

1993

LaSal Oil Company, Inc. v. Chicago Insurance Company (Interstate Insurance Group); Omaha Indemnity (Frank B. Hall): Zurich Insurance Company; and Utah Property and Casualty Insurance Guaranty Association : Brief of Appellant

Utah Court of Appeals

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Scott W. Christensen; Mark J. Williams; Hanson, Epperson & Smith; Attorneys for Omaha Indemnity; Tim Dalton Dunn.

J. Michael Hansen; Claudia F. Berry; Sutter, Axland & Hanson; Attorneys for Petitioner/Appellant.

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IN THE UTAH COURT OF APPEALS

930536 CA

LaSAL OIL COMPANY, INC.,

Plaintiff/Appellant

v.

CHICAGO INSURANCE COMPANY
(INTERSTATE INSURANCE GROUP);
OMAHA INDEMNITY (FRANK B.
HALL); ZURICH INSURANCE
COMPANY; and UTAH PROPERTY AND
CASUALTY INSURANCE GUARANTY
ASSOCIATION;

Defendants/Appellees

Case No. 930536-CA

Priority No. 15

BRIEF OF PETITIONER/APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
JUDGE JOHN A. ROKICH

J. MICHAEL HANSEN, Esq. (#1339)
CLAUDIA F. BERRY, Esq. (#5037)
SUITTER AXLAND & HANSON
Attorneys for Petitioner/Appellant
LaSal Oil Company, Inc.
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

Scott W. Christensen, Esq.
Mark J. Williams, Esq.
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
Post Office Box 2970
Salt Lake City, Utah 84110-2970
Attorneys for Omaha Indemnity
Tim Dalton Dunn, Esq.

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OCT 28 1993

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellant

v.

CHICAGO INSURANCE COMPANY
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J. MICHAEL HANSEN, Esq. (#1339)
CLAUDIA F. BERRY, Esq. (#5037)
SUITTER AXLAND & HANSON
Attorneys for Petitioner/Appellant
LaSal Oil Company, Inc.
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480
Telephone: (801) 532-7300

Scott W. Christensen, Esq.
Mark J. Williams, Esq.
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
Post Office Box 2970
Salt Lake City, Utah 84110-2970
Attorneys for Omaha Indemnity
Tim Dalton Dunn, Esq.

Carlton R. Ericson, Esq.
DUNN & DUNN
230 South 500 East, Suite 460
Salt Lake City, Utah 84102
Attorneys for Utah Property and Casualty
Insurance Guaranty Association

Robert G. Gilchrist, Esq.
RICHARDS, BRANDT, MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, UT 84144
Attorneys for Chicago Insurance Company

Wallace R. Lauchnor, Esq.
PAULSEN, LAUCHNOR & MICKELSON
CSB Tower, Suite 500
50 South Main Street
Salt Lake City, Utah 84144
Attorneys for Chicago Insurance Company

Donald V. Jernberg, Esq.
Orest Dachniwsky, Esq.
OPPENHEIMER, WOLFF & DONNELLY
Two Illinois Center
233 North Michigan Avenue, Suite 2400
Chicago, Illinois 60601
Attorneys for Chicago Insurance Company

Allan T. Brinkerhoff, Esq.
RAY, QUINNEY & NEBEKER
400 Deseret Building
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Attorneys for Zurich Insurance Company

PARTIES

The parties to the action below were as follows:

- A. Plaintiff: LaSal Oil Company, Inc.
- B. Defendants: Allianz Insurance Company;
Carriers Insurance Company;
Chicago Insurance Company
(Interstate Insurance Group);
Midland Insurance Company;
Omaha Indemnity (Frank B. Hall);
Pacific Employers Insurance Company
(CIGNA);
Travelers Insurance Company;
Zurich Insurance Company; and
Utah Property and Casualty Insurance
Guaranty Association

TABLE OF CONTENTS

	<u>Page</u>
<u>PARTIES</u>	i
<u>TABLE OF CONTENTS</u>	ii
<u>TABLE OF AUTHORITIES</u>	iv
<u>JURISDICTION</u>	1
<u>ISSUES PRESENTED FOR REVIEW</u>	1
1. Did the Trial Court Err When it Held that the Term "Sudden" in the Exception to the Pollution Exclusion Found in Omaha Indemnity's Comprehensive General Liability Policy is Unambiguous?	1
2. Assuming, Arguendo, That "Sudden" is Unambiguous and Has a Temporal Aspect of Abruptness, Did the Court Nevertheless Err in Holding That the Release of Gasoline From Plaintiff's Underground Line Was Not "Sudden"?	2
<u>STATEMENT OF THE CASE</u>	3
Nature of the Case, Course of Proceedings and Disposition in the Trial Court.	3
<u>STATEMENT OF FACTS</u>	9
A. <u>History of Hydrocarbon Contamination</u>	9
B. <u>The Insurance Policies</u>	13
C. <u>The Release of Hydrocarbons at the LaSal Station</u>	17
<u>SUMMARY OF ARGUMENT</u>	21
<u>ARGUMENT</u>	22
POINT I: The Pollution Exclusion in the Omaha and Carriers Policies is Ambiguous and Should, Therefore, be Construed in Favor of LaSal	23
POINT II: Assuming That the Term "Sudden" Has a Temporal Aspect, The Trial Court Nevertheless Erred in Holding That The Release of Gasoline From LaSal's Underground Line Was Not "Sudden"	28

A.	<u>The Volume of Pollutants Released and the Length of Time Between the Onset of a Release and Its Discovery Are Irrelevant as to Whether a Release Is "Sudden"</u>	30
B.	<u>The Fact That the Release From LaSal's Underground Line was Due to Corrosion Is Irrelevant as to Whether The Release Was "Sudden."</u>	38
	<u>CONCLUSION</u>	43

TABLE OF AUTHORITIES

	<u>Page</u>
 CASE LAW	
<u>Arkwright-Boston Manufacturers Mutual Ins. Co. v. Wausau Paper Mills Co.</u> , 818 F.2d 591 (7th Cir. 1987) . . .	38
<u>Allstate Insurance Co. v. Klock Oil Company</u> , 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980)	26
<u>American Casualty Co. of Redding, Pa. v. Eagle Star Ins. Co. Ltd.</u> , 568 P.2d 731 (Utah 1977)	23
<u>Anderson & Middleton Lumber Co. v. Lumbermen's Mutual Casualty Co.</u> , 53 Wash.2d 404, 333 P.2d 938 (1959) . . .	39-41
<u>Atlas Corp. v. Clovis Nat'l Bank</u> , 737 P.2d 225 (Utah 1987) . . .	2
<u>Claussen v. Aetna Casualty & Surety Co.</u> , 259 Ga. 333, 380 S.E.2d 686 (1979)	26, 31, 32
<u>Colonie Motors, Inc. v. Hartford Accident and Indemnity Co.</u> , 538 N.Y.S.2d 630, 632 (N.Y. App. Div. 1989)	34
<u>Draughon v. CUNA Mutual Ins. Society</u> , 771 P.2d 1105 (Utah Ct. App. 1989)	24
<u>Fashion Place Investment, Ltd. v. Salt Lake County</u> , 776 P.2d 941 (Utah Ct. App. 1989)	1, 2
<u>Fuller v. Director of Finance</u> , 694 P.2d 1045 (Utah 1985) . . .	23
<u>Goodman v. Aetna Casualty & Surety Co.</u> , 412 Mass. 807, 593 N.E.2d 233 (1992)	33
<u>Government Employees Ins. Co. v. Dennis</u> , 645 P.2d 672 (Utah 1982)	23
<u>Gridley Assoc., Ltd. v. Transamerica Ins. Co.</u> , 828 P.2d 524 (Utah Ct. App. 1992)	21-23, 29, 30, 35-37, 41, 42
<u>Hartford Accident & Indemnity Co.</u> , 962 F.2d 1484 (10th Cir. 1992)	29
<u>Hecla Mining Co. v. New Hampshire Ins. Co.</u> , 811 P.2d 1083 (Colo. 1991)	27
<u>Home Savings & Loan v. Aetna Casualty & Surety Co.</u> , 817 P.2d 341 (Utah Ct. App. 1991)	2

<u>Hunt v. ESI Engineering, Inc.</u> , 808 P.2d 1137 (Utah Ct. App. 1991)	3
<u>Joy Technologies, Inc. v. Liberty Mutual Ins. Co.</u> , 187 W.Va. 742, 421 S.E.2d 493 (W.Va. 1992)	27
<u>Julius Hyman & Co. v. American Motorists Ins. Co.</u> , 136 F.Supp 830 (D. Colo. 1955)	40
<u>Just v. Land Reclamation, Ltd.</u> , 155 Wis.2d 737, 456 N.W.2d 570 (Wis. 1990)	25, 26, 32, 34, 36
<u>Kitchen v. Cal Gas Co.</u> , 821 P.2d 458 (Utah Ct. App. 1991)	2
<u>Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc.</u> , 407 Mass. 675, 555 N.E.2d 568 (Mass. 1990), cert. denied, ____ U.S. ____, 112 S.Ct. 969 (1992)	32
<u>Mapco Alaska Petroleum v. Central Nat'l Ins. Co. of Omaha</u> , 795 F.Supp. 941 (D. Alaska 1991)	27
<u>Morton Int'l, Inc. v. General Accident Ins. Co. of America</u> , 134 N.J. 1, 629 A.2d 831 (1993)	26, 31, 34, 40, 41
<u>Morton Int'l, Inc. v. Harbor Ins. Co.</u> , 79 Ohio App. 3d 183, 607 N.E.2d 28 (1992)	27
<u>New Castle County v. Hartford Accident and Indemnity Co.</u> , 933 F.2d 1162 (3d Cir. 1991)	27
<u>Outboard Marine Corp. v. Liberty Mutual Ins. Co.</u> , 154 Ill.2d 90, 607 N.E.2d 1204 (1992)	27
<u>Petr-All Petroleum Corp. v. Fireman's Ins. Co.</u> , 188 A.D.2d 139, 593 N.Y.S.2d 693 (1993)	34
<u>Power Sys. & Controls, Inc. v. Keith's Elec. Constr. Co.</u> , 765 P.2d 5 (Utah Ct. App. 1988)	2
<u>Queens City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha</u> , 64 Wash.App. 838, 827 P.2d 1024 (1992)	27
<u>Remington Arms Co. v. Liberty Mutual Ins. Co.</u> , 810 F.Supp. 1406 (D.Del. 1992)	27
<u>Shell Oil Co. v. Winterthur Swiss Ins. Co.</u> , 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815 (1993)	33
<u>Silcox v. Skaggs Alpha Beta, Inc.</u> , 814 P.2d 623 (Utah Ct. App. 1991)	3

<u>Stevenson v. First Colony Life Ins. Co., 827 P.2d 973</u> (Utah Ct. App. 1992)	2
<u>U.S. Fidelity & Guaranty Co. v. Morrison Grain Co.,</u> 734 F.Supp. 437 (D.Kan. 1990)	29
<u>Utah Farm Bureau Mutual Ins. Co. v. Orville Andrews & Son,</u> 665 P.2d 1308 (Utah 1983)	23
<u>Wagner v. Milwaukee Mutual Insurance Co., 145 Wis.2d 609,</u> 427 N.W.2d 854 (Wis.Ct.App. 1988)	32-34, 36, 37
<u>Williams v. First Colony Life Ins. Co., 593 P.2d 534</u> (Utah 1979)	23

OTHER AUTHORITIES

<u>Compact Edition of the Oxford English Dictionary (1971,</u> reprinted 1981)	24
Nancer Ballard and Peter M. Manus, <u>Clearing Muddy Waters:</u> <u>Anatomy of the Comprehensive General Liability</u> <u>Pollution Exclusion</u> , 74 Cornell L. Rev. 610 (1990) .	24, 31
<u>Random House Dictionary of the English Language, (2d ed.</u> unabridged 1987)	24
<u>Webster's Ninth New Collegiate Dictionary (1988)</u>	24

JURISDICTION

The Court has jurisdiction over this appeal by LaSal Oil Company, Inc. ("LaSal") pursuant to Utah Code Ann. § 78-2a-3(2)(k) on the basis that it is a case transferred to the Court of Appeals from the Utah Supreme Court. The Utah Supreme Court had jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) on the basis that the order from which LaSal seeks relief was certified as a final order pursuant to Rule 54(b), Utah Rules of Civil Procedure.

ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court Err When it Held that the Term "Sudden" in the Exception to the Pollution Exclusion Found in Omaha Indemnity's Comprehensive General Liability Policy is Unambiguous?

Standard of Review

Rule 56(c), Utah Rules of Civil Procedure, provides in pertinent part as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In Fashion Place Investment, Ltd. v. Salt Lake County, 776 P.2d 941 (Utah Ct. App. 1989), the Utah Court of Appeals enunciated the standard when the trial court has granted a motion for summary judgment:

Because summary judgment is granted as a matter of law, we review the trial courts

conclusions of law for correctness. Id. If a trial court interprets a contract as a matter of law, that interpretation is not afforded any particular deference on appeal. Power Sys. & Controls, Inc. v. Keith's Elec. Constr. Co., 765 P.2d 5, 9 (Utah Ct. App. 1988).... [I]f the contract is ambiguous, but the case is decided on summary judgment, we can affirm only if the undisputed material facts, concerning the parties' intent, demonstrate the successful litigant's position is correct as a matter of law. Utah R. Civ. P. 56(c).

Id. at 943. See also, Stevenson v. First Colony Life Ins. Co., 827 P.2d 973, 976 (Utah Ct. App. 1992) (the trial court's interpretation of an insurance contract is reviewed under a correctness standard); Kitchen v. Cal Gas Co., 821 P.2d 458, 460 (Utah Ct. App. 1991) (the appellate court reviews the trial court's conclusions of law for correctness, including its conclusions that there are no material fact issues).

As set forth in Home Savings & Loan v. Aetna Casualty & Surety Co., 817 P.2d 341, 347 (Utah Ct. App. 1991), "[t]he interpretation of a contract normally presents a question of law." Interpretation of an insurance contract by the district court is given no particular deference on appeal.

2. **Assuming, Arguendo, That "Sudden" is Unambiguous and Has a Temporal Aspect of Abruptness, Did the Court Nevertheless Err in Holding That the Release of Gasoline From Plaintiff's Underground Line Was Not "Sudden"?**

Standard of Review

An appellate court, in reviewing a summary judgment, analyzes the facts and inferences in the light most favorable to the losing party. Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225,

229 (Utah 1987). As stated in Hunt v. ESI Engineering, Inc., 808 P.2d 1137, 1139 (Utah Ct. App. 1991):

Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.... The facts and inferences to be drawn therefrom are viewed in the light most favorable to the losing party and are affirmed only where it appears that there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. (Citations omitted.)

See also, Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623, 623-34 (Utah Ct. App. 1991).

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition in the Trial Court.

This is a declaratory judgment action filed by LaSal against nine insurance companies which provided comprehensive general liability and excess liability coverage for a service station owned and operated by LaSal in Moab, Utah (the "LaSal Station"). The insurance policies provided coverage for the period from April 1, 1975 through March 8, 1986. LaSal requested the court to declare that the defendant insurers had a duty to defend LaSal in three underlying actions (the "Underlying Actions")¹ and

¹ The underlying actions are:
Arthur Ross, et al. v. LaSal Oil Co., et al., Civil No. 5660, Seventh Judicial District Court in and for Grand County, State of Utah ("Ross");
Hartford Leasing Corp. v. LaSal Oil, et al., Civil No. 5692, Seventh Judicial District Court in and for Grand County, State of Utah ("Hartford"); and

to indemnify LaSal for any judgment or settlement arising out of claims in those three actions. In the Underlying Actions, the plaintiffs and the State of Utah alleged that LaSal, among others, had released gasoline from underground storage tanks and/or lines and had thereby caused property damage and bodily injury. The Utah Property and Casualty Insurance Guaranty Association (the "Guaranty Association") was added as a defendant because two of the insurers, Midland Insurance Company ("Midland") and Carriers Insurance Company ("Carriers"), declared insolvency and were, accordingly, insured by the Guaranty Association pursuant to Utah Code Ann. § 31A-28-20 et seq.

On September 10, 1990, LaSal filed a Motion for Partial Summary Judgment against three of the defendants--Omaha Indemnity ("Omaha"), Travelers Insurance Company ("Travelers") and Allianz Insurance Company ("Allianz")--requesting that the court declare that these three primary carriers had a duty to defend LaSal in the Underlying Actions (R. 491-495). Defendants Travelers, Allianz and Omaha filed cross-motions for summary judgment requesting the court to declare that these three insurers had no liability under their policies and, accordingly, no duty to defend or indemnify LaSal.

At a hearing before the district court on May 17, 1991 (R. 3046-3194), the court expressed concern as to whether it could rule on the issues of the insurers' duties to defend and indemnify when so little was known regarding the timing of the initial

In the Matter of LaSal Oil Co., et al., Civil No. 90-039-OHI, and the Order to Abate, No. 8712456 issued in accordance thereto (the "State Action").

release of gasoline from the underground line at the LaSal Station. Accordingly, the court ordered that additional discovery be undertaken regarding (1) the timing of the initial release of gasoline from the underground line and (2) the timing of the property damage/personal injuries in the Underlying Actions. As part of this discovery, LaSal asked its hydrogeologic consultant, EarthFax Engineering, Inc. ("EarthFax") to review the available data on the hydrocarbon contamination in Moab and to estimate the date when the discharge from the underground line began--assuming for the purposes of this analysis only--that all hydrocarbon contamination in Moab was derived solely from the leak at the LaSal Station and not from other potentially responsible parties. In addition to reviewing the existing data, EarthFax undertook additional sampling in Moab to aid in its analysis. EarthFax set forth its analysis and conclusions regarding the timing of the hydrocarbon release at the LaSal Station in a report entitled "Potential Timing of Hydrocarbon Leakage at LaSal Oil Company," dated October 31, 1991 (the "1991 EarthFax Report") (R. 1640-1663).²

Based upon the 1991 EarthFax Report, gasoline from the LaSal Station would have initially been released into the environment between February, 1983 and September, 1984.

² In addition to the report, affidavits of Richard B. White, the principle investigator at EarthFax who oversaw the work conducted by EarthFax for LaSal in Moab, and the affidavit of Lon P. Hamp, the EarthFax hydrogeologist who authored the 1991 EarthFax Report and who undertook the calculations found therein, were submitted to the court (R. 1664-1671 and 1673-1679, respectively).

Accordingly, damage to the environment in the form of gasoline pollution of the State's soils and groundwater resources would have first occurred within the Midland, Carriers or Omaha Policy periods. LaSal argued that the court should, accordingly, hold that Midland, Carriers and Omaha had a duty to defend LaSal in the State Action.

The 1991 EarthFax Report also estimated that contaminants would have arrived at the southern boundary of the Ross plaintiffs' residential properties no sooner than July, 1986. Any property damage or bodily injury would have occurred after that date and, as a result, would have occurred after the primary carriers' policy periods. Based on the EarthFax estimates LaSal conceded that none of the primary insurers, including Omaha or Carriers, owed a duty to defend LaSal in Ross (R. 1634-1635).

On the basis of the 1991 EarthFax Report, LaSal further argued that if the Hartford Leasing property were contaminated solely by a gasoline release from the LaSal Station, contaminants would have arrived at the Hartford Leasing property some time between approximately October-November, 1984 and July, 1986 (R. 1635-1636). As a result, contamination of the Hartford Leasing property occurred some time during the Carriers or the Omaha Policy periods. Accordingly, LaSal asked the court to hold that Carriers and Omaha had a duty to defend LaSal in the Hartford action.

After hearings held on March 23, 1992 and October 20, 1992, the court granted Travelers' and Allianz' Motions for Summary Judgment against LaSal on the basis that there was no evidence

establishing the possibility of an "occurrence," as defined in the Travelers and Allianz policies, during the Travelers or Allianz Policy periods. Pursuant to such ruling, Travelers and Allianz were dismissed with prejudice from the lawsuit (R. 1881-1883). LaSal does not appeal the ruling dismissing Travelers and Allianz.

An evidentiary hearing was held before the district court on December 17, 1992 wherein LaSal and Omaha presented expert testimony to assist the court in determining whether the holes in the underground gasoline line at the LaSal Station resulted in a "sudden" discharge of gasoline (R. 3195-3320). The Omaha Policy excludes coverage for pollution, except where the discharge or release is "sudden and accidental."

In a Memorandum Decision filed on January 21, 1993 (R. 1886-1893), the district court ruled that the term "sudden" was not ambiguous and that the release of gasoline at the LaSal Station was not "sudden" within the meaning of the pollution exclusion. Accordingly, the district court determined that no coverage was afforded LaSal under the Omaha Policy. In addition to the Memorandum Decision, the district court filed Findings of Fact and Conclusions of Law on February 11, 1993 (R. 1894-1903), together with a Judgment (R. 1904-1906) in favor of Omaha, holding that Omaha had no duty to defend or indemnify LaSal in any of the Underlying Actions and that plaintiff's Complaint was dismissed with prejudice on the merits.

Omaha filed a Motion for Rule 54(b) Certification and supporting memorandum on April 9, 1993 (R. 1929-1930 and 1920-1928).

On May 4, 1993, upon the stipulation of counsel (R. 1932-1935), the district court ordered entry of summary judgment on behalf of Chicago Insurance Co. ("Chicago") based upon the fact that Chicago was the excess carrier for Omaha and the court having found that there was no coverage under the Omaha Policy (R. 1936-1939). The Order of Summary Judgment on behalf of Chicago incorporated by reference the Findings of Fact and Conclusions of Law and Judgment that were previously entered on behalf of Omaha. Chicago filed a Motion for Rule 54(b) Certification on May 10, 1993 (R. 1949-1951).

In May, 1993, LaSal, the Guaranty Association and Zurich Insurance Co. ("Zurich") entered into a Stipulation, Motion and Order (R. 1962-1969), based upon the district court's January 20, 1993 Memorandum Decision (R. 1886-1893), the Findings of Fact and Conclusions of Law (R. 1894-1903), and the Judgment in favor of Omaha (R. 1904-1906). The stipulation provided that the Guaranty Association was entitled to an Order granting it partial summary judgment by reason of the pollution exclusion found in the Carrier Policy. The stipulation likewise provided Zurich was entitled to an order granting it summary judgment as an excess insurer to the Carrier Policy. Based upon the Stipulation, the court granted partial summary judgment to the Guaranty Association and summary judgment to Zurich. This Order was entered and filed with the

clerk of the Third Judicial District Court on May 27, 1993 (R. 1966-1969).

Plaintiff LaSal and defendants Omaha, Chicago, the Guaranty Association and Zurich entered into a Stipulation, Motion and Order stipulating and moving the court for an order certifying the three judgments to be final orders and that each of the judgments be entered as final orders in accordance with Rule 54(b) (R. 1962-1969). The three judgments certified as Rule 54(b) final orders are found at R. 1904-1906, 1036-1939, 1958-1961. It is these three judgments, certified as Rule 54(b) final orders, from which LaSal now appeals.

This appeal is taken from such part of the underlying summary judgments which hold, as a matter of fact and law, that the word "sudden," as found in the exception to the pollution exclusion, is not ambiguous and has a temporal meaning, that the holes in an underground gasoline transmission at the LaSal Station did not result in a "sudden and accidental" discharge of gasoline, and thus that the discharge or release did not fall within the exception to the pollution exclusion found in the Omaha and Carriers Policies, and that Omaha and Carriers had no duty to defend or indemnify LaSal in the Underlying Actions.

STATEMENT OF FACTS

A. History of Hydrocarbon Contamination.

1. Since 1977, LaSal has owned the LaSal Station, located at 322 South Main, Moab, Utah (R. 1895, ¶ 1).

2. In approximately December, 1985, the Utah Department of Health, Southeastern Utah Health District, located in Moab, began receiving complaints of gasoline fumes in a building located to the northwest of the LaSal Station. The tenants of this building include Walker Drug, Spencer's Office Supply and a medical center (this building is hereinafter referred to as the "Walker Drug Building"). By approximately April, 1987, hydrocarbon fumes were reported in four private residences located approximately 475 to 600 feet northwest of the Walker Drug Building.

3. In January, 1986, Ray Klepzig, President of LaSal, learned of the presence of gasoline fumes in and adjacent to the Walker Drug Building. Because of the possibility that the gasoline fumes might be due to a release from the LaSal Station's underground storage tanks and/or lines, LaSal had the lines and tanks tested (R. 1896, ¶ 7; 3216-3217).

4. As a result of this investigation, five small holes were discovered in the coupling threads of an underground gasoline transmission line between an underground gasoline storage tank and a gasoline dispenser (R. 1896, ¶ 8; 3216-3223).³ LaSal replaced all of the lines between the underground storage tanks and the

³ The pipe section with the five small holes was admitted as Exhibit 1-P at the December 17, 1992 evidentiary hearing. Exhibit 4-D, also admitted into evidence, is a photograph of the same pipe section (R. 1885).

dispensers. Since that time, all underground storage tanks and lines at the LaSal Station have tested tight.⁴

5. The underground gasoline transmission lines at the LaSal Station were subjected at all times to pressure of approximately 25 pounds per square inch (psi). When the gasoline dispensers were activated the gasoline transmission lines were subjected to approximately 40-45 psi of pressure (R. 1896; 3215).

6. State and federal agencies began investigating the hydrocarbon contamination in Moab. Preliminary data indicated that a hydrocarbon plume contaminating the soils and ground water extended from at least the vicinity of the Third South and South Main intersection northwest toward the confluence of Pack and Mill creeks (R. 2512-2515).

7. On December 7, 1987, the Utah Division of Environmental Health and the Utah Solid and Hazardous Waste Committee served Orders to Abate on LaSal and Rio Vista Oil Co., Ltd. ("Rio Vista") (R. 2189-2194, 3023-3027). Rio Vista owns and operates a gasoline station on the southeast corner of the Third South and South Main intersection.

8. The Utah Division of Environmental Health (now, the Department of Environmental Quality ("DEQ")), in accordance with Utah Code Ann. §§ 63-46d-1, et seq., held a formal adjudicative hearing in October, 1990 on the Orders to Abate issued to LaSal and Rio Vista. The purpose of the hearing, according to the State, was

⁴ A small hole in one of the underground lines, which was discovered and promptly repaired in July 1992, is not relevant to this action.

to uphold the Orders to Abate issued to LaSal and Rio Vista. On October 31, 1991, the DEQ issued its Order, concluding that the Orders to Abate issued to LaSal and Rio Vista were correct, as a matter of law, and should be affirmed. This conclusion was based on the DEQ's findings that a release of petroleum products from the LaSal and Rio Vista Stations had contributed to contamination of soils and ground water in the Moab area. LaSal appealed the order issued by the DEQ. On December 18, 1992, the Utah Court of Appeals reversed and remanded the order of the DEQ on the basis that the DEQ's findings of fact were insufficient to permit meaningful appellate review. LaSal Oil Co., Inc. v. Department of Environmental Quality, 843 P.2d 1045 (Utah Ct. App. 1992).

9. On or about March 29, 1988, a civil action was filed against LaSal and Rio Vista in the Seventh Judicial District Court in and for Grand County, State of Utah, styled Arthur Ross, et al. v. LaSal Oil Co., Rio Vista Oil, Ltd. and John Does 1-20, Civil No. 5660 (R. 2572-2597). The plaintiffs in Ross claimed that gasoline fumes from the LaSal and Rio Vista Stations had entered their homes. In September, 1992, trial was held in the Seventh Judicial District Court for Grand County. The jury apportioned liability between LaSal, Rio Vista and a third service station, the Auto Tire Service Center. A settlement was entered into between LaSal and the plaintiffs after trial, and no judgment was entered against LaSal.

10. On or about June 3, 1988, a second civil action styled Hartford Leasing Corp. v. Rio Vista Oil, Ltd., LaSalle [sic]

Oil Co., State of Utah, Dependable Janitorial Service and John Does I-X, Civil No. 5692, was filed against LaSal, among others, in the Seventh Judicial District Court of Grand County, State of Utah. Plaintiff alleged that petroleum products released by the defendants resulted in the infiltration of hydrocarbon vapors into the Moab Regional Center, a building owned by plaintiff (R. 2598-2612). In March, 1993, defendants LaSal and the State of Utah filed motions to dismiss plaintiff's Complaint for lack of prosecution. Defendant Rio Vista joined the motions filed by the State and LaSal. In a ruling filed on June 21, 1993, the district court granted defendants' motions to dismiss plaintiff's Complaint with prejudice for failure to prosecute. Plaintiff has appealed this decision.

B. The Insurance Policies.

11. Carriers issued a comprehensive general liability ("CGL") policy under which LaSal was one of the named insureds, Policy No. LP-400088 (the "Carriers Policy"), with a policy period from April 1, 1983 to April 1, 1984. The Carriers Policy was renewed with coverage extended to April 1, 1985. The Carriers Policy was cancelled effective August 6, 1984 (R. 2019-2109).

12. Carriers was declared insolvent and ordered liquidated by the Iowa District Court for Polk County, effective January 16, 1986.

13. Zurich issued a commercial umbrella liability policy (the "Zurich Policy") under which LaSal was one of the named insureds. The Zurich Policy provided excess coverage above the

underlying Carriers Policy. The Zurich Policy is Policy No. CU 3101-012-00 and has a policy period from April 9, 1984 to April 9, 1985. The Zurich Policy was cancelled effective July 1, 1984 (R. 6).

14. Omaha issued a CGL policy under which LaSal was one of the named insureds, Policy No. CL000269 (the "Omaha Policy"), with a policy period from July 1, 1984 to July 1, 1985 (R. 1895, ¶ 2).

15. Chicago issued a commercial umbrella liability policy (the "Chicago Policy") under which LaSal is the named insured. The Chicago Policy affords excess coverage above the underlying Omaha Policy CL-000269 (R. 460). The Chicago Policy is Policy No. 55C-2059706 and has a policy period from July 1, 1984 to July 1, 1985 (R. 452-465).

16. Under the "duty to defend" provision found in the Omaha and Carriers Policies, Omaha and Carriers agreed to:

. . . defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, . . .

(R. 2146, 2023.)

17. The coverage provision in the Omaha and Carriers Policies provides that the insurer:

. . . will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury; or (b) property damage; to which this insurance applies, caused by an occurrence, . . .

(R. 2146, 2023.)

18. The term "occurrence" is defined in the Omaha Policy
as:

"Occurrence" means an accident including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the stand point of the Insured.⁵

R. 2128.)

19. The Omaha Policy defines the term "property damage,"
as:

"Property damage" means: (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom; or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.⁶

(R. 2128.)

20. The term "bodily injury" is defined in the Omaha
Policy as:

"Bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, . . .⁷

(R. 2128.)

21. The Omaha and Carriers Policies contains the
following exclusion:

This insurance does not apply:

(f) to bodily injury or property damage arising out of the discharge, disbursal, release or escape

⁵ The Carriers Policy does not define "occurrence."

⁶ The Carriers Policy does not define "property damage."

⁷ The Carriers Policy does not define "bodily injury."

of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or other water course or body of water; but this exclusion does not apply if such discharge, disbursal, release or escape is sudden and accidental; . . .

(R. 2146, 2067) (emphasis added).

22. By letter dated February 21, 1986, LaSal notified Omaha of the possible gas leak from LaSal's underground storage lines and of potential claims under Omaha's CGL policy (R. 2841-2842).

23. In August 1987, Omaha agreed to underwrite certain expenses in the investigation of the alleged leak from LaSal's underground storage tanks and lines, including retention of EarthFax Engineering, Inc. and a drilling company, and retention of an accountant to assist LaSal in its review of gasoline inventories. Omaha also advised LaSal of certain reservations of rights (R. 2858-2859).

24. On or about June 18, 1987, LaSal filed a notice of claim with the Guaranty Association, based on the CGL policy issued by Carriers (R. 2850-2851).

25. By letter dated June 22, 1987, the adjuster for the Guaranty Association informed LaSal that the cutoff dates for filing claims against Carriers had past and, accordingly, that there was nothing the adjuster could do to aid LaSal (R. 2860).

26. On July 6, 1987, notice of claim was sent by LaSal directly to the liquidator for Carriers (R. 2863-2864). Carriers' liquidator, by letter dated July 15, 1987, refused to accept

LaSal's claim on the basis that the "underground leak" was not sudden and accidental and, therefore, that it was excluded under the pollution exclusion (R. 2865-2866).

27. By letter dated September 3, 1987, Omaha set forth its position regarding its coverage obligation and duty to defend obligation to LaSal (R. 2867-2868). Omaha, per its agreement and under its reservation of rights, paid for certain services performed for LaSal by EarthFax Engineering, Inc. and by Zimmerman Well Service, Inc. Omaha declined to pay LaSal's total attorneys' fees. Rather, Omaha paid one-sixth of LaSal's attorneys' fees or \$1,275.14, incurred prior to September 3, 1987.

28. In a letter dated December 28, 1988, counsel for LaSal tendered defense of the Underlying Actions to Omaha and the other primary carriers (R. 2876-2877).

29. By letter dated February 3, 1989, Omaha declined LaSal's tender of defense (R. 2905-2906).

30. LaSal received no response from the Guaranty Association regarding LaSal's tender of defense.

C. The Release of Hydrocarbons at the LaSal Station.

31. The 1991 EarthFax Report concluded that the onset of the gasoline release at the LaSal Station occurred between February, 1983 and September, 1984. The report further concluded that gasoline would have reached the groundwater within a few days (R. 1655-1656).

32. Based on the 1991 EarthFax Report, LaSal asserted, for purposes of argument on the cross-motions for summary judgment

only, that damage to the environment in the form of hydrocarbon pollution of the State's soils and groundwater resources would have first occurred between February, 1983 and September, 1984 and, as a consequence, fell within the Midland, Carriers and Omaha Policy periods (R. 1633-1634).

33. LaSal asserted that the trial court should, therefore, hold that Midland, Carriers and Omaha had a duty to defend LaSal in the State Action (R. 1636).

34. The 1991 EarthFax Report also concluded that contaminated groundwater from the LaSal Station would have arrived at the southern boundary of the Ross plaintiffs' residential properties no sooner than July, 1986. Based on this estimate, LaSal conceded that Omaha had no duty to defend LaSal in the Ross action (R. 1655-1656; 1898, ¶ 19).

35. Based on conclusions in the 1991 EarthFax Report, LaSal further asserted that hydrocarbon contaminants would have arrived at the Hartford Leasing Property (also known as the Moab Regional Center) some time between approximately October-November, 1984 and July, 1986 (R. 1635-1636).

36. As a result, LaSal contended that contamination of the Hartford Leasing Property occurred some time during the Carriers or Omaha Policy periods. LaSal asked the court to hold that Carriers and Omaha had a duty to defend LaSal in the Hartford Action (R. 1636).

37. After reading the parties memoranda and other submissions, and hearing oral argument on the issues of the duty to

defend and the duty to indemnify, the trial court requested that LaSal and Omaha present expert testimony at an evidentiary hearing to assist the court in deciding whether the five small holes found in the underground transmission line on the west side of the LaSal Station resulted in a "sudden" discharge of gasoline (R. 1898-1899, ¶ 20).

38. At the evidentiary hearing before the trial court on December 17, 1992, LaSal presented testimony through two witnesses, Ray Klepzig (the President of LaSal) and Dr. Charles Pitt, a Ph.D. in Metallurgy. Omaha presented the testimony of Dr. Franklin Alex, also a Ph.D. in Metallurgy (R. 1899, ¶ 21).

39. After analyzing the section of pipe which contained the five small holes, Dr. Pitt drafted a report on his conclusions as to whether the discharge of gasoline occurred suddenly. The report stated in part:

In my opinion the openings were caused by a sudden failure of the metal at the thread roots. The sudden failure was due to over stress of the metal from the interior pressure of the liquid gasoline in the tank. Corrosion of the pipe wall produced a situation where the metal thickness at the thread roots was too small to hold the interior pressure. At that point in time the thinned metal fractured suddenly (due perhaps to a fluctuation of pressure in the line) allowing gasoline to flow from the opening produced by the metal failure. . . . From information given by the station owner the interior pressure in the pipe could have been as much as 45 psi. The resulting calculation gives a metal thickness of 1.1 mils at the time of failure. Basically what will happen in a failure of this type is that the metal will rupture suddenly due to the interior stress at the thinnest area of the metal. After rupture there may be corrosion at the thin edge of the metal to further enlarge the openings.

R. 1885, Exhibit 3-P.

40. According to Dr. Pitt's testimony at the evidentiary hearing, the section of pipe he examined was corroded in a number of localized areas:

The corrosion proceeded to continue until at some point in time the metal was thin enough to burst suddenly from the inside pressure of the pipe.

. . .

The corrosion simply thinned the pipe to a point where it failed at the thread root.

R. 3235, 3238-3239.

41. It was Dr. Pitt's opinion that, prior to the instant when the holes in the pipe formed, gasoline was moving through the pipe with no leakage. Once a hole appeared in the pipe, there would be a release of gasoline to the environment (R. 3237-3239).

42. In Dr. Pitt's opinion, the failure exhibited on the pipe section probably occurred because of an increase in gasoline pressure inside the pipe as, for example, when the gasoline pump was turned on and the pressure inside the pipe went from 25-30 psi to 40-45 psi (R. 3255).

43. According to Dr. Pitt, the fracture moment, whether due to corrosion or some form of external stress, is the same (R. 3239-3241).

44. Dr. Alex, Omaha's expert, also analyzed the section of pipe. Dr. Alex, like Dr. Pitt, testified that prior to the instant when a hole in the pipe formed, the line would hold gasoline without leaking, whereas after failure of the pipe it would immediately begin to leak:

Q: Now, before there was a failure in that piece of pipe, before there was a failure, would it hold water or gasoline?

A: Yes, it would.

Q: And after the failure it wouldn't hold water or gasoline, right?

A: That is correct.

Q: And it's true, isn't it, that at one point in time that piece of pipe would hold gasoline? It was a good containment unit, right?

A: That is correct.

Q: And at some point in time it wasn't a good containment unit, right?

A: That is correct.

R. 3289.

SUMMARY OF ARGUMENT

The pollution exclusion in the Omaha and Carriers Policies contains an exception for any "discharge, disbursal, release or escape [which] is sudden and accidental." This Court in Gridley Assoc., Ltd. v. Transamerica Ins. Co., 828 P.2d 524 (Utah Ct. App. 1992) held that the term "sudden" found in the exception to the pollution exclusion is unambiguous and that it has a temporal element. Plaintiff requests that this Court reexamine the issue as to whether "sudden" is unambiguous. Based on dictionary definitions, the history of the exception to the pollution exclusion and the scope of the controversy among jurisdictions concerning the exception to the pollution exclusion, it is clear that the term "sudden" interpreted in conjunction with the term

"accidental" is reasonably susceptible to more than one interpretation, including "unintended or unexpected." Because the term is susceptible to more than one interpretation, the term must be construed against Omaha and Carriers, and in favor of LaSal since the release of gasoline at the LaSal Station was both unexpected and unintended.

In the alternative, assuming that the term "sudden" is unambiguous and that it has a temporal aspect, the release of gasoline from the LaSal Station was nevertheless "sudden." The initial small opening in the underground line at the LaSal Station, although caused by corrosive processes, materialized abruptly, discharging gasoline immediately into the environment. As this Court recognized in Gridley, neither the length of time which elapsed between this immediate release and the discovery of the release nor the volume of the initial release is relevant as to whether the release occurred "suddenly." The cause of the initial release or fracture is equally irrelevant as to whether the release occurred "suddenly." Accordingly, because the discharge occurred abruptly and instantaneously the release falls within the "sudden and accidental" exception to the pollution exclusion.

ARGUMENT

POINT I

The Pollution Exclusion in the Omaha and Carriers Policies is Ambiguous and Should, Therefore, be Construed in Favor of LaSal.

This Court held in Gridley Assoc., Ltd. v. Transamerica Ins. Co., 828 P.2d 524 (Utah Ct. App. 1992) that the term "sudden" found in the exception to the pollution exclusion in a CGL policy was unambiguous and that it had a temporal element. The Court should, however, reexamine the issue as to whether "sudden" is, in fact, unambiguous. Subsequent to this Court's Gridley decision, other jurisdictions have found that the term "sudden and accidental" is subject to more than one reasonable interpretation and, as a result, must be interpreted in favor of coverage for the insured.

It is well established that ambiguities in an insurance contract must be resolved against the insurance company as drafter of the language in question. Fuller v. Director of Finance, 694 P.2d 1045 (Utah 1985); Utah Farm Bureau Mutual Ins. Co. v. Orville Andrews & Son, 665 P.2d 1308, 1309 (Utah 1983); Williams v. First Colony Life Ins. Co., 593 P.2d 534 (Utah 1979). "[I]f an insurance policy is ambiguous or uncertain, so that it is fairly susceptible of different interpretations, any doubt should be resolved in favor of insurance coverage." American Casualty Co. of Redding, Pa. v. Eagle Star Ins. Co. Ltd., 568 P.2d 731, 734 (Utah 1977). See also, Government Employees Ins. Co. v. Dennis, 645 P.2d 672, 674 (Utah 1982).

The phrase "sudden and accidental" is not defined in the Omaha or Carriers Policies. Likewise, neither the word "sudden" nor "accidental" are defined separately. In the absence of a definition set forth in an insurance policy, terms in that policy are interpreted in light of their ordinary, commonly used meaning. Draughon v. CUNA Mutual Ins. Society, 771 P.2d 1105, 1108 (Utah Ct. App. 1989). Dictionary definitions support the position that "sudden" is susceptible to more than one reasonable meaning. The primary meaning of "sudden" found in most dictionaries is "happening without warning" or "unexpected."⁸ Dictionary definitions are inconsistent, however, with respect to whether the term "sudden" does or does not refer to duration:

⁸ Webster's Ninth New Collegiate Dictionary (1988) defines "sudden" as: (1) happening or coming unexpected, changing angle or character all at once; (2) marked by or manifesting abruptness or haste; (3) made or brought about in a short time; an unexpected occurrence; emergency.

The Compact Edition of the Oxford English Dictionary (1971, reprinted 1981) defines "sudden" as: happening or coming without warning or premonition; taking place or appearing all at once. In some contexts the implication is rather unexpected, unforeseen, unlooked for or not prepared or provided for; (2) of a turning, etc.: abrupt, sharp; (3) of physical objects: appearing or discovered unexpectedly; (4) made, provided, or formed in a short time; (5) prompt in action or effect, producing an immediate result; (6) brief, momentary, lasting only a short time.

The Random House Dictionary of the English Language, (2d ed. unabridged 1987) defines "sudden" as: (1) happening, coming, made, or done quickly, without warning or unexpectedly: a sudden attack; (2) occurring without transition from the previous form, state, etc.; abrupt, a sudden turn; (3) impetuous; rash; (4) unpremeditated; (5) and unexpected occasion or occurrence.

See additional definitions in Nancer Ballard and Peter M. Manus, Clearing Muddy Waters, Anatomy of the Comprehensive General Liability Pollution Exclusion, 75 Cornell L. Rev. 610, n. 11 (1990).

Courts that have not carefully considered the temporal nature of "sudden" have confused it with brevity and have asserted that an event which does not end quickly cannot be sudden. Certainly some "sudden" events do end quickly, due to the physical properties of the activity, such as a "sudden shot." However, a shot into the air could still be described as a "sudden shot" although the bullet might travel for miles and an indeterminate period of time. The dictionaries' various illustrations of sudden events are not events that necessarily end quickly. For example, Webster's New Twentieth Century Dictionary, unabridged, illustrates the meaning of sudden with the phrase "sudden emergency." A sudden emergency is one which arises abruptly and unexpectedly. The duration of the emergency is irrelevant to the concept. A "sudden need" begins abruptly but need not end quickly. Similarly, a "sudden attack," "sudden fear" and "sudden resolve" may be of long or short duration. Compare a "sudden recognition" of an old schoolmate that may continue for one's life time with a "sudden explosion" lasting less than a minute, and a "sudden heat wave" which could last one day or several weeks. In common usage, a "sudden" event is one which begins abruptly or without previous notice irrespective of whether the duration of that event is short or long.

Nancer Ballard and Peter M. Manus, 75 Cornell L. Rev. 610 (1990) (footnotes omitted).

In Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990), the Wisconsin Supreme Court rejected the position advanced by an insurer which argued that the only meaning for the word "sudden" was abrupt or immediate. While acknowledging that "abrupt or immediate" was certainly one common meaning, the court pointed out that recognized dictionaries provided a range of meanings for the term "sudden." Id. at 573.

The Just court also relied upon two additional lines of reasoning in holding that the word "sudden" was ambiguous. First, the court examined the history of the exception to the pollution

exclusion in order to determine the intent of the insurance industry when it drafted the pollution exclusion at issue in 1973. The Just court noted that according to various commentators, "the exclusion was designed to decrease claims for losses caused by expected or intended pollution by providing an incentive to industry to improve its manufacturing and disposal processes, and unintentional or unexpected damages would still be covered as an 'occurrence' under the policy." Id. at 574. The insurance industry also represented to state insurance commissioners that the new exclusion continued coverage for pollution-caused injuries resulting from accidents, but excluded coverage for injuries resulting from expected or intended pollution. Id. (See extensive discussion of the history of the pollution exclusion in Morton Int'l, Inc. v. General Accident Ins. Co. of America, 134 N.J. 1, 629 A.2d 831 (1993)).

Second, the Just court reviewed the scope of the controversy among jurisdictions concerning the exception to the pollution exclusion. The Just court found that the extensive debate over the meaning of the term "sudden" "dispels the insurer's contention that the exclusionary language is clear." Id. at 578. The court concluded that the term "sudden" was, in fact, ambiguous and, therefore, that the pollution exclusion must be interpreted in favor of coverage. See also, Allstate Insurance Co. v. Klock Oil Company, 73 A.D.2d 486, 426 N.Y.S.2d 603 (1980) ("sudden" not necessarily limited to an instantaneous happening); Claussen v. Aetna Casualty & Surety Co., 259 Ga. 333, 380 S.E.2d 686 (Ga. 1979)

("sudden" has more than one reasonable meaning, including "unexpected"); Mapco Alaska Petroleum v. Central Nat'l Ins. Co. of Omaha, 795 F.Supp. 941 (D. Alaska 1991) ("the phrase 'sudden and accidental', as well as having a temporal meaning, can also refer to that which occurs without notice"); Queens City Farms, Inc. v. Central Nat'l Ins. Co. of Omaha, 64 Wash.App. 838, 827 P.2d 1024 (1992); Outboard Marine Corp. v. Liberty Mutual Ins. Co., 154 Ill.2d 90, 607 N.E.2d 1204 (1992); Joy Technologies, Inc. v. Liberty Mutual Ins. Co., 187 W.Va. 742, 421 S.E.2d 493 (W.Va. 1992); Remington Arms Co. v. Liberty Mutual Ins. Co., 810 F.Supp. 1406 (D.Del. 1992) (under Connecticut law the term "sudden and accidental" was reasonably capable of two widely different interpretations); Morton Int'l, Inc. v. Harbor Ins. Co., 79 Ohio App. 3d 183, 607 N.E.2d 28 (1992); New Castle County v. Hartford Accident and Indemnity Co., 933 F.2d 1162 (3d Cir. 1991) (the term "sudden appears capable of two reasonable interpretations--"abrupt" and "unexpected" and, therefore, is ambiguous under Delaware law); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991).

In the case now before this Court, Carriers and Omaha are not relieved of their duty to defend or indemnify LaSal on the basis of the exception to the pollution exclusion found in each of their policies. The "sudden and accidental" language in the exception to the pollution exclusion is subject to at least two reasonable, alternative interpretations. If the term "sudden" is interpreted in conjunction with the term "accidental" to be

susceptible to more than one reasonable interpretation, one of which is "unintended or unexpected," there is coverage. There is no evidence whatsoever that LaSal either expected or intended that one of its underground lines would fracture, thereby releasing gasoline into the environment. Indeed, counsel for Omaha acknowledged that the release was "accidental," and that LaSal neither intended nor expected the release (R. 3143). The undisputed testimony of Ray Klepzig, the President of LaSal, is that as soon as he suspected that there may have been a release of gasoline, he took immediate steps to locate and repair LaSal's lines and tanks (R. 3215-3223). It was in LaSal's best interest to assure that no releases of gasoline from its underground tanks and lines occurred, and that if any fracture or opening did occur, it be stopped as quickly as possible.

In sum, the exception to the pollution exclusion is reasonably susceptible to more than one interpretation, including "unexpected" and "unintended." It must, therefore, be construed against Omaha and Carriers, and in favor of LaSal to provide coverage for the release of gasoline at the LaSal Station.

POINT II

**Assuming That the Term "Sudden" Has a Temporal Aspect,
The Trial Court Nevertheless Erred in Holding That The Release
of Gasoline From LaSal's Underground Line Was Not "Sudden"**

On January 21, 1993, the trial court issued its Memorandum Decision (R. 1886-1893) finding that the leak at the LaSal Station "was not the result of a sudden occurrence," and, accordingly, that no coverage was afforded LaSal under the Omaha

Policy because of the exception to the pollution exclusion. In so holding, the trial court relied upon this Court's decision in Gridley Assoc., Ltd. v. Transamerica Ins. Co., 828 P.2d 524 (Utah Ct. App. 1992), as well as the trial court's own experience with leaking pipes (R. 3296-3297). In relying on Gridley, the court noted that the Gridley court held that,

"The terms 'sudden and accidental' are unambiguous. As commonly used, the meaning of sudden combines both elements of without notice or warning and quick or brief in time. . . . Sudden connotes a 'temporal aspect of immediacy, abruptness, swiftness, quickness, instantaneous and brevity.'"

R. 1890, citing Gridley et al. v. Transamerica Ins. Co., 828 P.2d at 527 (quoting U.S. Fidelity & Guaranty Co. v. Morrison Grain Co., 734 F.Supp. 437, 446 (D.Kan. 1990)).⁹

The trial court, also following Gridley, properly recognized that the length of time which elapses between the commencement of a release and the discovery of the release "does not render the fracture any less sudden." The trial court also recognized that the amount of discharge was irrelevant as to whether the discharge was sudden (R. 1891). According to the trial court, the only fact distinguishing this case from Gridley is that the fracture in the pipe in Gridley was a "clean break," apparently caused by ground adjustment, whereas the point of release in LaSal's pipe was caused by corrosion. Because the force(s) which

⁹ Recent Tenth Circuit decisions, Anaconda Minerals Co. v. Stoeler Chemical Co., 990 F.2d 1175 (10th Cir. 1993) and Hartford Accident & Indemnity Co., 962 F.2d 1484 (10th Cir. 1992), have upheld the trial court's determination that under Utah law "sudden" is unambiguous and has a temporal aspect. Both cases involved continuous, routine discharges of pollutants on industrial sites.

caused the fracture in the Gridley pipe were different from those which caused the fracture in LaSal's pipe, the trial court concluded that the discharge of gasoline from the underground transmission line at the LaSal Station was not "sudden." According to the trial court, "[t]he convincing evidence is that a leak caused by corrosion is not sudden and accidental." (R. 1891). This perceived distinction is based on *dicta* in Gridley wherein the Court noted that there was,

[n]o evidence . . . that the break was caused by corrosion or deterioration which would have resulted in a gradual drip or trickle of gasoline from the line. The clean break certainly resulted in an unexpected as well as an immediate and abrupt flow of gasoline from the severed line every time the pump was activated.

Id. at 527.

A. The Volume of Pollutants Released and the Length of Time Between the Onset of a Release and Its Discovery Are Irrelevant as to Whether a Release Is "Sudden".

In Gridley, this Court adopted the position that "'sudden' has a plain, unambiguous meaning. While the word sudden connotes a sense of unexpectedness, 'sudden' within the 'sudden and accidental' clause cannot be defined without reference to a temporal element, specifically immediacy, abruptness, and quickness." Id. at 527 (footnotes omitted).

The Gridley court's interpretation of the term "sudden" as having a temporal element explicitly recognizes that the exception to the pollution exclusion merely requires that the discharge itself be sudden in order for there to be coverage and, as a result, that the length of time which elapses between the

initiation of the release and its discovery is irrelevant as to the "suddenness" of the release. The term "sudden," however, should not be confused with "brevity." As stated by the New Jersey Supreme Court in Morton Int'l, Inc. v. General Accident Ins. Co. of America, 134 N.J. 1, 629 A.2d 831 (1993):

Certainly some "sudden" events do end quickly, due to the physical properties of the activity, such as a "sudden shot." A sudden emergency is one which arises abruptly and unexpectedly. The duration of the emergency is irrelevant to the concept. A "sudden need" begins abruptly but need not end quickly. Similarly, a "sudden attack," "sudden fear," and "sudden resolve" may be of long or short duration. Compare a "sudden recognition" of an old schoolmate that may continue for one's lifetime with a "sudden explosion" lasting less than a minute and a "sudden heat wave" which could last one day or several weeks. In common usage, a "sudden" event is one which begins abruptly or without previous notice, irrespective of whether the duration of that event is short or long.

Id. at 871-872, citing N. Ballard and P. Manus, Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion, 74 Cornell L. Rev. 610 (1990).

Other jurisdictions have also recognized that the term "sudden" refers to the initial release of pollutants and not to the duration of the release. In Claussen v. Aetna Casualty & Surety Co., 259 Ga. 333, 380 S.E.2d 686 (1979), the court recognized that various definitions of "sudden" include both "abrupt" and "coming or occurring unexpectedly." The court stated,

On reflection one realizes that, even in the popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. Even when used to describe the onset of an event, the word has an elastic

temporal connotation that varies with expectations:
Suddenly, it's spring.

Id. at 688. Thus, the Claussen court held that under common usage, "sudden" has a temporal element of abrupt or unexpected onset, but did not necessarily mean brevity.

Similarly, in Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 407 Mass. 675, 555 N.E.2d 568 (Mass. 1990), cert. denied, ____ U.S. ____, 112 S.Ct. 969 (1992), the Supreme Judicial Court of Massachusetts considered a certified question from the United States District Court regarding the proper interpretation of the "sudden and accidental" exception to the pollution exclusion clause of a CGL policy. The Lumbermens court, in holding that the term "sudden" had a temporal element, reasoned that the sudden event to which the exception to the pollution exclusion applied was the release of pollutants, and not to the cause of the release or the damage caused by the release. Id. at 571. "Surely, the abruptness of the commencement of the release or discharge of the pollutant is the crucial element." Id. at 572.

In Wagner v. Milwaukee Mutual Insurance Co., 145 Wis.2d 609, 427 N.W.2d 854 (Wis.Ct.App. 1988); overruled on other grounds, Just v. Land Reclamation, Ltd., 155 Wis.2d 737, 456 N.W.2d 570 (Wis. 1990), the court found that a release of gasoline from an underground storage tank was both temporally sudden and accidental. Although the record did not establish the exact cause of the leak, the evidence indicated that it occurred three years before its discovery. According to the court, the fact that three years had elapsed between the date of the initial release and the discovery

of the leak was irrelevant to determining whether the event itself was "sudden." The court stated:

The gasoline began leaking immediately after the pipe was damaged in 1981, and continued to leak until it was discovered in 1984. Without question there was an immediate discharge of gasoline into the ground; it just took several years for the gasoline to migrate to a point where it could be detected. The length of time that elapsed before the leak was discovered is irrelevant as to the suddenness of the discharge.

427 N.W.2d at 857.

The Wagner court also rejected the insurance company's position that a pipe which leaked for three years was not "sudden" on the basis that if followed to its logical conclusion, the argument was unreasonable:

Milwaukee Mutual admitted at oral argument that even were the pipe to be damaged accidentally, only the quantity of pollutants released immediately following the property damage would meet the requirement that the discharge be "sudden." We believe that no reasonable distinction can be made between an accident that causes an immediate discharge of pollutants in great amounts and one that creates a leak permitting great amounts of pollutants to accumulate over time. Interpreting the contract language to make such a distinction would place an unreasonable and insurmountable burden on an insured. The insured would be forced to show that the damage for which he or she is liable resulted from the initial discharge as opposed to that occurring later in time. We refuse to construe the language of an insurance policy to effectuate an unreasonable result.

Id. See also, Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 15 Cal. Rptr. 2d 815, 841-842 (1993) ("‘sudden’ refers to the pollution’s commencement and does not require that the polluting event terminate quickly or have only a brief duration"); Goodman v. Aetna Casualty & Surety Co., 412 Mass. 807,

593 N.E.2d 233 (1992) (crucial element in determining whether an event is "sudden" is the abruptness of the commencement of the release of the pollutant); Petr-All Petroleum Corp. v. Fireman's Ins. Co., 593 N.Y.S.2d 693 (N.Y.App.Div. 1993) (leak from a subsurface pipe that continues undetected for a period of time is both sudden and accidental); Morton Int'l, Inc. v. General Accident Ins. Co. of America, 134 N.J. 1, 629 A.2d 831 (N.J. 1993) ("the duration of the event--whether it lasts an instant, a week, or a month--is not necessarily relevant to whether the inception of the event is sudden"). Colonie Motors, Inc. v. Hartford Accident and Indemnity Co., 538 N.Y.S.2d 630, 632 (N.Y. App. Div. 1989) (The initial discharge of waste oil from a containment tank was "sudden and accidental." "The fact that the discharge was not readily discoverable and, thus, continued for a period of time, through no fault of the insured, should not move an otherwise covered occurrence within the rather shadowy perimeter of the exclusion.")

Because the length of time that the release remains undetected is irrelevant, it follows that the volume of pollutants which escapes into the environment during the period when the release remains undetected is equally irrelevant to the "suddenness" of the release. Wagner v. Milwaukee Mutual Ins. Co., 427 N.W.2d 854 (Wis.Ct.App. 1988), *overruled on other grounds*; Just v. Land Reclamation, Ltd., 155 Wis.2d 737, 456 N.W.2d 570 (Wis. 1990). Hence, Judge Rokich in the instant case properly found that "the amount of discharge does not render the fracture any less sudden." (R. 1891.)

This Court recognized in Gridley that the amount of pollutants which escape prior to detection is irrelevant to the suddenness of the release, stating:

For instance, if an accident causes a break in a very large oil line in a remote area which spills large amounts of oil onto the ground, the fact that the oil spill remains undetected for a period of time does not render the discharge of oil any less "sudden." Accordingly, in the case at bar, where there was damage to a line which caused an immediate spill of gasoline into the ground that remained undiscovered by Gridley for some months, the discharge itself was still "sudden" as contemplated by the exception to the pollution exclusion.

Id. at 527-528.

The exception to the pollution exclusion does not contain any reference to volume. If the exception were intended to have a volume threshold in order to trigger coverage, then the exception should explicitly state that such a threshold must exist. Any volume threshold, furthermore, would be impracticable because that threshold would have to be tied to specific pollutants. This necessarily follows for the reason that certain pollutants, even in minute quantities, may disperse rapidly, causing immediate bodily injury or property damage, whereas other pollutants may require significant volumes before bodily injury or property damages occur.

In addition, to hold that the volume of pollutants released is relevant to determining whether the release was "sudden and accidental" would lead to anomalous results. For example, suppose that two insureds each releases the same amount of pollutants into the ground. The first insured, in the few moments after a large rupture of his underground tank or line, discharges

hundreds of gallons of pollutants into the ground and continues to do so at a lesser rate for a period of months or years. Assume, on the other hand, that the second insured has a very small hole in an underground tank or pipe which releases only one gallon of pollutants during the first moment and continues to release pollutants at that same rate for a period of years, so that the volume of pollutants released by the first insured with the large rupture is the same as that released by the second insured with the small hole. If the volume of release were relevant to whether the release was "sudden," the first insured would have insurance coverage under the exception to the pollution exclusion whereas the second insured with the small fracture would have no coverage, despite the fact that each insured releases the same amount of pollutants to the environment. Furthermore, to require that an insured be able to quantify the initial release in order to fall within the exception to the pollution exclusion places an insurmountable burden on the insured. In the vast majority of cases, the measurement of volume of pollutants at the initial release would be difficult, if not impossible, to determine.

The Gridley court, in holding that the break in the line at issue resulted in a "sudden and accidental" release to the environment, relied in part upon the reasoning found in Wagner v. Milwaukee Mutual Insurance Co., 145 Wis.2d 609, 427 N.W.2d 854 (Wis.Ct.App. 1988), *overruled on other grounds*, Just v. Land Reclamation, Ltd., 155 Wis.2d 737, 456 N.W.2d 570 (Wis. 1990). Gridley quotes Wagner with approval as standing the for proposition

that, "[t]he length of time that elapsed before the leak was discovered is irrelevant as to the suddenness of the discharge." Gridley Assoc., Ltd. v. Transamerica Ins. Co., 828 P.2d at 527. The Wagner court further concluded that, "[w]e believe . . . no reasonable distinction can be made between an accident that causes an immediate discharge of pollutants in great amounts and one that creates a leak permitting a great amount of pollutants to accumulate over time." Wagner v. Milwaukee Mutual Insurance Co., 427 N.W.2d at 857. Thus it follows, both from the reasoning in Wagner and from the hypothetical example in Gridley, that neither the volume released nor the length of time which elapses before discovery of the release are relevant to the suddenness of the release. The only logical conclusion that may be drawn is that the amount of the initial release, that is, the amount of pollutants released in the first moment when the containment vessel is breached, must also be irrelevant as to whether a discharge is "sudden and accidental."

The trial court in the instant case properly recognized that neither the volume of pollutants released nor the amount of time which passed before detection of the release were relevant to whether there was a "sudden and accidental" release of pollutants (R. 1891). This Court should affirm the trial court's finding that neither the volume of gasoline released at the LaSal Station nor the length of time which transpired between initiation of the release and its discovery are relevant to determining whether the release was "sudden and accidental."

B. The Fact That the Release From LaSal's Underground Line was Due to Corrosion Is Irrelevant as to Whether The Release Was "Sudden."

The trial court below distinguished Gridley on the basis that the break at issue in Gridley was a "clean break" whereas LaSal's break was due to corrosion. "The convincing evidence is that a leak caused by corrosion is not sudden and accidental." (R. 1891.) The perceived factual difference between Gridley and the case now before this Court is, for purposes of interpreting "sudden and accidental," a distinction without meaning. The only event which need be sudden in order to fall within the exception to the pollution exclusion is the initial release. The exception to the pollution exclusion does not require that the cause of the release be sudden. Lumbermens Mutual Casualty Co. v. Belleville Industries, Inc., 407 Mass 675, 555 N.E.2d 568 (1990), cert. denied ____ U.S. ____, 112 S.Ct. 969 (1992) (the exception to the pollution exclusion applies to the release of pollutants, not to the cause of the release). In fact, the exception is silent as to cause. If Omaha and Carriers wished to exclude releases due to corrosion they could easily have done so. Corrosion exclusions are commonplace in certain types of insurance policies¹⁰ and could have been inserted in the exception to the pollution exclusion found in LaSal's CGL policies had Omaha and Carriers intended to except sudden and accidental discharges due to corrosion.

¹⁰ See, e.g., Arkwright-Boston Manufacturers Mutual Ins. Co. v. Wausau Paper Mills Co., 818 F.2d 591 (7th Cir. 1987).

Judicial construction of the phrase "sudden and accidental" in the context of other types of insurance policies, such as, boiler and machinery policies, supports the proposition that "sudden" does not refer to the cause of the release. In Anderson & Middleton Lumber Co. v. Lumbermen's Mutual Casualty Co., 53 Wash.2d 404, 333 P.2d 938 (1959), for example, the boiler and machinery policy at issue covered a large band saw. Covered losses were defined in the policy as those "occasioned by an accident, defined as the sudden and accidental breaking of the band saw wheel, or any part thereof, into two or more separate parts while it was in use or connected for use." Id. at 939. The saw began to vibrate in an abnormal manner, and the insured took it out of service. It was only when the wheel to the band saw was removed that the insured discovered that one spoke was cracked all the way through and another was partially cracked. The insured's expert testified that the fracture was a fatigue-type break, attributable to a flaw in the original casting. The expert further testified that "there was a gradual cracking, extending through three-quarters of the broken spoke, which must have occurred over a period from one to three weeks but that the breaking of the last quarter was instantaneous." Id. at 940. The defendant insurance company argued that the breaking or cracking was a gradual process which extended over an unknown period of time and, therefore, that the accident did not occur "suddenly."

The trial court in Anderson & Middleton Lumber rejected the insurer's argument and concluded that the break was "sudden"

within the meaning of the policy. The Supreme Court of Washington affirmed, noting that there was no indication in the policy that the policy was not meant to cover breakage resulting from either latent defects or from fatigue. "It is only contended that the result, in order to be within the coverage of the policy, must have happened instantaneously." Id. at 941.

Similarly, in Julius Hyman & Co. v. American Motorists Ins. Co., 136 F.Supp 830 (D. Colo. 1955), the insurance policy covered "sudden" breaks in machinery and pipes. An opening in a boiler pipe appeared instantaneously after gradual internal restriction of the pipe occurred over an unknown period of time which caused the pipe to split at its weakest point. The court found that "[t]he pressure from within, when the strength of the pipe so decreased as not to be able to withstand it, split the pipe at its weakest point," thereby permitting certain chemicals to escape. The court further found that "this involved a sudden and accidental tearing asunder of the pipe," and not a gradual process that would preclude coverage if the break were not sudden and accidental. Id. at 832-833. As noted by the New Jersey Supreme Court in Morton Int'l, Inc. v. General Accident Ins. Co. of America, 134 N.J. 1, 629 A.2d 831 (N.J. 1993):

The most significant aspect of the boiler-and-machinery policy cases lies in the Washington Supreme Court's observation that from the insurers standpoint little if any justification existed for distinguishing between breaks in machinery that occurred instantaneously and those that resulted from gradual wear but were undetectable: "it seems to us that the risk to the insurer would be the same whether a break was instantaneous or began with a crack which developed over a period of time

until the final cleavage occurred, as long as its progress was undetectable."

Id. at 865, *citing Anderson and Middleton Lumber Co. v. Lumbermen's Mutual Casualty Co.*, 53 Wash.2d 404, 333 P.2d 938, 940 (Wash. 1959).

In the case now before this Court, there can be little question that the release of pollutants from the underground transmission line at the LaSal Station was "sudden." The trial court's focus on the cause of the release, namely, corrosion, and the fact that corrosion is a long-term process was misplaced. By concentrating on the process which led to the break in the underground line, rather than the release itself, the trial court ignored the crucial point that the initial release of gasoline to the environment was nevertheless "sudden." The fact that the initial release may have involved only small quantities of gasoline is, by this Court's and the trial court's reasoning, irrelevant because the volume of release is irrelevant to the suddenness of the release. Regrettably, the trial court failed to follow its reasoning to its logical conclusion; that is, that if the volume of release is irrelevant to the suddenness of the release, the fact that only minute quantities of gasoline may have been initially released is irrelevant to the release's "suddenness."

As noted, *supra* pp. 29-30, the trial court's reasoning that a release cause by corrosion cannot be sudden was based in part on *dicta* in Gridley, wherein this Court distinguished between the "clean break" in the case before it and a hypothetical break due to corrosion. The fractured pipe in Gridley was simpler

factually than the facts surrounding LaSal's release of gasoline. The Gridley Court did not directly address the issue of whether a release--whether caused by a corrosive process or a more dramatic and instantaneous process--has the same result: a sudden or abrupt opening in a containment vessel from which there is an immediate release of pollutants. The statement in Gridley regarding corrosion could not have been intended by this Court to be the final word on whether a corrosive process can lead to a "sudden and accidental" release from an underground line.

In the instant case, the section of LaSal's pipe with the five small holes was analyzed by two experts. Dr. Pitt, LaSal's expert, stated in his report:

In my opinion the openings were caused by a sudden failure of the metal at the thread roots. The sudden failure was due to over stress of the metal from the interior pressure of the liquid gasoline in the tank. Corrosion of the pipe wall produced a situation where the metal thickness at the thread roots was too small to hold the interior pressure. At that point in time the thinned metal fractured suddenly (due perhaps to a fluctuation of pressure in the line) allowing gasoline to flow from the opening produced by the metal failure. . . . From information given by the station owner the interior pressure in the pipe could have been as much as 45 psi. The resulting calculation gives a metal thickness of 1.1 mils at the time of failure. Basically what will happen in a failure of this type is that the metal will rupture suddenly due to the interior stress at the thinnest area of the metal. After rupture there may be corrosion at the thin edge of the metal to further enlarge the openings.

R. 1885, Exhibit 3-P.

According to Dr. Pitt, the process of corrosion "simply thinned the pipe to a point where it failed at the thread root."

(R. 3235, 3238-3239.) The failure exhibited on the pipe section with the five holes probably occurred because of an increase in gasoline pressure as, for example, when the gasoline pump was turned on and the pressure inside the transmission pipe went from 25-30 psi to 40-45 psi (R. 3255). The fracture moment, according to Dr. Pitt, whether due to corrosion or to some other process, is the same: prior to the instant when the first hole in the pipe appeared, gasoline was moving through an intact pipe with no leakage. Once the hole appeared in the pipe, gasoline was immediately released to the environment (R. 3237-3241).

Dr. Alex, Omaha's expert, concurred with Dr. Pitt's opinion that prior to the instant when the initial hole appeared in the pipe, the line held gasoline without leaking whereas after failure of the pipe, it immediately began to leak (R. 3289). The fact that the initial release may have involved only very small quantities of gasoline is irrelevant to the fact that the release, when it occurred, occurred suddenly.

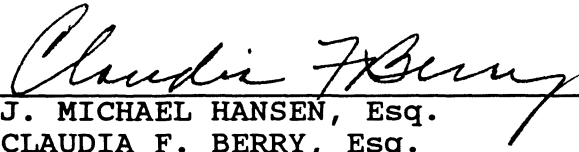
CONCLUSION

If the term "sudden" is interpreted in conjunction with the term "accidental" to be susceptible to more than one reasonable interpretation--one of which is "unintended or unexpected"--the release of gasoline at the LaSal Station falls within the exception to the pollution exclusion. This follows because it is undisputed that the release of gasoline was accidental and that LaSal neither intended nor expected the release. Because the exception to the

pollution exclusion is reasonably susceptible to more than one interpretation, it must be construed against Omaha and Carriers, and in favor of LaSal to provide coverage for the release of gasoline.

The release of gasoline at the LaSal Station occurred "suddenly." The initial small opening, although caused by corrosive processes, materialized abruptly, discharging gasoline immediately into the environment. The length of time which elapsed between this immediate discharge of gasoline and the discovery of the gasoline plume is irrelevant for determining whether the polluting event occurred "suddenly." The volume of gasoline released is irrelevant as to whether the release occurred "suddenly." The process whereby the initial fracture or hole appeared is irrelevant as to whether the release occurred "suddenly." The critical event, that is, the discharge itself, occurred abruptly and instantaneously. Accordingly, coverage exists under the Omaha and Carriers Policies. The gasoline release falls within the "sudden and accidental" exception to the pollution exclusion. This Court should hold that both Omaha and Carriers have a duty to defend and to indemnify LaSal in the State Action and the Hartford Action.

DATED this 27th day of October, 1993.



J. MICHAEL HANSEN, Esq.
CLAUDIA F. BERRY, Esq.
of and for
SUITTER AXLAND & HANSON
Attorneys for Plaintiff/Appellant
LaSal Oil Company, Inc.

CFB34.55

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused two (2) true and correct copies of the above and foregoing Brief of Petitioner/Appellant to be mailed, U.S. mail, postage pre-paid thereon, this 27th day of October, 1993, to the following:

Scott W. Christensen, Esq.
Mark J. Williams, Esq.
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
Post Office Box 2970
Salt Lake City, Utah 84110-2970
Attorneys for Omaha Indemnity

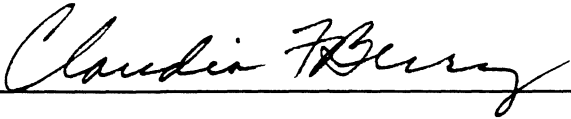
Tim Dalton Dunn, Esq.
Carlton R. Ericson, Esq.
DUNN & DUNN
230 South 500 East, Suite 460
Salt Lake City, Utah 84102
Attorneys for Utah Property and Casualty
Insurance Guarantee Association

Robert G. Gilchrist, Esq.
RICHARDS, BRANDT, MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, UT 84144
Attorneys for Chicago Insurance Company

Wallace R. Lauchnor, Esq.
PAULSEN, LAUCHNOR & MICKELSON
CSB Tower, Suite 500
50 South Main Street
Salt Lake City, Utah 84144
Attorneys for Chicago Insurance Company

Donald V. Jernberg, Esq.
Orest Dachniwsky, Esq.
OPPENHEIMER, WOLFF & DONNELLY
Two Illinois Center
233 North Michigan Avenue, Suite 2400
Chicago, Illinois 60601
Attorneys for Chicago Insurance Company

Allan T. Brinkerhoff, Esq.
RAY, QUINNEY & NEBEKER
400 Deseret Building
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Attorneys for Zurich Insurance Company



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JAN 21 1993

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LASAL OIL COMPANY, INC.,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. 880907028
vs.	:	
ALLIANZ INSURANCE COMPANY,	:	
et al.,	:	
Defendants.	:	

FILED
Utah Court of Appeals

OCT 28 1993


Mary T. Noonan
Clerk of the Court

An evidentiary hearing was held on December 17, 1992, to resolve the issues raised by plaintiff's Motion for Partial Summary Judgment and the Motion of defendant Omaha Indemnity Company ("Omaha") for Summary Judgment. The plaintiff was represented by Michael Hansen. Omaha was represented by Mark J. Williams.

The parties submitted memoranda and pertinent cases in support of their respective claims, presented expert testimony and orally argued the merits of their case.

The Court has given due consideration to all of the information presented to it and is now ready to enter its ruling.

FACTS

Plaintiff is a corporation that owned a service station in Moab since 1977 which it operated or leased to other parties.

Sometime in the mid-1970's, property owners and employees in the immediate area were complaining of gas fumes.

It was subsequently determined that the gas fumes originated from plaintiff's service station.

Civil actions have been filed against plaintiff, and as a result of these actions plaintiff is seeking to compel its insurance carriers to defend plaintiff in the civil actions.

INSURANCE COVERAGE

Omaha and plaintiff entered into an insurance contract wherein Omaha would provide coverage for certain occurrences.

The insurance policy contained the following exclusionary provision:

This insurance does not apply:

(f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or other water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental....

ISSUE

Plaintiff contends that the gasoline discharged from its gas line was sudden and accidental; therefore Omaha must extend coverage for damages that may result from the discharge.

Omaha contends that the discharge of gasoline did not result from a sudden and accidental discharge, therefore coverage should not be extended to plaintiff.

ANALYSIS

The Court having read the memoranda and hearing oral argument on the issue concluded that in the interest of establishing a basis for its decision, the Court should have the benefit of expert testimony on when a leak in a small metal pipe is sudden or not sudden.

The Court called to the attention of counsel that it had a considerable amount of experience with leaking water pipes caused by corrosion and accidents. Prior to becoming a Judge, the Court had represented a water company for a number of years and owned property where waterline leaks occurred frequently. However, the Court's decision is based upon the record made by the respective parties.

Plaintiff and Omaha each presented very well-qualified experts to testify on the properties of small metal pipes used for the transmission of gasoline from a storage tank to the gas pump. The transmission line was comparatively short, but was subjected to pressure of 25 psi to 45 psi when in use.

Dr. Pitt testified that, "corrosion of the pipe wall produced a situation where the metal thickness at the thread roots were too small to hold the interior pressure. At a point in time, the thin metal fractured suddenly. . . allowing gasoline to flow from the opening produced by the metal failure."

Omaha's expert witness, Dr. Franklin Alex, testified that corrosion caused a penetration of the pipe. Dr. Alex stated that corrosion started as soon as the pipe was laid in the ground and the process of corrosion was dependent upon the corrosivity of the environment.

Dr. Alex explained to the Court that the leak that occurred in plaintiff's gas line was the result of corrosion which took place over a lengthy period of time. Dr. Alex stated that corrosive leaks at the inception are minute and generally begin with seepage and the amount of liquid that escapes from the line is increased as the corrosion progresses.

The Court is of the opinion that both Dr. Pitt and Dr. Alex would agree that in the corrosive process, exclusive of wear and tear, it makes no difference if the metal pipe was a conduit for fluid, because in due time corrosion will cause the wall of the pipe to be penetrated. If there is fluid in the line, the

penetration will probably be discovered sooner, but the amount of discharge in and of itself doesn't mean that the leak was sudden.

Dr. Pitt takes the position that any penetration, even if it is molecular, is sudden; whereas Dr. Alex claims that a corrosion-caused leak is not sudden. In order for the Court to resolve the issue as to when a penetration is or is not sudden, the Court reviewed all of the cases submitted by counsel, and concluded that the recent Utah case of Gridley Associates, Ltd. Petroleum Management, Inc. and Vernon E. W. Dickman v. Transamerica Insurance Company, 828 P.2d 524 (Utah 1992), is the case that best defines what constitutes a sudden and accidental discharge.

Judge Russon, in his opinion stated that, "the terms 'sudden and accidental' are unambiguous. As commonly used, the meaning of sudden combines both elements of without notice or warning and quick or brief in time. . . . Sudden connotes a 'temporal aspect of immediacy, abruptness, swiftness, quickness, instantaneous and brevity.'"

Judge Russon went on to state that sudden within the "sudden and accidental" clause cannot be defined without reference to a temporal element, specifically, immediacy, abruptness and quickness.

Omaha argues that the Court should consider the amount of discharge from the fractured line and the length of time that has elapsed from the time of the leak to the time of discovery in making its determination whether the leak was sudden. There is some authority for this view, but this Court adopts the position taken by Judge Russon that length of time that elapses before the leak is discovered or the amount of discharge does not render the fracture any less sudden.

The Court recognizes that the Gridley case, on the facts, is distinguishable from this case. The facts in the Gridley case are such that the only conclusion that could be reached is that the break was sudden. In this case, there is the corrosion factor that adds another dimension to the analysis of whether the break, fracture or leak is sudden.

The convincing evidence is that a leak caused by corrosion is not sudden and accidental.

Since the leak was not the result of a sudden occurrence, the exclusionary provision of the Omaha policy is applicable and coverage need not be extended to plaintiff.

At the time the Court announced its decision from the bench as to whether or not the leak in the gas line was not a sudden occurrence, it explained to counsel that the Court was not

granting a Summary Judgment, but was entering a Judgment in conformance with the evidence presented.

Counsel for Omaha shall prepare Findings of Fact and Conclusions of Law, and Judgment in accordance with this Decision.

Dated this 20 day of January, 1993.

A handwritten signature in cursive script, reading "John A. Rokich", is written over a horizontal line.

JOHN A. ROKICH
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 21 day of January, 1993:

J. Michael Hansen
Claudia F. Berry
Attorneys for Plaintiff
175 S. West Temple, Suite 700
Salt Lake City, Utah 84101-1480

Scott W. Christensen
Mark J. Williams
Attorneys for Defendant Omaha
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970

Samuel D. McVey
Attorney for Defendant Allianz
330 South 300 East
Salt Lake City, Utah 84111-2599

Carlton Erickson
Glen T. Hale
Attorneys for Carriers Insurance Co.,
Midland Insurance Co., Utah Property
and Casualty Insurance
230 South 500 East, Suite 460
Salt Lake City, Utah 84102

John A. Adams
Attorney for Travelers Insurance
79 S. Main, Suite 400
P.O. Box 45385
Salt Lake City, Utah 84145-0385

W. E. Burt

SCOTT W. CHRISTENSEN UBN #0649
MARK J. WILLIAMS UBN #3494
HANSON, EPPERSON & SMITH
Attorneys for Defendant, Omaha Indemnity
4 Triad Center, Suite 500
P.O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

FILED DISTRICT COURT
Third Judicial District

FEB 11 1993

SALT LAKE COUNTY
By John A. Rokich
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

LaSal Oil Company, Inc.

Plaintiff,

v.

Allianz Insurance Company;
Carriers Insurance Company;
Chicago Insurance Company;
(Interstate Insurance Group);
Midland Insurance Company;
Omaha Indemnity (Frank B.
Hall); Pacific Employers
Insurance Company (CIGNA);
Travelers Insurance Company;
Zurich Insurance Company;
and Utah Property & Casualty
Insurance Guaranty Association,

Defendants.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Civil No. 88 0907028CV

Judge John A. Rokich

An evidentiary hearing was held on December 17, 1992, to resolve the issues raised by plaintiff LaSal Oil Company, Inc.'s ("LaSal") Motion for Partial Summary Judgment and the Motion of Defendant Omaha Indemnity Company ("Omaha") for Summary Judgment. LaSal was represented by J. Michael Hansen and Claudia F. Berry. Omaha was represented by Mark J. Williams. The parties had previously submitted Memoranda, and in conjunction with the evidentiary hearing, presented expert testimony and oral argument

on the merits of the case. Because of such evidentiary hearing, the Court, having given due consideration to the pleadings, memoranda and testimony presented to it, issues the following findings of fact:

1. LaSal has owned a certain gasoline service station located at 322 South Main, Moab, Utah, since 1977 (the "LaSal Station"). From 1979 until June 1987, LaSal leased the station to third parties. At all other times, LaSal has operated the station.

2. Omaha issued a comprehensive general liability ("CGL") policy of insurance under which LaSal was one of the named insureds, policy no. CL000269 (the "Policy"), with a policy period from July 1, 1984 to July 1, 1985.

3. Sometime in the mid-1970s, fumes were detected on a sporadic basis in the basement of the First Western National Bank Building located on the northwest corner of 300 South and Main Street, Moab, Utah, but neither the source nor the type of fumes was ascertained.

4. In approximately September 1982, a substantial leak of gasoline occurred at the Stars Service Station owned by Rio Vista Oil, Ltd. (the "Stars Station"), which is located east of the LaSal property on the southeast corner of the intersection at 300 South and Main Street, Moab, Utah. An investigation disclosed a heavily corroded underground metal pipe used for transmission of gasoline from storage tanks to the gasoline dispensers.

5. According to expert testimony, the First National Bank Building is downgradient from the Stars Station.

6. In approximately December 1985, complaints of gasoline fumes were received by the Southeastern Utah Health District, Moab, Utah, from tenants in the Walker Drug-Medical Center building. Said building is located to the north of, and across the street from, the LaSal Station.

7. During January, 1986, Ray Klepzig, President of LaSal, was notified of gasoline fumes in the area of the LaSal Station and undertook an investigation of the underground gasoline tanks and lines located on the LaSal Station property.

8. As a result of the investigation, three holes were discovered in the coupling threads of one length of steel pipe located on the west side of the LaSal Station. The pipe was used for the transmission of gasoline from the underground storage tanks to the dispensers at the LaSal Station.

9. The underground gasoline transmission lines were subjected at all times to pressure of approximately 25 pounds per square inch ("psi"). When the gasoline dispensers were activated the gasoline transmission lines were subjected to 40 to 45 psi of pressure.

10. On or about December 7, 1987, the State of Utah served an Order to Abate on LaSal alleging that LaSal was responsible for discharging gasoline to the soil and groundwater and requiring, inter alia, LaSal to halt the spread of any further gasoline in the waters of the state and to submit and initiate a plan of corrective action (the "State Action").

11. On or about March 29, 1988, a civil action entitled Arthur Ross, et al. v. LaSal Oil Co., et al., was filed in the

Seventh Judicial District Court in and for Grand County, Utah, as civil no. 5660 (the "Ross Plaintiffs' Suit"), wherein certain homeowners residing northwesterly from the LaSal Station claimed that gasoline fumes which originated at the LaSal Station entered their homes.

12. On or about June 3, 1988, the owners of another building northwest of the LaSal Station filed a lawsuit entitled Hartford Leasing Corp. v. Rio Vista Oil, Ltd., Lasalle [sic] Oil Company, State of Utah, Dependable Janitorial Service and John Does I through X, civil no. 5692, filed in the Seventh Judicial District Court in and for Grand County, Utah (the "Hartford Suit").

13. Thereafter, LaSal tendered to Omaha the defense of the State Action, the Ross Plaintiffs' Suit and the Hartford Suit (collectively referred to as the "Underlying Actions"), which was refused by Omaha.

14. LaSal filed this declaratory judgment action against Omaha and other of its insurers seeking defense costs arising from and indemnification against the Underlying Actions.

15. Omaha filed a Motion for Summary Judgment seeking a determination by this Court that it had no duty under its Policy to defend or indemnify LaSal from or against any of the Underlying Actions.

16. LaSal filed a Motion for Partial Summary Judgment seeking an Order that Omaha and the other insurance defendants had a duty to pay LaSal's defense costs incurred in the Underlying Actions.

17. The Omaha Policy contains the following exclusionary provision known as the "pollution exclusion":

This insurance does not apply:

(f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or other water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental
. . . .

18. Based on an analysis performed by LaSal's consultant in a report entitled "Potential Timing of Hydrocarbon Leakage at LaSal Oil Company," dated October 31, 1991 (the "EarthFax Report"), LaSal asserted for purposes of argument on the cross-motions for summary judgment only, that the date of probable onset of the leak from the pipe referred to above in paragraph 8 of these Findings was between February, 1983 and September, 1984.

19. The EarthFax Report also stated that, assuming arguendo that LaSal had contaminated the groundwater, any migration of contaminated groundwater from the leak at the LaSal Station would have arrived at the southern boundary of the Ross Plaintiffs' residential properties no sooner than July, 1986. Based on this estimate, LaSal conceded that Omaha had no duty to defend LaSal in the Ross Plaintiffs' Suit.

20. After reading the parties' memoranda and hearing oral argument on the issues of the duty to defend and indemnify, the Court requested LaSal and Omaha to present expert testimony at an evidentiary hearing to assist the Court in deciding whether the

leaks in the underground gasoline line at the LaSal Station were "sudden."

21. An evidentiary hearing was held before this Court on December 17, 1992, where LaSal presented testimony through its witnesses, Ray Klepzig and Dr. Charles Pitt, a Ph.D. in metallurgy, and Omaha presented testimony through its expert, Dr. Franklin Alex, also a Ph.D. in metallurgy.

22. Dr. Pitt, LaSal's expert testified at the evidentiary hearing that,

Corrosion of the pipe wall produced a situation where the metal thickness at the thread roots were too small to hold the interior pressure. At a point in time, the thin metal fractured suddenly . . . allowing gasoline to flow from the opening produced by the metal failure.

23. Omaha's expert, Dr. Franklin Alex, testified at the hearing that corrosion had caused the penetration of the pipe. Dr. Alex stated that the corrosion started as soon as the pipe was laid in the ground and that the process of corrosion was dependent upon the corrosivity of the environment. He explained that the leak that occurred in plaintiff's gasoline transmission line was the result of corrosion which took place over a lengthy period of time. He further testified that the corrosive leaks at the inception are minute and generally begin with seepage, and that the amounts of liquid that escape from the line increase as corrosion progresses.

24. Dr. Pitt was of the opinion that any penetration of the metal pipe, even if it is molecular, as with corrosion, is considered "sudden."

25. Dr. Alex opined that a corrosion-caused leak is not sudden.

CONCLUSIONS OF LAW

Based on the above facts, this Court issues the following conclusions of law:

1. There were property damages that potentially occurred within the Omaha Policy period sought in the State Action and the Hartford Suit.

2. There was no "occurrence" within the Omaha Policy period arising from the Ross Plaintiffs' Suit.

3. The costs sought in the Underlying Actions constitute "damages" under the Policy.

4. The Utah Court of Appeals case of Gridley Associates, Ltd. v. Transamerica Insurance Co., 828 P.2d 524 (Utah App. 1992), best defines what constitutes a "sudden and accidental" discharge in analyzing the pollution exclusion of the Policy.

5. The phrase "sudden and accidental" in the exception to the pollution exclusion is unambiguous.

6. This Court adopts the language of Gridley and recognizes that "[a]s commonly used, the meaning of sudden combines both elements of without notice or warning and quick or brief in time. . . . Sudden connotes a temporal aspect of immediacy, abruptness, swiftness, quickness, instantaneous and brevity." Gridley, 828 P.2d at 527 (quoting USF&G v. Morrison Grain Co., 734 F.Supp 437, 446 (D. Kan. 1990) (citation omitted)).

7. As established in Gridley, the term "sudden" within the "sudden and accidental" exception to the pollution exclusion cannot be defined without reference to a temporal element, specifically, immediacy, abruptness and quickness. Id. at 524.

8. The length of time that elapses before an underground leak in a gasoline transmission line is discovered or the amount of discharge does not render an otherwise suddenly fractured line any less sudden.

9. The facts of this case are distinguishable from the facts in Gridley because the only conclusion that could be reached in Gridley is that the leak was sudden, due to a "clean break."

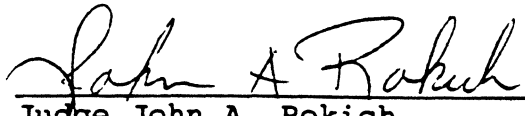
10. In this case, the leak in the pipe was caused by corrosion, and cannot be considered as sudden.

11. Because the release or discharge of gasoline from the underground gasoline transmission line was not sudden, the pollution exclusion contained in the Omaha Policy is applicable. Therefore, there is no coverage under the Policy to be extended to plaintiff for any of the claims contained in the Underlying Actions.

12. Defendant, Omaha is entitled to a judgment dismissing all claims of plaintiff against it in this action.

DATED this 9 day of February, 1993.

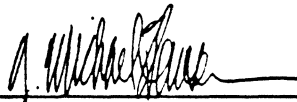
BY THE COURT:



Judge John A. Rokich
District Court Judge

Approved as to Form:

SUITTER, AXLAND, ARMSTRONG
& HANSON



J. Michael Hansen
Attorneys for Plaintiff
LaSal Oil Company

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing
was mailed postage prepaid, on this 8th day of Feb., 1993, to
the following:

J. Michael Hansen, Esq.
Claudia F. Berry, Esq.
SUITTER, AXLAND, ARMSTRONG & HANSON
175 South West Temple, Suite 700
Salt Lake City, Utah 84101-1480

Tim Dalton Dunn, Esq.
Carlton R. Ericson, Esq.
DUNN & DUNN
460 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

James J. Cassity, Esq.
Samuel McVey, Esq.
KIRTON, McCONKIE & POELMAN
60 East South Temple, #1800
Salt Lake City, UT 84111

Kenneth H. Clausen, Esq.
CLAUSEN & CAMPBELL
417 South Hill Street
Los Angeles, California 90013-1122

Wallace R. Lauchnor, Esq.
RICHARDS, BRANDT, MILLER & NELSON
50 South Main, Suite 700
Salt Lake City, Utah 84144