the Oregon insurance regulators and to the public concerning the scope of the exclusion, if Jesuit could allege reliance. Jesuit replead estoppel alleging that the regulators were acting on behalf of all the state's policyholders, including Jesuit, and relied on the representations, as evidenced by, among other things, the fact that they did not require a premium reduction in approving use of the exclusion. Jesuit also alleged that it directly relied on the representations as evidenced by the fact that it did not pursue alternative coverage, which it would have done had the insurers represented that the exclusion precluded coverage for gradual pollution or pollution arising out of routine business practices. These same facts apply with equal force with respect to M&B, and thus, M&B's insurers should be estopped from interpreting the exclusion to preclude unexpected and unintended pollution.

34. See, e.g., Joy Technologies, 421 SE2d at 499; Claussen II, 380 SE2d at 689; Just, 425 NW2d at 575.

insurers unequivocally represented that the exclusion was intended only to "clarify," and not to restrict, existing coverage under the "occurrence-based" CGLs in their filings with state regulators and when selling CGLs with the exclusion to policyholders. See, e.g., Just, 456 NW2d at 575.

The insurers cannot plausibly contend that the representations made to the regulators and to the public were oversights. In fact, Aetna, one of the insurers involved in drafting the exclusion, authored an internal memorandum contemporaneously with the regulatory filing of the exclusion, in which Aetna clearly acknowledges that the exclusion had created a "public relations" problem. It also demonstrates that representations that the exclusion merely "clarified" existing coverage were consciously intended to pacify both the regulators and their customers, and that the insurance companies knew they were intentionally deceiving the public and the regulators if they intended to use the exclusion as a further restriction of coverage. The Aetna memorandum states:

> There would seem to be industry public relations involved here, viz.:
>
> * * *
>
> There may be a hue and cry because there will be no reduction in premium, despite the fact that coverage would appear to be cut back; and,
>
> We don't want to concede that there is a cutback in coverage because this is tantamount to admitting that all such cases are now covered, whereas some of them may not be covered.

Aetna Interoffice Memorandum dated May 7, 1970 (Ex. 19) (emphasis added). This memorandum documents a plan to misrepresent the scope and effect of the exclusion and provides compiling evidence supporting the Morton holding.[35]

Because of the compelling evidence of a knowing deception of state regulators and the public, especially with regard to whether the exclusion was a cut-back in coverage, the insurers should be estopped from allowing the exclusion to place any additional restriction on the coverage under the 1966 CGL, which expressly provided coverage for certain unexpected and unintended gradual pollution.

5. The Affidavits Submitted by the Insurance Companies Support the Application of Morton

The insurers are likely to submit certain affidavits, which they assert are reason for rejection of the New Jersey Supreme Court's holding in Morton. The affidavits, however, do not contradict Morton. The affidavits allegedly support the insurers' assertion that state insurance regulators were not misled when the exclusion was submitted for approval in 1970. These affidavits, however, which were not obtained in this action, suffer from various evidentiary problems. Most

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35. See also Continental Casualty Co. v. Diversified Indus., Inc., 884 F Supp 937, 959-961 (ED Pa 1995) (Denying insurers' motion to dismiss the policyholder's "conspiracy to misrepresent facts" cause of action based on the alleged fraudulent introduction of the exclusion). The court ruled that the policyholder had sufficiently alleged that its insurers, as subscribers to ISO, had "fraudulently failed to inform insureds the pollution-exclusion clause had the effect of restricting insurance coverage, despite the fact they had knowledge of such effect." Id. at 960.

importantly, the affidavits do not support the insurers' arguments and, if anything, support Morton.

a. Morton Already Has Considered, and Rejected, the Same Affidavits

Insurance companies assert that the affidavits show that Morton was misguided. The insurers neglect to inform courts that the affidavits also were submitted in Morton on reconsideration, and the New Jersey Supreme Court[36] rejected them.[37] The same affidavits were submitted to the United States Supreme Court when the insurance companies appealed the Morton decision;[38] the Supreme Court denied certiorari.

Nevertheless, the insurers erroneously argue that this Court should accept these affidavits into evidence and reject Morton because the affidavits allegedly refute the premises upon which Morton was based. The Morton court, however, went through an exhaustive review of the regulatory history and found the record more than adequate for its rulings.

b. The Affidavits Are Inadmissible

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36. The Morton court included Justice Clifford, the former head of the New Jersey Department of Insurance and Banking.

37. Amicus curiae Aetna Casualty & Surety Company and other insured submitted many of the same affidavits, including the affidavit of New Jersey insurance regulator Jerome Steen, in support of their respective motions for reconsideration in Morton. See, e.g., Brief in Support of Motion For Reconsideration at 4-9 dated August 30, 1993 (Ex. 20) and Brief of Amicus Curiae Aetna Casualty and Surety Company in Support of Cross-Petitioner's Motion for Reconsideration at 2, et seq. (Ex. 21) filed in Morton Int'l, Inc. v. General Accident Ins. Co. of N. Am., No. 34,341 (NJ).

38. On Petition for a Writ of Certiorari to the Supreme Court of New Jersey, brief submitted by INA and joined by numerous other insurers, dated May 11, 1994, Ins. Co. of N. Am. v. Morton Int'l., Inc., (US), at 11 n.14 (Ex. 22).

The boiler-plate affidavits submitted by the insurers are inadmissible. They are neither relevant nor appropriate evidentiary material. See Oregon Evid R 401, 402.

The Morton Court properly examined the "objectively reasonable expectations" of the regulators -- and by extension policyholders -- concerning the exclusion's effect. It held that, based on its analysis of the "objectively reasonable expectations" of regulators and policyholders, it was not appropriate to analyze the subjective understandings of the many regulators across the country who may have had some involvement in reviewing the exclusion's filing. Thus, the affidavits, which merely hypothesize about certain regulators' subjective understanding of the exclusion, over twenty-five years after the filing, are not persuasive, especially in light of these affiants' lack of personal knowledge, inability to recall events, and credibility problems.

The affidavits reveal serious evidentiary deficiencies mandating that they be stricken. The majority of the affiants state that their testimony is not based on the affiant's actual recollection of the circumstances surrounding the filing of the exclusion.[39] In fact, the insurers likely will

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39. See, e.g., the affidavits of A. John Smither, a former regulator with the Pennsylvania Insurance Department, dated Oct. 25, 1994, at ¶ 3; John J. Sheehy, a former Director in the Pennsylvania Insurance Department, dated Jan. 31, 1994, at ¶ 2; Oscar H. Ritz, the former Commissioner of Insurance for the Indiana State Insurance Department, dated Sept. 16, 1993 at ¶ 2; and John N. Kane, a former Claims Examiner in the Connecticut Insurance Department, dated Mar. 7, 1994, at ¶ 2. Similarly, the affidavits submitted by Jerome J. McAvoy, Jr., a former examiner with the Pennsylvania Insurance Department, Jan. 21, 1995, at ¶¶ 1, 3, and Richard Smock, a former Deputy Commissioner with the Indiana Department of Insurance, dated Oct. 3, 1994, at ¶¶ 1, 8, (continued...)

fail to submit any affidavit from any Oregon regulator that had personal knowledge of the exclusion's filing.

These affidavits fail to satisfy the most basic evidentiary predicate that a witness have personal knowledge of the matters to which he is testifying. See, e.g., Oregon Evid R 401. Many of the affidavits contain impermissible hearsay. In fact, an overwhelming majority of the affiants either were not personally involved in considering the exclusion or could not recollect the events in 1970. Thus, these affidavits should be disregarded, if not stricken.[40]

Many of the other affiants have demonstrated that they were incompetent to aver to the meaning of the 1970 filings. For example, the insurers likely will submit the affidavit of Richard W. Simpson, formerly of the Pennsylvania Insurance Department.[41] Mr. Simpson claims in his affidavit, dated Oct. 22, 1993, that he recalls the filing. At his deposition, it was clear that Mr. Simpson does not accurately recall, and was thoroughly confused about, what an "occurrence" is and, thus, was in no position to comment competently on whether the exclusion restricts occurrence-based coverage -- in fact, Mr.

39.(...continued)
reveal that they were not even employed by their respective departments in 1970 and, therefore, admit that they have no personal knowledge of the 1970 filings.

40. Other affiants have not established any basis for their assertions, and their affidavits must be stricken on this ground. See Oregon Evid R 401, 402.

41. Mr. Simpson, like many of the other affiants, has worked as an insurance agent and an insurance company executive, thereby raising a compelling bias issue. Id. at 59. At the time of Mr. Simpson's affidavit, he was actively soliciting insurance companies to invest in a company he owns. Id. at 63-65.

Simpson's understanding of the meaning of "occurrence" is wrong. Tr. of Simpson Dep. at 80-81, Ex. 23.[42]

In addition, for every affiant who had no personal involvement with the filing allegedly supporting the insurers' position, there likely is a regulator with personal knowledge that supports Morton. For example, Mr. Simpson's affidavit is flatly contradicted by another former employee of the Pennsylvania Insurance Department, Richard J. Shultz, Jr., who recalls that the exclusion was viewed as a mere clarification of coverage. See Ex. 24. In addition, David Kuizenga, former secretary of the MIRB, has testified under oath that the state filings present the exclusion as only a "clarification" of coverage and not a change in coverage. Ex. 8.[43]

The affidavits also are contradictory and confusing, lending credence to the fact that many of the affiants were and continue to be misled. For example, many affiants say they understood the exclusion to both cut-back coverage and to

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42. Compare Simpson testimony at 93-94, Ex. 23 (an occurrence must involve a "boom event", with Morton, 629 A2d at 836 (the definition of an "occurrence" in the policies made clear that an "occurrence" may consist of "continuous or repeated exposure to conditions"). Another example of a bogus affidavit is the affidavit of John R. Blaine, the former Insurance Commissioner of Idaho. In his affidavit, dated Sept. 1, 1993, at ¶6, he states that he recalls the pollution exclusion filing, that he knew it excluded coverage, and that there was "no mystery in the language used in the pollution exclusion and the Explanation." When deposed about his affidavit, however, Mr. Blaine conceded that he does not recall anything about the filing; he probably was not involved with the approval of the filing; and he was "stumped" by questions regarding the very subject matter of certain statements made in "his" affidavit. Ex. 29 at 31, 80, 84, 181. Thus, Mr. Blaine's affidavit is completely unreliable and of no evidentiary value.

43. Mr. Kuizenga also notes that the insurers' use of the term "clarification" was not inadvertent and that state filings were either for "clarification" purposes or to "change" the scope of coverage. If the exclusion was to "change" coverage, the insurers would not have used the term "clarification".

clarify coverage. See, e.g., Farnam Aff., dated Sept. 24, 1993, at ¶¶ 4, 5. Beyond being contradictory, because the affiants uniformly were misled on the scope of coverage before the introduction of the exclusion, and thus, they are wholly unable to gauge the scope of the "cut-back."

F. Regardless of How the Insurance Policies are Interpreted, the Court of Appeals Erred in Ruling That There Were No Genuine Issues of Material Fact That Precluded Summary Judgment

In ruling on summary judgment, the court was required to accept as true M&B's evidence that its liabilities arose out of releases that happened quickly (in a matter of moments) and were accidental. The court disregarded this fundamental rule and concluded as a matter of law that these abrupt and unintended spills were not "accidental" because they resulted from "routine business practices." Regardless what meaning is given to the "caused by accident" and "sudden and accidental" language, M&B's evidence has raised genuine issues of material fact precluding summary judgment. This ruling, if left undisturbed, will pose great problems for Oregon policyholders seeking to obtain coverage for pollution liabilities.

The ruling below also inexcusably conflicts with the decision in North Pac. Ins. Co. v. United Chrome Prods. Inc., 122 Or App 77, 857 P2d 158 (1993)("United Chrome"), where summary judgment under similar facts was reversed.

As here, the insurers in United Chrome argued that the policyholder "intentionally discharged materials over a period of years through sloppy and negligent business operations, . .

. and gradual leakage from the dry well." Id. at 83, 857 P2d at 161 (emphasis added). The United Chrome Court made no reference at all to a "business practices" test, and instead properly reversed summary judgment and remanded for trial whether the incidents were "sudden and accidental."

The decision in United Chrome and of the court in MRB cannot be reconciled. Each case involves evidence of unintended spills from storage tanks that resulted in groundwater pollution and in each case, the court was asked to determine whether the pollution was "sudden and accidental." Notwithstanding the striking factual similarity between the two cases, a different panel of the Court of Appeals made no reference to its earlier decision in United Chrome and reached a conflicting result. The United Chrome Court was correct.

The court's ruling below on spills of hazardous substances is equivalent to concluding that traffic collisions involving a bus cannot be considered "accidents" for purposes of the bus company's CGL because it is foreseeable that such collisions will occur routinely in the "ordinary business" of operating a bus company. Just as spills inevitably will occur at industrial facilities, collisions inevitably will occur in the "ordinary business" of operating fleets of buses. Such fact should not render bus collisions any less "accidental" for insurance purposes. Whether they ordinarily and routinely result from the business practice of operating vehicles -- and

like chemical spills at industrial facilities, they inevitably do -- is simply not relevant to whether they are "accidental."

6. The Insurers Did Not Establish that the Exclusion Precludes All Coverage

Even under the insurers' misguided interpretation of the exclusion's scope, M&B still was entitled to insurance coverage. Even courts employing a restrictive interpretation of "sudden and accidental" have held that, just because a leak continues for a significant period of time, it does not mean that it was not "sudden and accidental." See, e.g., Petr-All Petroleum Corp. v. Firemens Fund Ins. Co., 593 NYS2d 693, 695 (NY App Div 1993)("Petr-All"). Thus, a spill from a ruptured pipe or overflow from a storage tank can be a "sudden and accidental" discharge precluding application of the exclusion. Id. In Petr-All, for example, the court concluded that "an accidental and unexpected leak from a subsurface pipe or tank that continued undetected for a period of time, [could be] an event both sudden and accidental within the meaning of [the insurer's] policy." Id. at 695 (citations omitted).

Thus, the insurers had the duty to indemnify M&B for all damages arising out of unexpected and unintended polluting events, or at least damages arising out of unexpected, unintended and abrupt polluting events. The insurers did not establish that the pollution for which M&B has been liable was caused by expected, intended or even gradual polluting events.

The record reflects a substantial release of hazardous material that qualifies as "sudden and accidental" even under

the insurers' own interpretation of the exclusion. The evidence shows that this substantial overflow, at a prime source of chemical contamination, was "sudden," "accidental" and abrupt. Virtually identical overflows have been held by different panels of the Court of Appeals to create at least a fact question as to their being "sudden and accidental". See, United Chrome, 122 Or App at 84, 857 P2d at 161.

In M&B's case, at a minimum, a fact question exists as to whether the spills and other releases were "sudden and accidental." Thus, summary judgment should be reversed.

CONCLUSION

For the following reasons, amici respectfully request that this Court rule that the qualified pollution exclusion does not preclude liability insurance coverage for liabilities imposed upon policyholders for unexpected or unintended property damage and reverse the Court of Appeals' decision affirming summary judgment in favor of respondents.

RESPECTFULLY SUBMITTED this 6th day of February, 1996.

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