IN THE SUPREME COURT OF PENNSYLVANIA

No. 0032 W.D. Appeal Docket 2000

SUNBEAM CORPORATION, MONTEY CORPORATION, TEMRAC COMPANY, INC., SUNBEAM PRODUCTS, INC., CHEMETRON INVESTMENTS, INC., ALLEGHENY INTERNATIONAL CANADA, LTD., ELISKIM, INC., AND WOODSHAFT, INC.,

Appellants,

v.

LIBERTY MUTUAL INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, AND PENNSYLVANIA MANUFACTURERS ASSOCIATION INSURANCE COMPANY,

Appellees.

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS

Appeal from Order of the Superior Court at No. 1122 PGH 1997 on 10/26/99, Affirming the Order of the Court of Common Pleas, Allegheny County, at No. GD 95-13947 on 5/23/97, AND Appeal from Order of Court of Common Pleas as per Order of Supreme Court allowing such appeal, at No. 0806WAL1999 on 6/13/2000.

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STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders ("United Policyholders" or "*Amicus Curiae*") is incorporated as a not-for-profit educational organization and was granted tax exempt status under §501(c)(3) of the Internal Revenue Code. United Policyholders' mission is to educate the public on insurance issues and consumer rights thereto, and to assist policyholders to secure prompt, fair, insurance settlements. United Policyholders provides educational materials, provides speakers at community and government forums, organizes meetings in disaster areas, and acts as a clearing house for information on insurance issues.

United Policyholders also provides assistance in large catastrophes. After a disastrous firestorm that destroyed over three thousand structures in Oakland and Berkeley Hills in 1991, United Policyholders sponsored meetings, workshops, and seminars for the victims, and worked with local officials, insurers and relief agencies to facilitate claim settlements. United Policyholders has repeated this process in Florida for victims of Hurricane Andrew, in Texas, for victims of the Northridge Earthquake, and in Northern California after a wildfire.

United Policyholders also files *amicus curiae* briefs in insurance coverage cases of public importance. Filing *amicus curiae* briefs is a small, albeit important, part of United Policyholders' activities. United Policyholders' *amicus curiae* briefs have been accepted by courts throughout the country. *See e.g., Humana, Inc. v. Forsyth*, 525 U.S. 299, 313 (1999) (citing to pp. 19-23 of Brief for United Policyholders as *Amicus Curiae*); *Western Alliance Ins Co. v. Gill*, 686 N.W. 2d 997 (Mass. 1997). [1] United Policyholders' activities are limited only to

[1] *See also, Fleming v. United Services Auto. Assoc.*, 988 P.2d 378 (Or. 1999) *modified*. 996 P.2d 501 (Or. 2000); *Vandenberg v Superior Court*, 88 Cal. Rptr. 2d 366 (Cal. 1999); *Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W. 2d 429 (Wis. 1999); *United States v. Brennan*, 183 F.3d 139 (2d Cir. 1999); *Board of Educ. of Township High School District No. 211 v International Ins. Co.*, 720 N.E.2d 622 (Ill.

the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae has a vital interest in seeing that standard form comprehensive general ("CGL) liability insurance policies sold to countless policyholders, in Pennsylvania and elsewhere, are interpreted properly and consistently by insurance companies and the courts. *Amicus curiae* has an interest in seeing that the insurance industry is not allowed to deceive state insurance regulators or courts, nor to manipulate the insurance regulatory and judicial systems by taking judicial positions that are contrary to the industry's regulatory positions asserted before state insurance regulators.

Ct. App. 1999); *Ducote v. Koch Pipeline Co., L.P.*, 730 So.2d 432 (La. 1999), *Carter-Wallace, Inc. v. Admiral Ins. Co., appeal denied*, 729 N.E.2d 494 (Ill. 2000) 712 A.2d 1116 (N.J. 1998); *National Ins Co v. George*, 953 S.W.2d 946 (Ky. 1997).

STATEMENT OF JURISDICTION

Amicus curiae hereby incorporates the Appellants' Statement of Jurisdiction.

ORDER IN QUESTION

A copy of the Opinion and Order in question is attached to this brief as Exhibit A.

QUESTIONS FOR REVIEW

Amicus Curiae presents and will address the following questions for review:

1. Whether insurers should be permitted to violate insurance regulatory laws by enforcing a policy exclusion in a manner different than was represented to gain approval for the exclusion's use.

Answer by the Superior Court below: Not addressed.
Suggested Answer: Yes.

2. Whether, when interpreting the phrase "sudden and accidental" in an insurance contract, the court should consider the surrounding circumstances, including evidence that the wording has acquired an accepted meaning through usage in the trade, to determine whether there is an ambiguity in the contract wording.

Answer by the Superior Court below: Yes.
Suggested Answer: Yes.

3. Whether the phrase "sudden and accidental" in a standardized pollution exclusion should be interpreted to require that the release of pollutants be both "abrupt" and "last only a short time" when many courts have disagreed with this interpretation, it violates several canons of contract interpretation, and it conflicts with the meaning previously given to the phrase through usage in the trade and in representations submitted to obtain regulatory approval to use the exclusion in Pennsylvania.

Answered by the Superior Court below: Yes.
Suggested Answer: No.

SUPPLEMENTAL HISTORY

Amicus curiae filed its brief in Superior Court in this matter on September 22, 1997. On October 24, 1997, Appellees Liberty Mutual Insurance Company, Pennsylvania Manufacturers' Association Insurance Company, and First State Insurance Company filed a Motion to Strike Exhibits to Brief of *Amicus Curiae* United Policyholders. Defendants-Appellees' motion sought to strike from *amicus curiae*'s brief an affidavit of Richard J. Schultz, Jr., a former Property and Casualty Rate and Policy Examiner with the Pennsylvania Department of Insurance and an official that worked on the approval of the sudden and accidental pollution exclusion at issue herein, as well as the exhibits attached to the Schultz Affidavit (attached hereto as Exhibit C).

The Court granted the Appellees' Motion and United Policyholders filed a Revised Brief of *Amicus Curiae* on January 28, 1998 ("1998 Revised Brief"). When the Superior Court decided to grant rehearing *en banc*, it gave all parties the option of relying on their prior brief in the Superior Court or of filing a substituted brief. United Policyholders' filed a substituted brief with this Court. *See*, Substituted Brief on Rehearing of *Amicus Curiae*, United Policyholders (dated Nov. 20, 1998). In a footnote, United Policyholders made reference to the fact that it had attempted to file the affidavit of Richard J. Schultz, Jr., a former Property and Casualty Rate and Policy Examiner with the Pennsylvania Department of Insurance and an official that worked on the approval of the sudden and accidental pollution exclusion at issue herein, as well as the exhibits attached to the Schultz Affidavit. *Id.* at 12 n.2.

Appellees again moved to have the references to the Schultz Affidavit and its exhibits in the 1998 Substituted Brief stricken and this Court granted the motion and directed United Policyholders to refile. Appellees filed no objection to the Guiney Memorandum. United Policyholders refiled its brief, deleting all references to the Schultz Affidavit and Exhibits. Subsequent to this an insurance industry trade organization, the Insurance Environmental Litigation Association, filed a brief which cited extensively to the affidavits of a number of former insurance regulators. Although most of these regulators were not personally involved in the regulatory approval of the "sudden and accidental" pollution exclusion, these regulator affidavits contained opinions on what the regulators would have understood at the time The regulator affidavits discussed in the IELA brief were appended as exhibits to a law review article written by insurance industry advocates.

Because the issue of whether this Court should consider regulatory history is before this Court, United Policyholders has attached a copy of the Schultz affidavit hereto as Exhibit C United Policyholders believes that this affidavit provides credible evidence that Sunbeam's fraud, misrepresentation, and estoppel counts have factual support.[2]

[2] Mr. Schultz was a Property and Casualty Rate and Policy Examiner for the Pennsylvania Insurance Department when the Polluter's Exclusion was filed and approved in 1970 and was personally involved in the Insurance Department's approval of the exclusion. *See* Schultz at ¶3. Schultz was "responsible for reviewing requests made by individual insurance companies, the Mutual Insurance Rating Bureau ("MIRB") and the Insurance Rating Board ("IRB") on behalf of their member and subscriber companies to revise their general liability insurance covering bodily injury and property damage by adding a contamination and pollution endorsement." *Id* at 6.

The Insurance Department staff considered and relied on the representations made in the Explanatory Filing Memorandum submitted by the MIRB and IRB. *Id* at 11. In the Explanatory Filing Memorandum, "the MIRB and IRB represented and the Insurance Department understood the contamination and pollution endorsement to be merely a clarification and continuation of the coverage provided by the "occurrence" clause of their general liability policies and the "occurrence" clause's exclusion of expected or intended losses. In fact at staff meetings to discuss pending filings it was

SUMMARY OF ARGUMENT

"Before the addition of the so-called 'pollution exclusion' to 'occurrence'- based * * * policies * * * it was clear that the policies provided coverage for gradually occurring environmental contamination." *Alabama Plating Co. v U.S Fid & Guar. Co.*, 690 So.2d 331, 335 (Ala. 1996). In 1970, the insurance industry drafted and submitted the sudden and accidental pollution exclusion, along with a standard-form regulatory explanatory memorandum to state insurance departments, including the Pennsylvania Department of Insurance. *See* Am. Compl. ¶46 (R. 714a) (quoting from IRB Memorandum to George F. Reed, Pennsylvania Commissioner of Insurance (May 8, 1970)) ("Explanatory Filing Memorandum"); *see also New Castle County v. Hartford Accident and Indemnity Co.*, 933 F.2d 1162, 1198 (3d Cir. 1991), *cert. denied*, 507 U.S. 1030 (1993).

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discussed and understood that the contamination an pollution endorsement was only a clarification and any new filing using the identical language would also be approved as a clarification." *Id* at ¶12.

Because of the MIRB and IRB representations the Insurance Department understood the endorsement to be a clarification and not a fundamental change in coverage, otherwise required review and approval from the actuarial division was not sought by the MIRB or IRB nor asked for by the Insurance Department. *Id* at ¶13. Schultz summed up his affidavit by pointing out that if, as is asserted by the insurance company herein, the exclusion was intended by the IRB or the MIRB to exclude coverage that was provided under the "occurrence" CGL policy, then the Insurance Department was misled by the IRB and MIRB:

> [i]f any member of the IRB or MIRB is asserting that the language of the contamination and pollution endorsement was originally intended or contains language which goes beyond a clarification and continuation of coverage provided by the occurrence clause of the general liability policies and its exclusion of expected or intended losses, then I believe they misled the Insurance Department as to the nature and effect of the contamination and pollution endorsement.

Schultz Aff. at ¶13.

The language of the sudden and accidental exclusion purported to exclude insurance coverage for pollution damages that were not "sudden and accidental". In 1970, the "sudden and accidental" clause was a standard insurance industry term of art. "Sudden and accidental" had long been used in "boiler and machinery" insurance policies where it had the specific meaning of "unexpected and unintended". Contemporary insurance treatises stated that "sudden" was not synonymous with "instantaneous."

Elements of the insurance industry that were involved in the drafting and regulatory filing of the exclusion downplayed both the existing scope of insurance coverage under the standard CGL insurance policy, as well as any additional preclusive effect that the sudden and accidental exclusion might have on that coverage. This was done in order to ensure that the exclusion would be approved by the regulators without a correlative reduction in premium rates.

United Policyholders asserts that a recent decision of this Court prevents insurance companies from violating insurance regulatory laws by attempting to judicially enforce an insurance policy provision in a manner different than was represented to gain regulatory approval for the provision's use. *See, Trowbridge v. Scranton Artificial Limb Co.*, 560 Pa. 640, 644, 747 A.2d 862, 864 (2000).

Secondly, United Policyholders argues that well-established precedent allows the Court to consider surrounding circumstances and trade usage to determine the ambiguity and meaning of insurance policy meaning.

Finally, United Policyholders argues that the phrase "sudden and accidental" in the standard pollution exclusion should not be interpreted to require that the releases or damage

be "abrupt" and "last only a short time." as this interpretation conflicts with the drafting, marketing, and regulatory history, conflicts with the phrase's well-established meaning of "unexpected and unintended" and is contradictory to the insurance industry's representations to the Pennsylvania Insurance Department and other state insurance departments.

ARGUMENT

I. INSURANCE COMPANIES SHOULD NOT BE PERMITTED TO VIOLATE INSURANCE REGULATORY LAW BY ENFORCING A POLICY EXCLUSION IN A MANNER DIFFERENT THAN WAS REPRESENTED TO GAIN APPROVAL FOR THE EXCLUSIONS USE.

A. Under the Pennsylvania Doctrine of Judicial Estoppel, A Litigant Is Precluded From Taking Positions That Are Inconsistent With Those Taken Before an Administrative Body.

This Court recently answered the first question presented. That questions was whether insurance companies should be permitted to enforce their insurance policy provision in a manner different than was represented to the State Insurance Department in order to gain approval for the provisions. This Court held that the doctrine of judicial estoppel precludes a party from taking a position contrary to a position taken in a prior, unrelated administrative proceeding. *Trowbridge*, 560 Pa. at 644, 747 A.2d at 864.

"As a general rule, a party to an action is estopped from assuming a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained." *Trowbridge*, 560 Pa. at 644, 747 A.2d at 864 (citing *Associated Hospital Service of Phila. v. Pustilnik*, 497 Pa. 221, 439 A.2d 1149, 1151 (1981)). In *Trowbridge*, the issue was whether a litigant's representations in her successful application for Social Security Administration ("SSA") disability benefits, could judicially estop her from making contrary representations in a subsequent unrelated judicial proceeding brought under the Pennsylvania Human Relations Act ("PHRA"). Both the trial court and the Superior Court had held that her prior, inconsistent assertions in the unrelated administrative proceeding judicially estopped her from taking an inconsistent position before Pennsylvania courts. *See, Trowbridge*, 560 Pa at 644, 747 A.2d at 864. This Court reversed and remanded on the factual issue of whether the statements were in fact inconsistent, this Court held that in order to defeat the

application of judicial estoppel, the party "must sufficiently explain how the claims made in [the successful administrative] proceedings are consistent with [the] claims [in the unrelated judicial proceeding]." *Id.*, 560 Pa. at 647, 747 A.2d at 866.

As this Court noted, "[f]ederal courts have long applied this principle where litigants play 'fast and loose' with the courts by switching legal positions to suit their own ends.'" *Trowbridge*, 560 Pa. at 644-45, 747 A.2d at 865. In *Scarano v. Central Railroad Co.*, 203 F.2d 510, 513 (3d Cir. 1953), a litigant was judicially estopped from contradicting position taken before regulatory agency because "use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate." Judicial estoppel, when invoked on the basis of prior statements to government regulatory bodies, is sometimes referred to as regulatory estoppel. Judicial or regulatory estoppel principles are designed "to protect the essential integrity of the judicial process" by "prevent[ing] the party from playing 'fast and loose' with the courts." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). Judicial estoppel prevents inconsistent judicial results that could weaken public confidence in the judiciary; prevents intentional inconsistency by parties seeking to manipulate the judicial process; and prevents unnecessary litigation that diminishes the efficiency of the judicial system.[3] These principles apply equally to administrative proceedings such as the Insurance Commissioner's regulatory review and approval of insurance policy language.[4]

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[3] *See Edwards v. Aetna Life Ins. Co* , 690 F.2d 595, 598-99 (6th Cir. 1982); *USLIFE Corp. v. United States Life Ins. Co.*, 560 F. Supp. 1302, 1304-05 (N.D. Tex. 1983).

[4] Steuber, *The Doctrines of Judicial and Collateral-Estoppel: Virginia Insurance Commissioner*, 2 Envtl. Claims J. 317, 328 (1990); *see generally*, Comment, *Precluding Inconsistent-Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. Rev. 1244 (1986).

The primary purpose of the doctrine is not to protect litigants, but rather to protect the integrity of the judiciary. *See Brandon v. Interfirst Corp.*, 858 F.2d 266. 268 (5th Cir.1988). Because judicial estoppel is designed to protect the courts from "chameleonic litigants" and not necessarily to protect the party invoking the doctrine, the party invoking the doctrine is not required to show prejudice. *Levinson v. United States*, 969 F.2d 260, 264-65 (7th Cir.), *cert. denied*, 506 U.S. 989.

For over 120 years federal courts have invoked judicial estoppel to prevent litigants from seeking to enforce a scope of patent that is broader than the litigant originally represented to the patent regulators:

> [A]n owner of a patent is estopped or prevented from taking positions which are inconsistent with positions that he took in the Patent Office in order to get the patent in the first place. This is called the doctrine of prosecution history estoppel. The doctrine of prosecution history estoppel is merely designed to preclude a patent owner from obtaining a claim construction [interpretation] that would resurrect subject matter surrendered during the prosecution of the patent before the Patent Office, as reflected in the file history.

Ziggity Sys., Inc. v. Val Watering Sys., 769 F. Supp. 752, 790 (E.D. Pa. 1990) (citation omitted). Federal courts have recognized that a party should not be able to obtain through litigation what it gave up or eschewed during the regulatory process. *Zenith Labs., Inc. v. Bristol-Myers Squibb Co.*, 19 F.3d 1418, 1424 (Fed. Cir.), *cert. denied*, 513 U.S. 995 (1994). This axiomatic principal of regulatory integrity is equally valid to insurance regulation. *See, e.g., Morton International, Inc. v. General Acc. Ins. Co.*, 629 A.2d 831, 847-857, 870-880 (N.J. 1991), *cert. denied*, 512 U.S. 1245 (1994).

Similar to this Court's holding in *Trowbridge*, numerous courts have also used judicial estoppel to prevent a party that claimed total disability before the Social Security Administration ("SSA") from asserting an inconsistent positions while seeking to judicially enforce rights to employment under the Americans with Disabilities Act.[5] Judicial estoppel has been applied in a wide variety of regulatory contexts. *See, e.g., Callanan Road Improvement Co v. United States, 345 U.S. 507, 513 (1953)* (judicial estoppel will be applied to prevent party from contradicting successful assertions made during administrative proceedings); *Zapata Gulf Marine Corp. v. Puerto Rico Maritime Shipping Auth.*, 731 F. Supp. 747, 749 (E.D. La. 1990) (inconsistent position taken before Interstate Commerce Commission); *Department of Transp. v Coe*, 445 N.E.2d 506, 508 (Ill. App. Ct. 1983) (representations during worker's compensation claim); *Long Island Lighting Co. v Transamerica Delaval*, 646 F. Supp. 1442, 1447 (S.D.N.Y 1986) (rate representations made before the Public Service Commission); *Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2d Cir. 1963) (position taken at a hearing before the N.J. Department of Labor).

When a party attempts to take a judicial position that is contrary to representations made before an administrative body, it is irrelevant whether the party misled the court or the administrative agency. The integrity of both systems require the application of estoppel:

> It is the sanctity of the oath and the integrity of the process that lies at the heart of judicial estoppel and "*the truth is no less important to an administrative body . . than it is to a court of law.*"

Johnson v. Hines Nurseries, Inc., 950 F. Supp. 175, 178 (N.D. Tex. 1996) (italics added) (quoting *Rissetto*, 94 F.3d 597); *Department of Transp.*, 445 N.E.2d at 508.

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[5] *See, e.g., McNemar v. The Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997); *Blanton v. Inco Alloys Int'l, Inc.*, 108 F.3d 104, 108-09 (6th Cir.), *supplemented & rev'd in*

629 A.2d at 852-53 (emphasis in original, bolding added).

The Supreme Court found that, compared against the insurance industry's current interpretation, the representation in the Explanatory Filing Memorandum that coverage was continued for an "accident" was "camouflage" and that "the conclusion is virtually inescapable that the [Explanatory] memorandum's lack of clarity was deliberate." *Id.* 629 A.2d at 853. "Supplemental explanations submitted by the IRB to state regulatory agencies were similarly lacking in candor." *Id.*

Because the insurance industry misrepresented the effect of the sudden and accidental exclusion to the New Jersey Department of Insurance, among others, *and thereby avoided either disapproval of the exclusion or a reduction of rates*, the New Jersey Supreme Court applied judicial estoppel:

> Although we have not heretofore applied the estoppel doctrine in a regulatory context, its application to these circumstances is appropriate and compelling. A basic role of the Commissioner of Insurance is "to protect the interests of policy holders" and to assure that "insurance companies provide reasonable, equitable, and fair treatment to the insuring public." In misrepresenting the effect of the [sudden and accidental] pollution-exclusion clause to the Department of Insurance, the [Insurance Rating Board, an ISO predecessor] misled the state's insurance regulatory authority in its review of the clause, and avoided disapproval of the proposed endorsement as well as a reduction in rates. As a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB, its designated agent, in presenting the pollution-exclusion clause to state regulators.

629 A.2d at 874 (citation omitted). The Supreme Court refused to enforce the exclusion in the manner urged by the insurance companies, including appellees herein, Liberty Mutual, First State, and Lexington, as well as the *amici* IELA insurance companies, as "[t]o do so would contravene ... public policy requiring regulatory approval of standard industry-wide policy forms

to assure fairness in rates and in policy content, and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause." 629 A.2d at 848.

G. Other High Courts Have Found "Dishonesty" In The Insurance Industry's Pollution Exclusion Regulatory Filings.

The *Morton International* court's finding of insurance industry deception in the regulatory and judicial processes was neither an aberration nor a fluke. A significant number of state supreme courts have found the Explanatory Filing Memorandum to have been deceptive or misleading when compared to the current assertion that the exclusion clause precludes coverage for all gradual discharges. *See e.g.*, *Textron*, 754 A.2d at 753 (refusing to interpret the sudden and accidental exclusion to bar insurance coverage for gradual pollution damage because "it is reasonable to hold insurers to the representations they made to regulators when seeking approval for a pollution-exclusion clause); *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. and Sur. Co.*, 89 F.3d 976, 991 (3d. Cir.), *cert. denied sub nom , Jackson v. Chemical Leaman Tank Lines*, 519 U.s. 994 (1996) (insurance companies with pollution exclusion clauses should not benefit from the misleading explanation given to state insurance regulators); *Morton International*, 629 A.2d at 852-853 (unanimous Supreme Court describes the Explanatory Filing Memorandum as "grossly misleading," "simply untrue," "not only astonishing but inaccurate and misleading," "even more misleading," "indefensible," and "camouflage"); *Claussen v. Aetna Cas. & Sur. Co.*, 676 F. Supp. 1571, 1573 (S.D. Ga. 1987) (finding "dishonesty" in the Explanatory Filing Memorandum) *rev'd on other grounds*, 888 F.2d 747 (11th Cir. 1989); *Claussen v. Aetna Cas & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989); *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493, 498-500 (W. Va. 1992) (applying estoppel against Liberty Mutual; finding that in the Explanatory Filing "the insurance group representing Liberty Mutual unambiguously and

affirmatively represented. . . . that the exclusion did not alter coverage"); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 575 (Wis.), *modified*, 157 Wis.2d 507 (1990) ("representations by the insurance industry confirm that. . . the exclusionary clause clarified but did not reduce the scope of coverage. This expressed intent was also the interpretation relied upon by insurance regulators. . . .").

In *Joy Technologies*, the West Virginia Supreme Court reviewed the Explanatory Filing and concluded that "the insurance industry thus represented to the State of West Virginia, acting through the West Virginia Commissioner of Insurance, that the exclusion which is at issue in the present case merely clarified the preexisting 'occurrence' clause." 421 S.E.2d at 499.[22] The West Virginia Supreme Court applied estoppel against defendant Liberty Mutual. By attempting to rely on the erroneous interpretation of the sudden and accidental exclusion in *Lower Paxton Township* (Liberty Mutual argued that Pennsylvania law applied), Liberty Mutual was acting in a manner that was inconsistent with its prior regulatory representations:

> [T]his Court believes that Liberty Mutual Insurance Company, in studied, affirmative and official communications with a regulatory authority ... took the position that the exclusion in question in the present case would have a meaning and effect different from that attributed to it by the State of Pennsylvania [courts]. In view of this, if this Court held that Pennsylvania law applied to the questions in issue, it would allow Liberty Mutual Insurance Company to take a position, and act in a manner, inconsistent with Liberty Mutual's studied, unambiguous, official and affirmative representations. Such, in this Court's view, would be inconsistent with, and contrary to, the public policy of this State.

Joy Technologies, 421 S.E.2d at 497.

> [I]n view of the fact that in the present case the insurance group representing Liberty Mutual unambiguously and officially

[22] The West Virginia Circuit Court below had held that Pennsylvania law applied and that coverage for the policyholder's gradual release was excluded under the exclusion, as interpreted *in Lower Paxton Township*. *See* 421 S.E.2d at 494-496.

> represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage under the policies involved, ... this Court must conclude that the policies ... covered pollution damage, even if it resulted over a period of time and was gradual, so long as it was not expected or intended.

Id. at 499-500.

The Court was, of course, referring to the Explanatory Filing which was also submitted to West Virginia by both the MIRB and IRB.

If the insurance companies' current position is accurate — that the sudden and accidental exclusion represents a reduction of the insurance coverage otherwise available under the "occurrence" CGL insurance policy for gradual pollution damage — then, as many courts have found, the Explanatory Filing Memorandum was misleading and the Insurance Department was misled. If, on the other hand, the Explanatory Filing Memorandum was correct, then the insurance company defendants are attempting to mislead this Court. *See generally*, Prof. A. Timmer, *Are They Lying Now or Were They Lying Then? The Insurance Industry's Ambiguous Pollution Exclusion: . . . .* 46 Baylor L. Rev. 355 (1994) ("*Are They Lying?*"); *see also, Morton International*, 629 A.2d at 852 (determining the accuracy of the 1970 Explanatory Filing Memorandum by comparing it with the industry's *current* litigation position that "sudden" means "abrupt").

Attempting to get the New Jersey Supreme Court to reverse itself on rehearing, attorneys for Aetna (now Travelers) obtained a number of former state insurance department employees from across the country. After the New Jersey Supreme Court denied rehearing, the attorneys published an article which attached the Supreme Court's utilizing these affidavits. See, Zampino, Cavo, & Harwood, *Morton International: Fiction of Regulatory Estoppel*, 24 Seton

Hall L. Rev. 847-920 (1993) ("*Regulatory Estoppel*") (attaching state insurance regulator affidavits). Regulatory Estoppel makes reference to 45 affidavits, of which only 20 of these affidavits appear in the article's appendix, the rest "are on file with the authors." *Id* at 878-79. It is fair to assume that the authors of *Regulatory Estoppel* selected the twenty strongest, pro-insurance company affidavits for publication. These published affidavits are revealing. Of the 20, a full 13 (sixty-five percent) either had no actual recollection of the events or were not involved in the filing.[23] It is hard to believe that the insurance industry could find so few individuals from the fifty states with actual recollection and one is left to wonder how many recollections were left unrecorded because they were unfavorable to the insurance industry's position. One is also left to wonder how many of the affiants left government to work in the insurance industry. The affidavits give absolutely no clue as to where these individuals work or worked nor where they might be located.

Despite their surficial claims otherwise, the remainder of the affiants make statements that demonstrate that they were misled, most particularly by IRB's specious claim that most pollution damages were already excluded by the definition of "occurrence." A significant number of the twenty were obviously misled into believing that the IRB's false claim

[23] Larry K. Bryan, 24 Seton Hall L.Rev. at 883, ¶2 ("very limited recollection"); Stanley C. DuRose, Jr., *Id.* at 885, ¶8 (I have no clear recollections...."); Louis N. Hannes. *Id* at 893, ¶3 ("I do not actually recall the 'pollution exclusion' filing...."); Robert D. Hayes, *id.* at 897, ¶2; ("I was not employed by the Department when the Insurance Rating Board filed the 'sudden and accidental' pollution exclusion...."); Thomas O'Malley, *id* at 902, ¶5 ("I do not presently have clear recall of their filing...."); Elmer V.. Omholt, *id.* at 904, ¶2 ("I do not specifically recall the [IRB's] filing...."); Robert D. Preston, *id.* at 993 (" I do not recall with any specifity...."); Milton P. Rice, *id* at 910 ("I have no recollection of the events surrounding that filing...."); Melvin M. Summerhays, *id.* at 914 ("While I do not actually recall the 'sudden and accidental' pollution exclusion...."); Milton S. Troxell, *id.* at 916 ("While I do not specifically recall the details of this situation...."); Samuel H. Weese, *id.* at 918 ("I did not actively participate at the hearing or in the pre-hearing or post-hearing filing process."); Broward Williams, *id* at 919 ("I do not have a precise recollection of the filing of the pollution exclusion in 1970.")

in this regard was actually correct.[24] It evident from the language of the "occurrence" definition that only pollution damages that were expected or intended were excluded under the CGL insurance policy. Many of the affiants also claimed that pollution claims were rare and that environmental laws and liabilities were relatively unknown.[25] The regulators were seriously misled on this point as well. Environmental liability had been common for decades. This is obvious from the discussion of environmental law found in an early 1960s Pennsylvania landfill pollution liability case:

> This action falls into the category known as non-trespassory invasions of another's land. Restatement, Torts, § 822 states the general rule as follows:
>
> > The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if, (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and (b) the invasion is substantial; and (c) the actor's conduct is a legal cause of the invasion; and (d) the invasion is either (i) intentional and unreasonable; or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.

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[24] John R. Blaine, *id* at 881 ("the results to be achieved by occurrence definition were pretty much the same thing"); C. Eugene Farnam, *id.* at 891 "It was understood in 1970 that there was generally no pollution coverage under the 1966 CGL occurrence policy."); Henry L. Lauer ("The *Explanation* submitted with the exclusion confirmed that coverage was continued for a pollution 'accident.' That was about the only real coverage under 'occurrence' policies anyway."); John W. Lindsay, *id.* at 898, ¶2 (Pollution coverage issues were essentially non-issues. This was so because, even under the 1966 CGL "occurrence" policy, there was generally no coverage intended or provided."); Edward P. Lombard *id.* at ¶4 ("Pollution claims were not common, and were generally not covered as occurrences.").

[25] *See*, Zampino, Cavo, & Harwood, *Morton International: Fiction of Regulatory Estoppel*, 24 Seton Hall L. Rev. 847, 878-79 (1993) ("*Regulatory Estoppel*") (attaching state insurance regulator affidavits). The vast majority of these obviously believed the IRB's assertion that pollution claims were very rare in 1970. *See, e.g.*, John R. Blaine, *id* at 882, ¶ ("[T]here were so few pollution claims. I was not surprised to see the first part of the *Explanation* express the same thought."); Stanley C. DuRose, Jr., *id* at 885, ¶7 ("The Insurance Rating Board's filing, which I just reviewed, was not misleading. Moreover, pollution claims had not been filed with any frequency at the time of the filing...."); C. Eugene Farnam, *id.* at 892, ¶7 ("Pollution claims were quite rare in 1970 "); Edward P. Lombard, *id.* at 900, ¶4 ("Pollution claims were not common...."); Thomas L. O'Malley, *id.* at 903, ¶8 ("In 1970, pollution claims were not common."); Elmer V. Omholt, *id.* at 904, ¶4 ("Pollution claims were extremely rare in 1970."); Robert D. Preston, *id* at 905, ¶4 ("Pollution claims were not common back at that time."); Milton S. Troxell, *id* at 916, ¶4.

> Restatement, Torts, § 832, applies the rule to waters: 'Non-trespassory invasions of a person's interest in the use and enjoyment of land resulting from another's pollution of surface waters, subterranean waters or water in watercourses and lakes are governed by the rules stated in §§ 822-831 of this Chapter.

Reinhart v. Lancaster Area Refuse Auth., 201 Pa. Super. 614, 618, 193 A.2d 670, 671-72 (1963). Indeed, Far from being rare, pollution claims were so prevalent that in 1965 Liberty Mutual's G.L. Bean explained that "Smoke, fumes, or other air or stream pollution have caused an *endless chain of severe claims for gradual property damage*...."[26]

In reality, pollution claims had risen to significant levels by 1970, as evidenced by the large number of published high court and other appellate decisions across the country in the year immediately prior to the adoption of the exclusion.[27] In Pennsylvania, pollution damage claims had been prevalent for over a century, resulting in numerous published opinions.[28]

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[26] G.L. Bean, Assistant Secretary, Liberty Mutual Ins. Co., *New Comprehensive General and Automobile Program, The Effect on Manufacturing Risks*, paper presented at Mutual Insurance Technical Conference, Nov. 15 -18, 1965, at 6, 10, quoted in 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, 365 - 66 (1991).

[27] *See, e.g., Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870 (1970) (action to recover for property damages caused by long-term emissions from cement plant); *Nelson v. C&C Plywood Corp.*, 4654 P.2d 314 (Mon. 1970) (action for pollution of private well caused by disposal of glue waste); *Jost v. Dairyland Power Cooperative*, 172 N.W.2d 647 (1969) (recovery for property damage resulting from discharge of sulfur fumes); *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (Ind. 1969) (property damage caused by gasoline from an adjacent gasoline station); *Perkins v. State of Indiana*, 251 N.E.2d 30 (1969) (action against state for damages for bodily injury illness caused by contamination of a beach, lake, and state park); *Scurlock Oil Co. v. Harrell*, 443 S.W.2d 334 (Tx. Ct. App. – Austin 1969) (damage to land and water caused by leaking oil pipeline); *Brady v. City of Springdale*, 441 S.W.2d 81 (Ark. 1969); *White v. Smith*, 440 S.W.2d 497 (Mo. 1969) (garnishment action against insurance company for damage award for slaughterhouse's contamination of plaintiffs' well); *Western Salt Co. v. City of Newport Beach*, 76 Cal. Rptr. 322 (Ct. App., 4th Dist, Div. 2 1969) (damages action for contamination of salt crop caused by discharges from construction site); *Refuse Authority v. Transamerica Ins. Co* , 251 A.2d 739 (Pa. Super. 1969) (insurance action for damages awarded against refuse site owner for pollution of wells). *Wilson v. Farmers Chemical Assn., Inc.*, 444 S.W.2d 185 (Tn. Ct. App. 1969) (damages awarded to landowner for silt pollution to bay); *Trosclair v. Superior Oil Co.*, 219 So.2d 278 (La Ct. App. 1969) (suit against oil company for loss of oysters due to oil contamination).

[28] *Borough Of Brookhaven v.American Rendering, Inc.*, 434 Pa. 290, 256 A.2d 626 (1969); *United States Steel Corp.*, 432 Pa. 140, 247 A.2d 563 (1968) (air pollution damages to farm crops); *Reinhart v. Lancaster Area Refuse Auth.*, 201 Pa.Super. 614, 618, 193 A.2d 670, 672 (1963) (well

According to a subcommittee of a National Association of Insurance Commissioners Advisory Committee chaired by George Mulligan of the American Insurance Association, environmental statutes began in the last century and Federal Water Pollution Control Act was first enacted in 1948.[29]

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contamination); *Evans v. Moffat*, 192 Pa.Super. 204, 160 A.2d 465 (1960): (Trespass action for nuisance brought by homeowners to recover for injuries to their homes caused by noxious and foul- smelling gases); *Bumbarger v. Walker*, 193 Pa.Super. 301, 164 A.2d 144 (1960) (alloc. denied) (pollution of ground water and spring); *Ressler v. Gerlach*, 189 Pa.Super. 192, 149 A.2d 158 (1959) (alloc. denied) (pollution of well); *Cramer v. Alberts*, 395 Pa. 510, 150 A.2d 840 (1959) (contamination sanitary sewers); *Daniels v. Bethlehem Mines Corp.*, 391 Pa. 195, 137 A.2d 304 (1958) (pollution of stream); *Burr v. Adam Eidemiller, Inc.*, 386 Pa. 416, 126 A.2d 403 (1956) (subterranean contamination of water supply); *Waschak v. Moffat*, 379 Pa. 441, 109 A.2d 310 (1954) (hydrogen sulphide gas pollution from banks of waste material); *Milan v. City Of Bethlehem*, 372 Pa. 598, 94 A.2d 774 (1953) (pollution from landfill); *Jackson v. United States Pipe Line Co.*, 325 Pa. 436, 191 A. 165 (1937) (pollution of a water well); *Schlichtkrull v. Mellon-Pollock Oil Co.*, 301 Pa. 553, 152 A. 829 (1930) (pollution of ground water); *Good v. City Of Altoona*, 162 Pa. 493, 29 A. 741 (1894); (pollution of stream); *Collins v. Chartiers Val. Gas Co.*, 131 Pa. 143, 18 A. 1012 (1890) (action for pollution of water wells).

[29] "Report of Subcommittee on Background and History, Working Draft," 1986-1 NAIC Proc. 700, 733 (1985) (LEXIS, Insure Library, NAIC File). Aetna, Hartford, and Liberty Mutual, among others, were participants in the Advisory Committee. In relevant part the Subcommittee wrote:

> Concern for the environment became a significant public issue in the mid-1960s. Actually, the first environment law can be traced to 1899 when the River and Harbors Act was passed which prohibited the discharge of solid waste into navigable rivers. In 1948 Congress passed the first water pollution act, the Federal Water Pollution Act which was administered originally by the Department of Interior. Congress passed the first air pollution act, the Air Pollution Act, in 1955. In its early years, the Air Pollution Act was administered by the now defunct Department of HEW. However, the creation of EPA, which centralized the administration of the various environmental Acts, and the enactment of more stringent environmental standards and enforcement procedures marked the beginning of environmental problems and solutions as important public issues. Fostered by several spectacular pollution incidents in the late 1960s, this public concern culminated in the formation of the Environmental Protection Agency (EPA) in 1970 and the enactment of comprehensive legislation to avoid and abate damage to public health and the environment by air pollution emissions, water pollution effluents, and solid waste disposal.

Pennsylvania had established common law strict liability for pollution in the 1880s[30] and had enacted environmental liability statues throughout this Century.[31]

In sum, in 1970 pollution claims were "rampant," not "rare." It was the insurance industry's very business to defend and be aware of all potential liabilities of their industrial clients. The industry knew of the ever-increasing pollution claims being brought in 1970. It is obvious that the industry chose not to inform its regulators of this fact. It may have not done so because the industry, as acknowledged at the time by a key IRB polluter's exclusion proponent, Aetna, "[t]here 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 cut back in coverage.*"[32]

It is worthwhile observing that a significant number of state attorneys general have filed amicus curiae briefs arguing that the insurance industry be held to its 1970 regulatory representations. *See, e.g., Morton International*, 629 A.2d at 855. Brief of *Amici Curiae* State of Delaware and Commonwealth of Pennsylvania, *New Castle County*, 933 F.2d 1162; Brief of *Amicus Curiae* Insurance Commissioner of West Virginia, *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 182 W.Va 580, 390 S.E.2d 562 (1990); Memorandum of *Amicus Curiae* State of

[30] As this Court observed: "Under the Act of June 2, 1883, P.L. 61, § 2, as amended by Act April 30, 1929, P.L. 896, § 1 (15 P.S. § 2153), appellant is *liable without proof of negligence*, if oil from its pipe line polluted the well. *Jackson v. U.S. Pipe Line Co.*, 325 Pa. 435, 438, 191 A. 165, 165-66 (1937).

[31] *See, e.g.*, The Clear Streams Act of 1937, 35 P.S. §§ 691.1 et seq., 691.3 1937, P.L.1987, Art. I, par. (quoted in *Commonwealth v New York & Penn. Co.* 367 Pa. 40, 47, 79 A.2d 439, 444 (1951); Air Pollution Control Act of 1960, P.L. (1959) 2119, 35 P.S. s 4001;

[32] Memorandum from Guiney, Aetna's counsel, to Aetna Cas. & Sur. Co. (May 7, 1970) ("Guiney Memorandum") (quoted in Amy Timmer, *Are They Lying Now or Were They Lying Then? The Insurance Industry's Ambiguous Pollution Exclusion:...*, 46 Baylor L. Rev. 355, 373 n.68 (1994) ("Timmer") (bolding added).

Indiana, in Support of Plaintiff's Motion for Partial Summary Judgment, *Ulrich Chem., Inc. v American States Ins. Co.*, No. 73C 01-8901-CP 016, 1990 WL 484974 (Ind. Cir. Ct. July 26. 1990)).

II. THE PENNSYLVANIA INSURANCE STATUTES REQUIRES EXAMINATION OF THE REGULATORY HISTORY.

Aside from judicial estoppel, Pennsylvania insurance statutes also prevent the insurance companies from interpreting their insurance policies in a manner inconsistent with their regulatory representations to Insurance Commissioner Reed. Before it could be included in CGL insurance policies, the sudden and accidental exclusion had to be reviewed and approved by the Pennsylvania Department of Insurance. *See* 40 P.S. § 477(b) (West 1999). Prior to the time the insurance industry made the representations in the Explanatory Memorandum to the Pennsylvania and other state insurance regulators, the Pennsylvania Supreme Court held that an "accident" CGL insurance policy provided insurance coverage for *unintentional* damages resulting from an intentional waste disposal operation.

Subsequent to the Supreme Court's decision, the IRB and MIRB made the following plain and unambiguous representation to the Insurance Department: "Coverage is continued for contamination or pollution caused injuries when the contamination or pollution results from an accident...." *See* Explanatory Filing Memorandum (R. 714a). As a matter of law, this affirmative representation of continued insurance coverage for pollution resulting from an "accident" meant that the insurance industry represented to the Insurance Department

coverage was continued for unintentional damage resulting from long-term intentional waste disposal activities.[33]

Under Pennsylvania law, insurance policy provisions had to be reviewed and approved by the Department of Insurance:

> It shall be unlawful for any insurance company, association or exchange, . . . doing business in this Commonwealth, to issue, sell, or dispose of any policy, contract, or certificate, covering life, health, accident, personal liability, fire, marine, title, and all forms of casualty insurance, or contracts pertaining to pure endowments or annuities, or any other contracts of insurance, or use applications, riders, or endorsements, in connection therewith, until the forms of the same have been submitted to and formally approved by the Insurance Commissioner . . . .

40 P.S. § 477(b) (West 1999).

Although the Insurance Commissioner's approval of language forms for particular

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[33] The trial court stated that the Insurance Department was aware of the *Lancaster* holding at the time that the Department reviewed the sudden and accidental exclusion. Slip Op. at 21. More importantly, even if the Insurance Department was not aware of the holding in Lancaster, *the insurance industry* certainly would have been aware of it when it made its affirmative representation to the Pennsylvania Insurance Department that the sudden and accidental exclusion continued insurance coverage for an "accident." The *Lancaster* finding that "accident" included insurance coverage for liability for unintentional damage from intentional waste disposal or similar operations was hardly a surprise to the insurance industry. In 1964 the Federal District Court for the Eastern District of Pennsylvania held that "accident" included insurance coverage for damage caused by noxious gases emitted by mining wastes intentionally stacked by a policyholder *See Moffat v. Metropolitan Cas. Ins. Co.*, 238 F. Supp. 165 (M.D. Pa. 1964). Indeed, most of the cases involving standard-form CGL Policies prior to its revision in 1966 held that the term "accident" as used in CGL insurance policies provided insurance coverage for unintentional gradual pollution damages. *See, e.g., American Mut. Liab. Ins Co. v. Agricola Furnace Co.*, 183 So. 677, 678 (Ala. 1938) (injuries from ten-year emission of dust and metal particles is a covered "accident") *Anchor Cas. Co. v. McCaleb*, 178 F.2d 322 (5th Cir. 1949). *Aetna Cas & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp.*, 256 F. Supp. 145 (D. Or. 1966) (long term emission of flyash); *Employers Ins. Co v Rives*, 87 So. 2d 653 (Ala. 1955), *cert. denied*, 87 So.2d 658 (Ala. 1956) (pollution damage caused by several months discharge of gasoline from a separated pipe is an "accident"), *cert. denied*, 87 So. 2d 658 (Ala. 1956); *Moore v. Fidelity & Cas. Co.*, 295 P.2d 154 (Cal. App. Super. Ct. 1956) (emission of lint from commercial driers); *Travelers v. Humming Bird Coal Co.*, 371 S.W.2d 35 (Ky. 1963) (intentional disposal of dirt and debris from mining operation); *White v. Smith*, 440 S.W.2d 497 (Mo. Ct. App. 1969) (six-year disposal of slaughterhouse waste into a lagoon); *City of*

policy provisions does not *per se* establish the validity of such language, the "approval of forms . . . is a prerequisite to their use." *Brader v. Nationwide Mut. Ins. Co.*, 270 Pa. Super 258, 261, 411 A.2d 516, 517 (1979). An unapproved insurance policy provision cannot be enforced against a Pennsylvania policyholder. *See Hepler v. Liberty Mut Fire Ins. Co* . 13 Pa. D & C. 4th 528, 532 (C.P. Dauphin Cty. 1992). Significantly, in its review of rates to be charged for proposed insurance policy provisions, the Insurance Department must specifically consider the "character and *extent* of coverage" provided by the provision. *See* 40 P.S. § 1184 (West 1992 and Supp. 1998) (italics added). It is a violation of the insurance law to present the Insurance Department misleading information that may affect rates or premiums. 40 P.S. § 1184.

The IRB Explanatory Filing submitted to the Pennsylvania Insurance Commissioner, the abundant case law, and the Guiney Memorandum, demonstrate that, if the sudden and accidental exclusion was intended to restrict the CGL insurance policy's grant of coverage for unintentional gradual pollution damage resulting from intentional waste disposal activities, the insurance companies misled the Insurance Department. They did so through the Explanatory Filing submitted by their agents, the MIRB and IRB. If the insurance companies' current interpretation of the exclusion is accepted, then the Explanatory Memorandum violated § 1184 by, among other things, misrepresenting that coverage was continued for an "accident," *i e.*, in order to secure the Insurance Commissioner's approval pursuant to 40 P.S. § 477b. Under Pennsylvania law, the term "accident" includes unintended damages from long-term waste disposal activities. *See Lancaster*, 437 Pa. 493, 263 A.2d 368. If the insurance companies' current assertion that such damages are excluded by the exclusion's language is accepted, then the Explanatory Filing was a glaring misrepresentation.

Kimball v. St. Paul Fire & Marine Ins. Co., 206 N.W.2d 632 (Neb. 1973) (seepage from lagoon in which

Under 40 P.S. § 756(A) (West 1999), "[n]o policy provision ... shall make a policy, or any portion thereof, less favorable in any respect to the insured ... than the provisions thereof which are subject to this act." Furthermore, "[a] policy delivered or issued for delivery . . . in this Commonwealth in violation of this act shall be valid *but shall be construed as provided in this act*. When any provision in a policy ... is in conflict with any provision of this act, the rights, duties and obligations of the insured ... shall be governed by the provisions of this act." 40 P.S. § 756(B) (West 1999).

Section 756(B) prevents insurance companies from improperly benefiting from unapproved policy provisions by mandating that an unapproved policy "shall be *construed* as provided in this act." The sudden and accidental exclusion was approved by the Insurance Department, pursuant to Section 477b, on the basis of the representations that it did not restrict insurance coverage for unintentional injuries resulting from intentional waste disposal activities (an "accident"). Under Section 756 it is unlawful to issue a policy with the sudden and accidental exclusion if that exclusion was intended to provide less insurance coverage than that intended by the Insurance Department in its Section 477b approval. The Explanatory Filing Memorandum indicated that coverage would be continued for an "accident" and it is reasonable to assume that the Insurance Department Officials that approved the exclusion were led to believe, therefore, that insurance coverage would be continued for an "accident" as that term was understood under Pennsylvania insurance law at the time. Section 756 requires that the sudden and accidental exclusion be construed in accordance with the Section 477b approval. Pennsylvania policyholders are deprived the protections of §§477b and 756 when the courts refuse to allow them to present regulatory evidence.

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municipality intentionally disposed of sewage).

III. THE PAROL EVIDENCE RULE DOES NOT EXCLUDE CONSIDERATION OF EXTRINSIC EVIDENCE

A. Drafting and Regulatory Evidence is Admissible Under the Circumstances of This Case

It is important to understand exactly what the parol evidence rule is in order to understand how it applies in the present circumstances. As articulated by this Court, "it is well-settled" that the parol evidence rule holds that "in the absence of fraud, accident, or mistake, parol evidence as to the preliminary negotiations or oral agreement is not admissible in evidence if it adds to, modifies, contradicts, or conflicts with the written agreement of the parties." *Resolution Trust Corp. v. Urban Redevelopment Auth. Of Pittsburgh*, 536 Pa. 219, 225, 638 A.2d 972, 975 (1994) (citation omitted). The reasoning behind the parol evidence rule is that the parol evidence, "the alleged oral written agreements are merged into or superseded by the subsequent written contract, and [, for that reason,] parol evidence to vary, modify or supersede the written contract is inadmissible in evidence." *LeDonne v. Kessler*, 256 Pa. Super. 280, 286-87, 389 A.2d 1123, 1126-27 (1978). It simply has never been the case, however, that this Court has imposed a blanket bar to the use of extrinsic evidence in interpreting contracts or insurance policies. "[I]n construing a contract we seek to ascertain what the parties intended and, in so doing, we consider the circumstances, the situation of the parties, the objects they have in mind and the nature of the subject matter of the contract." *United Refining Co. v. Jenkins*, 410 Pa. 126, 138, 189 A.2d 574, 580 (1963). "The Court in interpreting a will or a contract can always consider the surrounding circumstances in order to ascertain the intention and the meaning of the parties." *In re Estate of Herr*, 400 Pa. 90, 93, 161 A.2d 32, 34 (1960).

One glaring obstacle to the application of the parol evidence rule in this case is that the evidence that Sunbeam wishes to introduce is not evidence of the "preliminary

negotiations or oral agreement" between it and the insurance companies herein. Instead, Sunbeam wishes to introduce history of the insurance industry's unilateral drafting of the sudden and accidental exclusion; the marketing history (post-drafting evidence of how the insurance product was interpreted by insurance industry officials in articles, public presentations and published articles); and the exclusion's regulatory history (the representations that the insurance industry made to insurance regulators about the meaning, effect, and intent of the already-drafted language). All of this evidence is contained in documents authored or statements made by insurance industry officials or state insurance regulators. None of the evidence runs the danger of the introduction of self-serving evidence of unilateral intent of the party seeking to introduce the extrinsic evidence. Facially, factually, and as a matter of public policy, the parol evidence rule does not apply.

Furthermore, "the parol evidence rule does not apply in its ordinary strictness where the existence of a custom or usage to explain the meaning of words in a writing are concerned." *Resolution Trust*, 536 Pa. at 226, 638 A.2d at 975. The exception to the parol evidence rule does not apply to evidence that the contract employs words or terms of art is widely recognized. *See Restatement (Second) of Contracts*: § 202(3) (technical terms and words of art are given their technical meaning when used in a transaction within their technical field); *Restatement (Second) of Contracts*. §222 (unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged gives meaning to their agreement). Notwithstanding the parol evidence rule "extraneous evidence is admissible to show local usage which would give particular meaning to the language.." *Resolution Trust*. 536 Pa. at 226, 638 A.2d at 976. Thus, Sunbeam should have been able to present evidence that the term "sudden

and accidental" was an insurance industry term of art that had been given a specific meaning at the time it was adopted by the insurance industry.

B. Drafting and Regulatory Evidence is Admissible in Cases of Fraud and Misrepresentation

1. Aside From Judicial Estoppel, Courts Allow Injured Parties to Bring Common Law Fraud and Misrepresentation Claims Predicated Upon Regulatory Misrepresentation.

Courts also allow injured parties to bring common law misrepresentation or fraud claims predicated upon the defendant's misrepresentations made to a relevant regulatory agency. The Third Circuit Court of Appeals very recently held in a case arising in the Eastern District of Pennsylvania that injured parties could bring common law misrepresentation claims premised upon the defendants regulatory statements to the federal Food and Drug Administration ("FDA"). *In re: Orthopedic Bone Screw Products Liability Litigation*, 159 F.3d 817, 826 (3d Cir. 1998). The Third Circuit observed that there is "ample precedent" allowing common law fraudulent misrepresentation claims "premised upon misrepresentations to a federal agency." *Id.* Are fraudulent misrepresentations to a state agency somehow different?

In *Stanton by Brooks v. Astra Pharmaceutical Products, Inc.*, injured patients were allowed to bring claims against drug manufacturers based upon regulatory misrepresentations to the FDA. 718 F.2d 553, 568-69 (3d Cir. 1983) (Pa. law). In *Learjet Corp v. Spenlinhauer*, an aircraft purchaser was allowed to bring claim based upon a manufacturer's misrepresentations to the Federal Aviation Administration. 901 F.2d 198, 202-03 (1st Cir. 1990) (Kan. law); *See also, Hawkins v. Upjohn Co* , 890 F. Supp. 609, 612 (E.D. Tex. 1994) (similar).

Sunbeam's common law claims of fraud and misrepresentation stemming from the insurance industry's regulatory misrepresentation to the Insurance Department are similar to

and stand on equal footing with the common law claims upheld in the cases set forth above. The trial court erred in failing to allow Sunbeam to go forward with these claims. These types of claims, however, can never be proven if the misapplication of the parol evidence rules bars submission of the fraudulent misrepresentation itself! As the following section demonstrates, the parol evidence rule is simply inapplicable to common law claims based upon estoppel, fraud, and misrepresentation

2. **The Parol Evidence Rule is Inapplicable to Claims of Estoppel, Fraud, or Misrepresentation.**

As Sunbeam alleged fraud and misrepresentation, Sunbeam should have been allowed to introduce extrinsic evidence to prove fraud or misrepresentation. "[I]f fraud, accident, or mistake is alleged, extrinsic evidence is admissible to vary or contradict the terms of the written agreement." *Espenshade v Espenshade*, 729 A.2d 1239, 1241 (Pa. Super. 1999) (citation omitted). The parol evidence rule only operates when the cause of action sounds in contract and is not applicable to estoppel or misrepresentation claims. *See, Continental Cas. Co. v. Diversified Indus., Inc.*, 884 F. Supp. 937, 959 (E.D. Pa. 1995) (Pa. law). In *Continental Casualty*, the district court specifically held that, when misrepresentation is raised, "the parol evidence rule does not operate to preclude the admission of evidence involving the history and drafting of the pollution-exclusion." *Id*; *see, also, Mellon Bank Corp v First Union Real Estate Equity & Mortg. Invs.*, 951 F.2d 1399, 1408 n.8 (3d Cir. 1991) (the Pennsylvania Supreme Court would follow the "majority position ... that the parol evidence rule does not apply in misrepresentation cases").

Northwest Savings Ass'n v. Distler, 354 Pa. Super. 187, 192, 511 A.2d 824, 826 (1986) (citations omitted). Finally, "[a] contract apparently valid upon its face may nevertheless

be impeached for illegality as opposed to public policy by evidence aliunde." *Constructor's Ass'n of Western Pa. v. Furman*, 165 Pa. Super. 248, 252, 67 A.2d 590, 592 (1949).

C. A Significant Number of State Courts Use Extrinsic Evidence, Such As Drafting and Regulatory History, As an Aid in Interpreting Insurance Policy Provisions

It should be pointed out that when policyholders submit regulatory and drafting history evidence they are not seeking to vary the written terms of a contract by introducing evidence of their own intentions prior to the drafting of the written agreement. Standard form insurance policy provisions are unilaterally drafted by the insurance industry before the policyholder ever gets to see the language. What they are usually trying to demonstrate is that the drafting or regulatory history demonstrates that the policyholders' interpretation of the insurance policy language is a reasonable interpretation.

In this vein, the Indiana Supreme Court examined the drafting history of the pollution exclusion in order to determine whether the policyholder's interpretations of "sudden" as "unexpected" was reasonable:

> If one considers the insurance industry's own interpretation of the contractual language, it becomes clear that there exists a lack of clarity.
>
> * * *
>
> [T]he insurance industry's own understanding of this language indicates that "sudden" can be understood to mean "unexpected."

American States Ins. Co. v. Kiger, 662 N.E.2d 945, 947, 948 (Ind. 1996).

The Texas Supreme Court held, in a case involving more restrictive, non-standard pollution exclusions, that "[e]xtrinsic evidence may, indeed, be admissible to give the words of a contract a meaning consistent with that to which they are reasonably susceptible, *i.e.* to

'interpret' contractual terms." *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995). The Court gave the example of "trade usage" evidence as one type of extrinsic evidence which could be used to interpret meaning even in the absence of an ambiguity. *Id.* at 521 n.6. Numerous others have looked at evidence of the meaning of "sudden and accidental" as term of art in the insurance industry as set forth below.

D. "Sudden and Accidental" was an Insurance Industry Term of Art Meaning "Unexpected and Unintended," Containing No Temporal Element or Requirement; The Drafters of the Sudden and Accidental Exclusion Consciously Chose This Terminology Because Insurance People Would Be Familiar with the Term from its Use in Boiler and Machinery Policies.

In drafting the sudden and accidental exclusion, the insurance industry used the insurance industry term of art, "sudden and accidental," a term of art that was familiar to insurance regulators from its use in boiler and machinery policies. Prior to the time that the exclusion was drafted, courts across the country "uniformly had construed the phrase to mean unexpected and unintended."[34]

At the time the exclusion was drafted and in effect, the leading insurance treatise stated that: " '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 * * *; 'sudden' is not to be construed as synonymous with instantaneous." George J. Couch, et al., 11 Couch Cyclopedia of Insurance Law, § 42:383 (2d ed 1963) (footnotes omitted)) (quoted in *St. Paul Fire & Marine Insurance Company, Inc. v McCormick & Baxter Creosoting Co.*, 923 P.2d 1200, 1217-18 (Or. 1996). This generally-accepted meaning of "sudden" continued to be viable throughout the years that the "sudden and accidental" exclusion was being used. "*See,*

[34] *New Castle County*, 933 F.2d at 1197 (citing earlier cases); *accord, Alabama Plating*, 690 So.2d 331 (Ala. 1996)

e.g., 10 G. Couch, *Couch on Insurance 2d* § 42:396, at 505 (2d ed. 1982) ("When coverage is limited to a sudden 'breaking' of machinery 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.") (quoted in *New Castle County*, 933 F.2d at 1197).

> The *Alabama Plating* court also noted that the phrase had undergone years of judicial construction before insurers used it in property-damage policies and that "[c]ourts had uniformly interpreted [it] to mean that the damage had to be unexpected and unintended for the insurance to apply, so that the phrase provided coverage for gradual events." *Alabama Plating Co.*, 690 So.2d at 336. The court defended its historical reasoning by noting that the "judicial construction placed upon particular words or phrases made prior to the issuance of a policy employing them will be presumed to have been the construction intended to be adopted by the parties." *See id.* (quoting Couch on Insurance 2d § 15:20 (1984)).

Textron, 754 A.2d at 752.

Furthermore, the drafters of the sudden and accident exclusion specifically borrowed the "sudden and accidental" concept from boiler and machinery insurance policies. Why was the "sudden and accidental" language used? Richard Schmalz, the MIRB drafter of the qualified "polluter's exclusion," "testified in a deposition that the drafters of the exclusion used language that at least some people in the insurance business had seen before", and hence "turned to" the "analogous concept" in the boiler and machinery policy. *Alabama Plating*, 690 So. 2d at 336 n.8. As noted by a leading insurance dictionary of the time, "sudden" in these policies was not to be construed as synonymous with "instantaneous." George J. Couch, et al., "Couch Cyclopedia of Insurance Law, 42:383 (2d ed 1963) (quoted in *St. Paul Fire & Marine Ins. Co v. McCormick & Baxter*, 923 P.2d at 1217-1218).[35] The "judicial construction placed upon

[35] Prior to 1970, the boiler and machinery policies provided coverage for machinery and boilers which cease functioning as a result of a "sudden and accidental breakdown or tearing asunder." The phrase "sudden and accidental" in those policies had been judicially construed to mean an unexpected and unintended happening, without temporal connotation. *See New England Gas & Elec. Ass'n v. Ocean*

particular words or phrases made prior to the issuance of a policy employing them will be presumed to have been the meaning adopted by the parties." Couch on Insurance 2d §15:20 (1984) (*quoted in Alabama Plating*, 690 So. 2d at 335).

At the time the "sudden and accidental" term of art was utilized in the exclusion, it had long been ascribed a specific meaning by both the courts and the insurance industry, that meaning was "unexpected and unintended".

Under Pennsylvania law, if a policyholder's interpretation is reasonable, then the policyholder's interpretation must be given effect. How can Sunbeam's interpretation of the word "sudden" as meaning "unexpected" not be reasonable when that is precisely how insurance treatises have defined the term?

Judge Wettick recognized that

> "[T]here is support for plaintiffs' position that a contract should be construed by considering the manner in which the terms are used within a particular industry. See *Restatement (Second) of Contracts*: § 202(3) (technical terms and words of art are given their technical meaning when used in a transaction within their technical field); ... and §222 (unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged gives meaning to their agreement)."

Slip op. at 10. Although policyholders are typically not bound by the usage of technical language that is inconsistent with everyday meaning, it is eminently fair *to bind the insurance industry* to the meaning of a term of art when the industry knowingly adopted that term of art.

The fact that "sudden and accidental" had a specific meaning as a term of art also undercuts the rationale of the *Lower Paxton Township v. United States Fidelity & Guaranty Co.*,

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Accident & Guar. Corp., 116 N.E.2d 671, 680-81 (Mass. 1953); see, also, *Alabama* Plating, 690 So. 2d at 336 and n.7 (courts had uniformly interpreted "sudden and accidental" so that the phrase provided

holding that was followed by the trial court: "'[t]o define sudden as meaning only unexpected or unintended, and therefore as a mere restatement of accidental, would render the suddenness requirement mere surplusage.'" Slip op. at 5 (quoting *Lower Paxton*, 383 Pa. Super. 558, 557 A.2d 393, 402, *alloc. denied*, 523 Pa. 649, 567 A.2d 653 (1989)). Whatever its general merit in interpreting insurance policy language, the "surplusage argument" has no meaning when applied to a unitary term of art that has been given a specific, ascribed meaning. Furthermore, there is no surplusage when "sudden" is given its primary meaning of "unexpected" and accidental is given its meaning of "unintended." *See e.g., Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1091-92 (Colo. 1991) (examining various dictionary definitions; concluding "sudden" can mean "unexpected"); *Claussen v. Aetna*, 380 S.E.2d at 688 (same).

As the United States Court of Appeals for the Third Circuit stated:

> We believe that the word "sudden," even if defined to mean "unexpected," is not completely synonymous with the word "accidental." Simply put, sudden means unexpected, and accidental means unintended. *To the extent that the meanings of these words overlap, we do not think that this precluded the district court from defining sudden as unexpected. Insurance policies routinely use words that, while not strictly redundant, are somewhat synonymous.* For example, the exception to the pollution exclusion clause also uses the words "discharge, dispersal, release or escape" – terms that convey the same basic idea, with only slightly different permutations. We think that the words "sudden" and "accidental," when read together, serve the same purpose as "discharge, dispersal, release or escape": they each connote the same general concept – namely, fortuity – with a small variation. Neither do we think that annexing the word "sudden" to the word "accidental" with the conjunctive "and" necessarily injects a temporal element, such as brevity or abruptness, into the exception to the pollution exclusion clause.

New Castle County, 933 F.2d at 1194-95 (citations omitted) (emphasis added).

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coverage for gradual events"). Anderson *& Middletown Lumber Co. v. Lumbermens Mut. Cas Co.*, 333

One commentator has observed that:

> Although the terms "sudden" and "accidental" seem to imply that an immediate or instantaneous event must occur, courts have construed these terms more broadly. Utilizing the "common meaning" doctrine, the courts have uniformly held that the dictionary definition of the terms as "unforeseen, unexpected and unintentional" is controlling.

Cozen, Insuring Real Property, Section 5.03[2][a], at 5-14 (1989)

This trade usage and drafting history demonstrates that: (1) "sudden and accidental" was an insurance industry term of art meaning "unexpected and unintended;" (2) the drafters of the sudden and accidental exclusion, by consciously adopting this term of art, intended that this meaning be ascribed to the exclusion; and, (3) that *Lower Paxton and Sunbeam* were wrongly decided.

E. Post-Regulatory Evidence of the Understanding of the Pollution Exclusion and the Term "Sudden and Accidental"; After The Qualified "Polluter's Exclusion" Was Incorporated Into Standard Form CGL Policies, The Common Belief Remained In The Insurance Industry That "Sudden And Accidental" Meant "Unexpected And Unintended".

Every known commentary from the 1970 period focussed on how the qualified "polluter's exclusion" denied coverage to *intentional* polluters, regardless of timing – abrupt, instantaneous or otherwise – of the pollution. For example, a leading industry publication stressed that the purpose of the qualified "polluter's exclusion" was to deny coverage to intentional polluters:

> Liability insurers here and in England have made the right move by opting to exclude pollution coverage from the policies to ***bar***

P.2d 938, 940 (Wash. 1959).

> ***coverage for those companies that knowingly pollute the environment.***[36]

Another insurance industry publication explained:

> The filed exclusions are ***described by insurance spokesmen as being of a "clarifying nature"*** because such damages are believed to be outside the policy definition of "occurrence" which covers events that are "neither expected not intended from the standpoint of the insured."[37]

In 1973, the Fire Casualty & Surety Bulletin published by the National Underwriters Association and used by agents and brokers to interpret standard policies, stated:

> In one important respect, ***the exclusion simply reinforces the definition of occurrence.*** That is, the policy states that it will not cover claims where the "damage was expected or intended" by the insured and the exclusion states, in effect, that the policy will cover incidents which are sudden and accidental — unexpected and not intended.[38]

After the "sudden and accidental" exclusion was placed into the boilerplate of the CGL insurance policy, a leading insurance text noted that the exclusion was merely intended to exclude *expected or intended pollution damages*:

> It eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are excluded by definition of "occurrence."[39]

Contemporaneous public commentaries by persons with obvious expertise in insurance understood that the sudden and accidental exclusion was only intended to exclude

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[36] Business Insurance, June 8, 1970, at 12.

[37] *Environmental Law: Pollution Coverage Exclusions*, 11 For the Defense No. 7 at 75 (Sept. 1970). (italics added).

[38] *The Fire, Casualty & Surety Bulletin, quoted in Just*, supra, 456 N.W.2d 570 (emphasis added).

expected or intended injury and damage. If nothing else, these commentaries reveal that *Sunbeam's* equivalent interpretation is a reasonable one. Because it is reasonable, *Sunbeam's* interpretation must be given effect.

F. Insurance Companies Have Often Defined "Sudden" to Include "Gradual Exposure to Conditions"

It is disturbing that the insurance industry argues so vociferously that "sudden" cannot include gradual or "continuous or repeated exposure to conditions," when many insurance companies, including an IELA litigant before this court and co-drafter of the "sudden and accidental" language, specifically define "sudden" as "including continuous or repeated exposure to conditions."

> [I]n Hartford's policy, "accident" was defined as "**a sudden event; including continuous or repeated exposure to the same conditions**, resulting in bodily injury neither expected nor intended by the insured."

Argento v. Village of Melrose Park, 838 F.2d 1483, 1498 (7th Cir. 1988) (citation omitted) (emphasis added). United Policyholders' research has revealed numerous other examples across the country in which "sudden" is defined in insurance policies to include "continuous or repeated exposure to the same conditions."[40] Now if "sudden" always contains the temporal quality of

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[39] Long, *Law of Liability Insurance* (1973) at App-58; see, also, Long, Law of Liability Insurance (76) (same) (quoted in Joest, *Will Insurance Companies Clean the Augean Stables? - Insurance Coverage for the Landfill Operator*, 50 Ins. Couns. J. 258, 259 (1983)) ("*Augean Stables*").

[40] *See, e.g., Morris v. Farmers Ins. Exch.*, 771 P.2d 1206, 1212 n.6 (Wyo. 1989) ("'accident means a sudden event, including continuous or repeated exposure to the same conditions'"); *State Farm Mut Auto Ins. Co. v. Blystra*, 86 F.3d 1007, 1009 (10th Cir. 1996) (same); *Farmers Ins. Co. of Washington v Clure*, 6 702 P.2d 1247, 1250 n.6 (Wash. Ct. App.1985) (same); *Illinois Farmers Ins. Co v. Preston*, 505 N.E.2d 1343, 1345 (Ill. App. Ct. 1987); *Mallin v. Farmers Ins. Exch.*, 839 P.2d 105, 110 (Nev. 1992) (same); *Thornberg v. Farmers Ins. Co.*, 859 S.W.2d 847 (Mo. Ct. App. 1993) (same); *Mid-Century Ins. Co. v. Shutt*, 845 P.2d 86, 87 (Kan. Ct. App. 1993) (policy states: "'Accident or occurrence means a sudden event, including continuous or repeated exposure to the same conditions...'"); *Kazi v. State Farm Fire and Cas.*, 83 Cal. Rptr. 2d 364, 368 (Cal. Ct. App. 2d Dist. 1999) (policy states: "'Occurrence means a sudden event, including continuous or repeated exposure to the same conditions'"); *Catholic Diocese of*

"abrupt" or "instantaneous" then Hartford's policy would define "accident" as meaning "a[n abrupt] event, including continuous or repeated exposure to the same conditions." This would be non-sensible interpretation because an event of short duration is the opposite of continuous exposure, which can last for days, months, years, or even decades. However, if "sudden" is given its primary meaning of "unexpected," then the definition logically provides that "an accident" is an "[unexpected] event, including continuous or repeated exposure to the same conditions."

Dodge City v. Raymer, 840- P.2d 456 (policy reads: "a sudden event, including repeated or continuous exposure to the same conditions, resulting in bodily injury or property damage neither expected nor intended by the insured"); *Farmers Ins Co., Inc. v. Suiter*, 964 S.W.2d 408, 410 (Ark. Ct. App. 1998); *Farmers Ins. Exch. v. Star*, 952 P.2d 809, 814 (Colo. Ct. App. 1997) ("policy defines accident or occurrence as "a sudden event, including continuous or repeated exposure to the same conditions, resulting in bodily injury or property damage neither expected nor intended by the insured"), *Fire Ins Exchange v. Diehl*, 545 N.W.2d 602, 605 (Mich. 1996) ("[A] sudden event, including continuous or repeated exposure to the same conditions"); *Gunderson v. Fire Ins. Exch.*, 37 Cal. App. 4th 1106, 1114-15 (1995);

G. The Pollution Exclusion is Ambiguous.

[J]ust what is or is not sudden and accidental has puzzled insurance men since the advent of liability insurance.

Comments of Thomas L. Ashcraft, Secretary, Policyholders Service Division, INA, quoted in Ashcraft, Ecology, Environment, Insurance and the Law, 21 Fed'n of Ins. Couns. Q. 37 (1970-1971) (published less than one year after the adoption of the qualified "polluter's exclusion"). Not only has the meaning of "sudden accidental" puzzled insurance men, it has puzzled judges.

As the New Hampshire Supreme Court recently noted, that "sudden" in insurance policies meant "unexpected" and not "instantaneous" or "brief" continued into the 1980's:

> [A] leading text on insurance law instructs that " 'sudden' is not to be construed as synonymous with instantaneous." 10A M. Rhodes, Couch on Insurance 2d § 42:396 (Rev. ed. 1982) ("When coverage is limited to a sudden 'breaking' of machinery the word 'sudden' should be given its primary meaning as a happening without previous notice") While not determinative, such an interpretation suggests that the term "sudden and accidental" is at least reasonably susceptible to an interpretation consistent with "unexpected and unintended."

Hudson v. Farm Family Mut. Ins. Co. 697 A.2d 501, 504 (N.H. 1997)(citations omitted). If the term "sudden and accidental" can reasonably mean "unexpected and unintended" and reasonably mean something else as well, "sudden and accidental" is ambiguous.

The trial court and Superior Court both followed the interpretation of "sudden and accidental" expressed in *Lower Paxton Twp. v. U.S. Fidelity & Guar. Co.*:

> Rejecting Sunbeam's definition of "sudden," the trial court was bound by this Court's decision in *Lower Paxton*... [T]he Court in *Lower Paxton* explained its holding as follows:

> ***The very use of the words "sudden and accidental" ... reveal[s] a clear intent to define the words differently, stating two separate requirements. Reading "sudden" in its context, *i.e.*[,] joined by the word "and" to the word "accident," the inescapable conclusion is that "sudden," even if including the concept of unexpectedness, also adds an additional element because *"unexpectedness" is already expressed by "accident."* This additional element is the temporal meaning of sudden, *i.e.*, abruptness or brevity. To define sudden as meaning only unexpected or unintended, and *therefore as a mere restatement of accidental*, would render the suddenness requirement mere surplusage.

Slip op. at 15 (attached as Exhibit A) (quoting *Lower Paxton Twp.*, 383 Pa. Super. 558, 557 A.2d 393, 402 *alloc. denied*, 523 Pa. 649, 567 A.2d 653 (1989). (italics added; first deletion and first brackets added; additional deletions and brackets in original).

The *Lower Paxton Twp.* analysis is backwards. "Sudden" comes before "accidental," not the other way around. Thus, it is more likely to give the first word encountered its usual meaning and then have the second word supply any additional meaning. If the first word encountered, "sudden," is given its primary meaning as "unexpected," then "accidental" supplies the additional meaning of "unintended." Viewed this way, there simply is no surplusage problem.

H. The Profound Judicial Disagreement Over the Meaning of "Sudden and Accidental" Found in Hundreds of Judicial Interpretations Demonstrates Ambiguity.

The cases swim [in] the reporters like fish in a lake. The Defendants would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too.[41]

As this colorful quotation indicates, there is a profound judicial disagreement on the meaning of the term "sudden and accidental." Pennsylvania Courts have split on whether such judicial disagreement evidences ambiguity. *Compare, Lower Paxton Township v. U.S.F. & G. Co.*, 383 Pa. Super 558, 573, 557 A.2d 393, 400, *alloc. denied*, 523 Pa. 649, 567 A.2d 653 (1989) (split of authority does not evidence ambiguity) *with Gamble Farm Inn, Inc. v. Selective Ins. Co.*, 440 Pa. Super. 501, ___, 656 A.2d 142, ___ (1995) (split of authority evidences ambiguity) *and Cohen v. Erie Indem. Co.*, 288 Pa. Super. 445, 451, 432 A.2d 599 (1981) (split of authority creates an inescapable conclusion of ambiguity).

Since the early Superior Court decision in *Techalloy*, the interpretation of the phrase "sudden and accidental" has generated profound judicial disagreement nationwide. In the mid-1990s, the First Circuit found "[s]tate and federal courts ... fairly evenly divided" on the interpretation of the term "sudden and accidental" "polluter's exclusion." *St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp.*, 26 F.3d 1195, 1200 (1st Cir. 1994) ("*Warwick Dyeing*"). Noting that the insurance company's brief listed 74 "sudden accidental" cases, all of which held for the insurance industry's side, stated "we do not doubt for a minute that there are another 74 cases" holding for the other. *Warwick Dyeing*, 26 F.3d at 1201, n.2; *see also, Morton*

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[41] *Pepper's Steel & Alloys, Inc. v. United States Fid. and Guar. Co.*, 668 F.Supp. 1541, 1549-50 (S.D. Fla.1987) (finding "sudden and accidental" to be ambiguous).

International, 629 A. 2d at 855-871(analyzing case law). The *Warwick Dyeing* court was correct, there is just as substantial a body of case law finding that "sudden and accidental" does not exclude insurance coverage for non-abrupt pollution discharges as there is supporting the opposite.[42] Many courts have recognized that wide diversity of judicial opinion is "proof positive" of ambiguity in an insurance policy term. *Zanfagna v. Providence Wash. Ins. Co.*, 415 A.2d 1049, 1051 (R.I. 1980). The policyholder's task is merely to demonstrate that the

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[42] See, e.g., *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200 (Ore. Sup. Ct. 1996); *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996); *Seymour Mfg Co., Inc. v Commercial Union Ins. Co.*, 665 N.E.2d 891 (Ind. 1996); *Alabama Plating Co. v. United States Fidelity and Guar. Co.*, 690 So. 2d 331 (Ala. 1996); Greenville County, 443 S.E.2d at 553; *Queen City Farms v. Aetna Cas. & Sur. Co.*, 882 P.2d 703 (Wash. 1994); *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 881 P.2d 201 (Wash. 1994); *Harleysville Mut. Ins Co v. Sussex County, Del.* 831 F. Supp. 1111 (D. Del. 1993), *aff'd* 46 F.3d 1116 (3d Cir. 1994), *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 629 A.2d 831 (N.J. 1993); *Joy Technologies, Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W. Va. 1992); New Castle County, 933 F.2d at 1198; *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F. Supp. 1406 (D. Del. 1992) (applying Connecticut law); *Broderick Inv. Co. v Hartford Accident & Indem. Co.*, 954 F.2d 601, 608 (10th Cir.) 506 U.S. 865 (1992); Just, 456 N.W.2d 570; *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686 (Ga. 1989) ("Claussen"); *Avondale Indus., Inc. v. Travelers Indem Co.*, 887 F.2d 1200, 1204-06 (2d Cir. 1989), *cert denied*, 496 U.S. 906 (1990); *Benedictine Sisters of St. Mary's Hosp. v. St. Paul Fire & Marine Ins. Co.*, 815 F.2d 1209, 1210-12 (8th Cir. 1987); *MAPCO Alaska Petroleum, Inc. v. Central Nat'l Ins. Co.*, 795 F. Supp. 941, 946 (D. Alaska 1991); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 160 (W.D. Mo. 1986) ; *National Grange Mut. Ins. Co. v. Continental Cas. Ins. Co.*, 650 F. Supp. 1404, 1409-12 (S.D.N.Y. 1986); *City of Northglenn v. Chevron U.S.A., Inc.*, 634 F. Supp. 217, 223 (D. Colo. 1986); *Payne v. United States Fidelity & Guar. Co.*, 625 F Supp. 1189, 1191-93 (S.D. Fla. 1985); *Hecla Mining Corp. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1090-92 (Colo. 1991); *Outboard Marine Corp. v. Liberty Mut. Ins Co.*, 607 N.E.2d 1204, 1217-22 (Ill 1992); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 535 N.E.2d 1071, 1075-78 (Ill. App. Ct.) 545 N.E.2d 133 (Ill. 1989); *Reliance Ins. Co. v. Martin*, 467 N.E.2d 287, 289-90 (Ill. App. Ct. 1984); *Grinnell Mut. Reinsurance Co. v. Wasmuth*, 432 N.W.2d 495, 497-500 (Minn. Ct. App. 1988); *Colonie Motors, Inc. v. Hartford Accident & Indem. Co.*, 538 N.Y.S.2d 630, 632 (N.Y. App. Div. 1989); *Allstate Ins. Co. v. Klock Oil Co.*, 426 N.Y.S.2d 603, 604-05 (N.Y. App. Div. 1980); *Farm Family Mut. Ins. Co. v. Bagley*, 409 N.Y.S.2d 294, 295-96 (N.Y. App. Div. 1978); *United Pacific Ins Co. v. Van's Westlake Union, Inc.*, 664 P.2d 1262, 1266-67 (Wash. App. Div.), *review denied*, 100 Wash. 2d 1018 (1983); *Lumbermens Mut. Cas. Co. v. Plantation Pipe Line Co.*, 447 S.E.2d 89 (Ga. 1994); *Thompson v Temple*, 580 So.2d 1133 (La. Ct. App. 1991); *Bentz v. Mutual Fire, Marine & Inland Ins. Co.*, 575 A.2d 795 (Md. Ct. Spec. App. 1990); *South Macomb Disposal Authority v. American Insurance Co* , 225 Mich. App. 635, 572 N.W.2d 686 (Mich. Ct. App. 1997); SCSC *Corp. v. Allied Mut. Ins.* Co., 536 N.W.2d 305 (Minn. 1995); *Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888 (Minn. 1994); *Grindheim v. Safeco Ins. Co. of America*, 908 F. Supp. 794 (D. Mont. 1995); *Byrd v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 722 A.2d 598 (N.J. Super. Ct. App. Div. 1999); *Continental Cas. Co. v Rapid-American Corp.*, 609 N.E.2d 506 (N.Y. 1993); *Lumbermens Mut. Cas. Co. v S-W Industries, Inc.*, 39 F.3d 1324 (6th Cir. 1994); *Snydergeneral Corp. v. Century Indem Co.*, 113 F.3d 536 (5th Cir. 1997);

interpretation it advances is reasonable. If it is reasonable, then the doctrine of ambiguities requires that the policyholder's interpretation is given effect. The fact that a single judge has agreed with the policyholder's interpretation may be insufficient to confirm that the policyholder's interpretation is reasonable. However, at some point in time--when three, four, five, ten, twenty, fifty, a hundred or more judges--have reached a similar interpretation as the policyholder, to continue to assert that the policyholder's interpretation is not reasonable simply flies in the face of reality. Well over one hundred judges have determined that the phrase "sudden and accidental" may be reasonably interpreted to mean "unexpected and unintended."[43]

To hold that substantial judicial disagreement is proof positive of ambiguity is no abdication of proper judicial function. Such a holding simply represents a sound evaluation of the irrefutable evidence of reasonability of the policyholder's interpretation. Judges that refuse to acknowledge that the interpretation that "sudden and accidental" means "unexpected and unintended" is at least reasonable might be swayed by the belief that their own interpretation or that offered by the insurance industry is a better one. The policyholder's interpretation need not be better or the best; it need only to be reasonable. Numerous courts around the country agree that the profound judicial disagreement over the meaning of "sudden and accidental" is proof of ambiguity.[44]

Murphy Oil Co., Ltd v. Continental Ins. Co., 33 O.R. (2d) 853 (Cty. Ct. 1981) (Ontario); *Patz v. St Paul Fire & Marine Ins. Co.*, 15 F.3d 699 (7th Cir. 1994).

[43] *See, id.*

[44] *See, McCormick & Baxter*, 923 P.2d 1200, 1218 (Or. 1996) ("'The very fact that a number of courts have reached conflicting conclusions as to the interpretation of a certain provision is frequently considered evidence of ambiguity.'") (*quoting* J.A. Appleman & J. Appleman, 13 *Ins. Law & Practice*, § 7404 (1976)); *Greenville County v. Insurance Reserve Fund*, 443 S.E.2d 552, 553 (S.C. 1994) ("*Greenville County*") ("In view of the holding by numerous jurisdictions, along with the definitions found in both Webster's and Black's, we find the term is ambiguous and susceptible of more than one reasonable interpretation. Construing the ambiguity, as we must, in favor of the insured, we hold that

The Third Circuit stated when interpreting the exclusion:

> We also are impressed by the profound judicial disagreement over the meaning of the phrase "sudden and accidental". That so many learned jurists throughout the nation differ on the construction of the phrase is, in our view, additional proof that the phrase admits to two reasonable constructions."

New Castle County, 933 F.2d at 1198.

Given the vast number of decisions rendered to date, if the interpretation of "sudden and accidental" urged by the insurance industry was the *only* reasonable interpretation one would expect that the case law would tilt mightily in their favor with only a handful of aberrant decisions supporting the policyholder. The Rhode Island Supreme Court, the most recent court to address the "sudden and accidental" issue observed that "a slim but persuasive majority of other jurisdictions holds that the word "sudden" in this type of clause is ambiguous: that is, it is susceptible to more than one reasonable interpretation.... *Textron*, 754 A.2d at 749 (citing *Alabama Plating*, 690 So.2d at 334 (Ala.1996) (per curiam)). "The cases swim [in] the reporters like fish in a lake. The Defendants would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too." *Pepper's Steel & Alloys*, 668 F.Supp. at 1549-50.

'sudden' is to be interpreted as 'unexpected.'"); *New Castle County*, 933 F.2d at 1198 ("That so many learned jurists throughout the nation differ on the construction of the phrase is, in our view, additional proof that the phrase admits to two reasonable constructions.") (italics added); *Just*, 456 N.W.2d 570, 577-78 (Wis. 1990) ("[T]that substantial conflicting authority exists with respect to the 'correct' interpretation of the exclusionary terms merely serves to strengthen the conclusion that the terms are susceptible to more than one meaning, and thus ambiguous"); *United States Fid and Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1155-56 (W.D. Mich. 1988) ("comprehensive debate" over the meaning of the qualified "polluter's exclusion" confirms its inherent ambiguity); *Pepper's Steel & Alloys, Inc. v. United States Fid. & Guar. Co.*, 668 F. Supp. 1541, 1549 (S.D. Fla. 1987) ("[T]here is a plethora of authority from jurisdictions throughout the United States which ... go 'both ways' on the issues presented today. The cases swim the reporters like fish in a lake."); *see also* Annot., *Insurance — Ambiguity — Split Court Opinions*, 4 A.L.R. 4th 1253, 1255 (1981) (same principle)

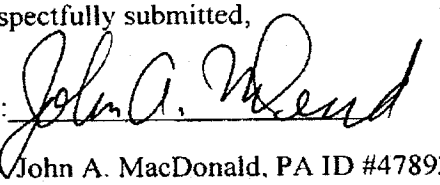
Pennsylvania policyholders are entitled to the full scope of insurance coverage that the insurance industry represented to the Pennsylvania and other insurance departments that would be provided if the regulators approved the sudden and accidental exclusion without a rate reduction. Pennsylvania policyholders should not be deprived of this insurance coverage either through regulatory deceit or through the exclusion of the evidence that would reveal that deceit.

IV. CONCLUSION

The sudden and accidental exclusion, as represented by the insurance industry and approved by the Pennsylvania Department of Insurance, does not exclude insurance coverage for gradual, unintentional pollution injury resulting from intentional waste disposal activities. Pennsylvania statutory and case law requires that the insurance company defendants be estopped from asserting a contrary position herein. The trial court incorrectly dismissed Sunbeam's regulatory estoppel, fraud, misrepresentation, and quasi-estoppel counts. Accordingly, and in the interests of Pennsylvania policyholders and the integrity of the insurance regulatory and judicial systems, it is respectfully asserted that the trial court and Superior Court opinions must be reversed.

Dated: August 11, 2000

Respectfully submitted,

By: 

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