

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 : Reply Brief

Utah Court of Appeals

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

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

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IN THE UTAH COURT OF APPEALS

<p>LaSAL OIL COMPANY, INC.,</p> <p>Plaintiff/Appellant</p> <p>v.</p> <p>CHICAGO INSURANCE COMPANY (INTERSTATE INSURANCE GROUP); OMAHA INDEMNITY (FRANK B. HALL); ZURICH INSURANCE COMPANY; and UTAH PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION;</p> <p>Defendants/Appellees</p>	<p>Case No. 930536-CA</p> <p>Priority No. 15</p>
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REPLY BRIEF OF PETITIONER/APPELLANT

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

UTAH COURT OF APPEALS
BRIEF

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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

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Mary T. Noonan
Clerk of the Court

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

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RESPONSE TO DEFENDANTS'/APPELLEES'
STATEMENT OF RELEVANT FACTS

For purposes of continuity, the following comments adhere to the paragraph numbering found in LaSal Oil Company's ("LaSal") Appellant's Brief, which numbering was continued in Defendants/Appellee's ("Defendants," "insurers" or the "insurance companies") brief.

42. As further clarification of Dr. Pitt's testimony, LaSal's adds the following:

Defendants have quoted the testimony of Dr. Pitt, LaSal's expert, concerning the leak in the section of pipe, Exhibit 1-P (Defendants' Brief at 4). Dr. Pitt's testimony should be quoted in full, however, in order to understand the import of his opinion:

The process that I visualize that occurred was that--from the facts there were presented to me, is that the corrosion likely occurred as a result of what we call straight current corrosion, which is involved with cathodic protection systems that are close to pipes, and the corrosion process occurs as the current is flowing through the pipe and various areas in the pipe. The metal goes into solution due to that corrosive current and is lost from the surface of the pipe.

And in this case, it occurred in--the corrosion occurred 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. And in my opinion that is what caused at least one of the holes present.

Q: Okay. Now, you say that it burst suddenly through the pipe caused by the--you have a corroded pipe and you have pressure inside, and at some point because of that pressure a hole was burst through it and suddenly created in that pipe?

A: Simply the metal is not strong enough to hold the interior pressure.

R. 3234-3235.

44. As clarification to the statement made by Defendants in Paragraph 44 (Defendants' Brief at 5-6) and the statements made by the insureds' in their argument (Defendants' Brief at 27-28), LaSal adds the following:

According to Defendants, Dr. Alex, Defendants' expert, testified that "[i]n his opinion, this type of leak typically would progress from simply moisture on the outside to drops forming in a matter of days to weeks, and from a few drops to a gradual trickle of gasoline over a matter of weeks to months." Dr. Alex's response to Defendants' counsel's question is as follows:

Q: Typically do you have an opinion as to how long would it take to get from the point where you have the initial, as you said, osmotic process where its moisture on the outside, to the time when you have drops forming? What kind of time frame are you looking at? Can you give an opinion as to that?

A: Days to weeks.

R. 3271-3272.

The insurers further state (Defendants' Brief at 27-28) that LaSal's expert, EarthFax Engineering, Inc. ("EarthFax"), "has concluded that the onset of the gasoline release occurred sometime between February, 1983 and September, 1984. . . . The pipe was not uncovered and removed until approximately January 30, 1986, when the leak was located and repaired. (R. 3223.)" This statement, although correct, is taken out of context and does not present a full picture of the nature of EarthFax's analysis and the underlying assumption that EarthFax was required to make by the trial court.

In May, 1991, counsel for the parties presented oral argument to the trial court on their motions for summary judgment. After

reviewing the briefs, documentation and hearing oral argument, the trial court expressed its concern regarding whether it could rule on the issues of duty to defend and duty to indemnity when so little was known about the timing of the alleged release of gasoline at the LaSal Station. Consequently, the trial court requested that additional discovery be undertaken by LaSal in order to ascertain both the timing of the release of gasoline and the timing of property damage and/or personal injury to plaintiffs and the State of Utah in the Underlying Actions.

In response to the trial court's request, LaSal's consultant, EarthFax, reviewed and analyzed available data and undertook additional sampling in order to estimate the timing of a possible gasoline leak at the LaSal Station. The analysis assumed, for purposes of that analysis only, that all of the hydrocarbon contamination alleged in the Underlying Actions resulted solely from the leak at the LaSal Station (R. 1630).¹

Based on the assumptions (1) that the LaSal Station was the sole source of hydrocarbon contamination in Moab, (2) that all gasoline discharged from the LaSal Station was from the perforated pipe found on the west side of the service station, and (3) that gasoline from the perforated pipe reached the water table within a few days, EarthFax concluded that the date on which the discharge of gasoline commenced at the LaSal Station fell sometime between February 1983 and September 1984 (R. 1630-1636, 1655-1656). The assumption used by EarthFax, namely, that LaSal was responsible for

¹ EarthFax's analysis and conclusions are found in a report entitled "Potential Timing of Hydrocarbon Leakage at LaSal Oil Company," (the "1991 EarthFax Report"). (R. 1640-1663.)

all hydrocarbon contamination alleged in the Underlying Actions, was required by the trial court even though LaSal steadfastly maintained in defense of itself in the Underlying Actions that the leak in the underground pipe, discovered in January, 1986, did not contribute to the pollution of the groundwater in Moab. Rather, LaSal maintained that the hydrocarbon contamination complained of in the Underlying Actions resulted from years of leaking pipes at the Rio Vista Service Station (the "Rio Vista Station"), the other named defendant in the Underlying Actions. Furthermore, LaSal claimed (and still claims) that it is just as likely that the leak began a short time prior to its discovery in January 1986, and not sometime between February 1983 and September 1984. Consequently, the fact that EarthFax estimated the initiation of the leakage as falling sometime in 1983-1984 is in essence an artifice, and should not be now used against LaSal by the Defendants to indicate that there has been a steady leak for a two and one-half to three-year period.

The following additional facts are relevant to this case:

45. The underground lines at the LaSal Station connecting the underground tanks with the dispensers, including the line in which the leak was found, were maintained at a pressure of 25 to 30 pounds per square inch (pps) when the dispenser was switched off. When the dispenser pump was switched on, the underground lines (again, including the line in which the leak was found) were subjected to between 40 and 45 pps (Testimony of C. Ray Klepzig, owner of the LaSal Station, R. 3215).

46. Mr. Klepzig further testified that prior to finding the leak, the LaSal Station inventory records had not reflected any loss of product or any other factors that would have put him on notice that he had a leak in an underground line or storage tank (R. 3215-3216).

ARGUMENT

POINT I

Under General Tenants of Contract Interpretation, The Pollution Exclusion Should be Strictly Construed Against the Insurers

For over thirty years the Utah Supreme Court has adhered to the fundamental rule that "insurance policies should be strictly construed against the insurer and in favor of the insured because they are adhesion contracts drafted by the insurance companies." U.S. Fidelity and Guar. Co. v. Sandt, 854 P.2d 519 (Utah 1993). In Sandt, the Utah Supreme Court reaffirmed its long-held position regarding the one-sided nature of insurance contracts:

Normally, the details and provisions of the policy are not discussed, except that the particular form of policy is best suited to give the applicant the protection he seeks. If he reads the policy he is generally not in a position to understand its details, terms, and meaning except that, in the event against which he seeks insurance, the company will pay the stipulated sums. He seldom sees the policy until it has been issued and is delivered to him. He signs an application blank in which the policy sought is described either by form number or by a general designation, pays his premium, and in due course thereafter receives, either from the agent or through the mails, his policy. Many of its terms and all of its defenses and super-refinements he has never heard of and would not understand them if he read them. Such fact is evident from the fact that cases like this arise where lawyers and courts disagree as to what such provisions mean. . . . For this reason the rule of *strictissimi juris* has been applied almost universally to insurance contracts, and this jurisdiction, like many others, has declared in favor of a liberal construction in favor of the insured to accomplish the purpose for

which the insurance was taken out and for which the premium was paid.

Id. at 522, citing Browning v. Equitable Life Assurance Soc'y, 94 Utah 532, 72 P.2d 1060, 1073 (1937). Under this rule of interpretation, "the insured is entitled to the broadest protection that he could reasonably believe the commonly understood meaning of its terms afforded him." Id. at 523, citing P.E. Ashton Co. v. Joyner, 17 Utah 2d 162, 164, 406 P.2d 306, 308 (1965).

The Sandt court adduced from these general rules of construction that inconsistent provisions, that is, separate provisions which can be construed to afford coverage and at the same time to exclude coverage, must be construed in favor of coverage. As a corollary, according to the Sandt court, provisions that limit or exclude coverage must be construed strictly against the insurance company. It therefore follows that any clause which excludes or reduces liability must contain explicit language that is clear to the insured and not just to those familiar with insurance law, namely, lawyers, judges and insurers. Id. at 524-525.

Where the terms used in the policy "may be understood to have two or more plausible meanings," those terms are *a fortiori* ambiguous. Village Inn Apts. v. State Farm Ins. Co., 790 P.2d 581, 583 (Utah Ct. App. 1990). In the instant case, the insurers' position regarding the interpretation of "sudden and accidental" in the pollution exclusion, while arguably plausible to someone trained in technical construction, is ambiguous when read by the typical, reasonable insured. This is clearly illustrated if one compares the reasonable expectations of the insured in Gridley

Assoc. v. Transamerica Ins. Co., 828 P.2d 524 (Utah Ct. App. 1992) with those of LaSal. Moreover, the insurers' interpretation of the pollution exclusion leads to wholly irreconcilable results, depending upon the process whereby a containment vessel--such as an underground storage tank or line--is breached; this, despite the fact that the exception to the pollution exclusion says nothing at all about the cause or process which results in a discharge.

POINT II

The Term "Sudden and Accidental" Found Within the Exception to the Pollution Exclusion Is Not, as the Insurers Contend, "Clear"

LaSal's insurers, in response to LaSal's argument that "sudden and accidental" is susceptible to more than one reasonable meaning, claim that under basic rules of contract interpretation no ambiguity exists in the phrase "sudden and accidental" (Defendants' Brief at 10-12). In essence, the insurers' primary argument is that the "better reasoned cases," i.e., those whose definition of "sudden and accidental" comports with the insurers' position, requires that "sudden" have a temporal element. Furthermore, the insurance companies would have this Court reject out of hand two lines of evidence which have been weighed by other courts in determining whether coverage was afforded an insured whose policy contains a "sudden and accidental" exception to the pollution exclusion: the existence of multiple dictionary definitions for the word "sudden," and the existence of extensive judicial debate among jurisdictions over the meaning of the term "sudden." These two lines of evidence, while arguably not dispositive, are compelling evidence that ambiguity indeed exists

in the phrase "sudden and accidental," despite the insurers' argument to the contrary.

In support of their position, the insurance companies point to the analysis found in Newcastle County v. Hartford Accident and Indem. Co., 933 F.2d 1162 (3d Cir. 1991) wherein the Third Circuit reasoned that conflicting precedent and the multiplicity of dictionary definitions of the word "sudden" might not render that term ambiguous. Nevertheless, the Third Circuit concluded that under Delaware law the phrase "sudden and accidental" was in fact ambiguous. Thus, even though the Third Circuit stated that "dictionaries define words in the abstract," it nevertheless concluded that "sudden" had more than one reasonable definition:

The district court simply began its analysis by doing that which any reasonable person would do: it looked the word up in the dictionary. Upon discovering that Webster's dictionary offers several definitions of the word "sudden," the district court quite reasonably concluded that this suggests that the "word has more than one reasonable definition."

Id. at 1194. Furthermore, the Third Circuit, in acknowledging that two contrasting lines of cases exist, stated that "we cannot help but view such a division as at least suggesting that the term "sudden" is susceptible of more than one reasonable definition."

Id. at 1196.

LaSal's insurers also direct this Court's attention to a number of recent cases wherein the term "sudden and accidental" has been interpreted to be unambiguous. See, e.g., Hartford Accident and Indem. Co. v. U.S. Fidelity and Guar. Co., 962 F.2d 1484 (10th Cir. 1992), *cert. denied*, El Paso Natural Gas Co. v. Hartford Accident and Indem. Corp., 113 S.Ct. 411 (1992); Anaconda Minerals

Co. v. Stoller Chemical Co., 990 F.2d 1175 (10th Cir. 1993); Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1993 W.L. 241520 (Fla. July 1, 1993); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F.Supp. 1317, 1324 (E.D. Mich. 1988), *quoted in Hartford*, 962 F.2d at 1498, n. 6.

These cases, however, are factually distinguishable from the case at bar because the pollution in question involved routine discharges that were part of the insureds' regular business operations. These discharges were also continuous insofar as "continuous" signifies that the releases of pollutants happened over and over again on an ongoing basis with the insureds' knowledge.² In Hartford Accident and Indem. Co. v. U.S. Fidelity and Guar. Co., 962 F.2d 1484 (10th Cir. 1992), for example, the Tenth Circuit affirmed the decision of the United States District Court for the District of Utah which found that "sudden and accidental" in the pollution exclusion meant "occurring without notice and happening by chance." *Id.* at 1486 (emphasis added). In Hartford, the pollution at issue was the disposal of used PCBs by "routinely draining the contaminants directly into the ground or periodically draining them into concrete sumps, which were later pumped out into dirt pits. Some pits contained pipes designed to discharge any waste overflow directly into the surrounding ground."

² The term "continuous" is, unfortunately, as ambiguous as the term "sudden," when used in the context of describing both the release of pollutants and the pollution itself. Thus, "continuous" may refer to a single event of uninterrupted duration or to a series of spatially/temporally related events as, for example, "a continuous series of blasts; a continuous row of warehouses." See, Random House Dictionary of the English Language, 440 (2d ed. 1987); The Compact Edition of the Oxford English Dictionary 910 (1971).

Hartford Accident and Indem. Co. v. U.S. Fidelity and Guar. Co., 675 F.Supp. 677, 679 (D. Utah 1991).

The insurer in Hartford argued that this regular, repeated discharge of waste materials over a period of years could not be interpreted as "sudden and accidental." The district court agreed, holding that the deliberate and repeated business practice of disposing of contaminants "did not occur without notice and by chance." Id. at 680. In so holding, the district court rejected the line of cases which interpreted "sudden and accidental" to mean "unexpected and unintended," but was silent as to whether "sudden and accidental" had a temporal aspect. Under the district court's analysis in Hartford (whereby it found that "sudden and accidental" meant "happening without notice and occurring by chance"), the leak at the LaSal Station would necessarily be deemed "sudden and accidental" because it too happened "without notice and by chance."

Similarly, in Anaconda Minerals Co. v. Stoller Chemical Co., Inc., 773 F.Supp. 1498 (D. Utah 1991), *aff'd*, 990 F.2d 1175 (10th Cir. 1993), at issue was liability for the cleanup of flue dust used in the manufacturing operations of Stoller's predecessor. Flue dust was released and disbursed in the regular course of unloading, transporting and processing the flue dust. Moreover, waste materials were dumped in a pit south of the manufacturing facility and exposure to the elements regularly affected the piles of flue dust and waste material on the property. Other materials were transported to the plant site as part of experiments to see if they were usable in fertilizer products and, when the experiments proved unsuccessful, these products were dumped in waste piles at

the site. The trial court found that there was "nothing even remotely 'sudden' about ongoing and regular polluting events" at the manufacturing site. Id. at 1505. See also, Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F.Supp. 1317 (E.D. Mich. 1988) (day-to-day manufacturing practices, tank spillage and ruptured pipes which contaminated the groundwater were expected by the manufacturer and therefore held not to be "sudden and accidental"); Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 1993 W.L. 241520 (Fla. July 1, 1993) (placement of waste oil sludge in unlined storage ponds from which chemicals then leached into the soil and groundwater, along with other polluting events, held not to be "sudden and accidental").

It is clear that the "sudden and accidental" language in the exception to the pollution exclusion is subject to at least two reasonable, alternative interpretations depending upon whether a pollutant has been discharged from a containment vessel without the knowledge or intent of the insured or whether it has been knowingly released through a series of day-to-day activities in the regular course of the insured's business. The problem of interpreting the term "sudden" arises, at least in part, because the insurance industry has used "sudden" in insurance policies issued to manufacturers who, in the every day course of their businesses, intentionally and knowingly release pollutants to the environment, as well as in policies issued to companies, such as LaSal, who have valuable product in containment vessels which pollute, if released inadvertently into the environment. The problem in interpretation, therefore, rests squarely on the insurance industry which should

have chosen a less "slippery" word to cover fundamentally distinct types of events. Having chosen the word "sudden" which, depending upon the particular context, is reasonably susceptible to more than one interpretation, including "unexpected" and "unintended," the term must be construed against the insurers. In the instant case, "sudden" must be construed against Omaha and Carriers, and in favor of LaSal to provide coverage for the release of gasoline at the LaSal Station.

POINT III

The Trial Court Erred When It Held That the Release of Gasoline From LaSal's Underground Line Was Not Sudden

Even assuming the term "sudden" has a temporal aspect, the trial court nevertheless erred in holding that the release at the LaSal Station was not "sudden." This necessarily follows from the Gridley court's correct interpretation of the term "sudden" as requiring merely that the initiation of the discharge itself be sudden in order to fall within the exception to the pollution exclusion, irrespective of the length of time which elapses prior to discovery of a leak. Gridley Assoc. v. Transamerica Ins. Co., 828 P.2d at 527. See also, Morton Int'l, Inc. v. General Accident Ins. Co. of America, 134 N.J. 1, 629 A.2d 831 (1993); Claussen v. Aetna Casualty and Surety Co., 259 Ga. 333, 380 S.E.2d 686 (1979); Lumbermens Mutual Casualty Co. v. Belleville Indus., Inc., 407 Mass. 675, 555 N.E.2d 568, (1990), *cert. denied*, ____ U.S. ____, 112 S.Ct. 969 (1992).

LaSal's insurers, on the other hand, contend that interpretation of the term "sudden" turns on distinctions among the causative processes which lead to a breach in a containment vessel.

The insurers' disingenuous focus on the cause of the leak rather than the initial discharge is no more than an ill-disguised attempt to divert the Court's attention from the fact that the exception to the pollution exclusion concerns the release, not the process resulting in the release. According to the insurance companies, the cases to which this Court should look "distinguish between differing causes of leaks as a means of deciding the true nature of leaks," that is, whether they are sudden or not (Defendants' Brief at 19) (emphasis added). Under the insurers' approach, a process which occurs over a lengthy period of time, as for example corrosion, results in a gradual release whereas a process which occurs over a shorter period of time results in a sudden release. According to this reasoning, the initial discharge of gasoline from the Gridley pipe was "sudden" whereas the initial discharge from the LaSal pipe was not. (Defendants' Brief at 16-18). From this perceived distinction in causative processes, the insurers conclude that LaSal has no insurance coverage, whereas Gridley was afforded coverage. This analysis is flawed.

A. Any Attempt to Distinguish the Facts in Gridley From the Facts Now Before This Court Leads to Irreconcilable Results.

In relating the facts in Gridley, this Court stated:

The uncontroverted fact before the district court was that the break in the gasoline line was a "clean break" that "would have had to have been caused by an adjustment of the area in which it is in." No evidence was ever presented that the break was caused by corrosion or deterioration which would have resulted in a gradual drip or trickle of gasoline from the line.

Id. at 527.

The facts in Gridley, LaSal respectfully submits, are somewhat more complex. The importance of this complexity, while not apparent to this Court when the decision in Gridley was announced, is significant when the Court is faced with construction of the same exception to the pollution exclusion but with a slight variation on the facts. According to the statement of facts found in Transamerica's Brief in Gridley,³ the "leak occurred in a section the pipe which had been weakened by the gradual process of electrolysis" (Transamerica Brief at 6).

According to the testimony of Billie Gene Hankins,⁴ who apparently was the only witness to testify as to the break in the fuel line at the Gridley station, approximately 25% to 30% of the pipe had been corroded away (Hankins Deposition at 41-42). Hankins testified that the corrosion would have weakened the pipe prior to the event which caused the final rupture, thereby making the corroded pipe more susceptible to damage than an uncorroded pipe (Hankins Deposition at 51-52). Hankins further testified that the final break in the pipe "would have to have been caused by an adjustment of the area in which it is in. Something would have had to have moved that area." (Hankins Deposition at 9.) The broken line, according to Hankins, was located only a few inches below newer lines which were not broken. Hankins testified that the

³ A copy of relevant portions of Defendant/Appellant Transamerica Insurance Company's Brief in Gridley v. Transamerica Ins. Co. is attached hereto as Exhibit "A" (the "Transamerica Brief").

⁴ A copy of the Deposition Transcript of Billie Gene Hankins (the "Hankins Deposition") taken in Gridley v. Transamerica Ins. Co. is attached hereto as Exhibit "B." The Hankins Deposition was attached as Exhibit G to the Transamerica Brief.

ruptured pipe was definitely the older of the pipes. This opinion was based on Hankins's observation of the amount of corrosion present on the broken pipe in contrast to the absence of corrosion on the "newer" pipes (Hankins Deposition 41-42, 48, 53). Hankins opined that the final event which ruptured the line was caused by some type of earth movement as, for example, heavy equipment or an earthquake. Thus, although the break is characterized as a "clean break" by the Gridley court, it is clear from the evidence before the trial court that the line in which the break appeared was also heavily corroded. It is significant, therefore, that the lines adjacent to and above the broken line--lines which were not broken by the hypothesized earth movement--were not corroded.

Gasoline leakage from the broken pipe at the Gridley station occurred over a period of several months, during which large quantities of gasoline were released. The summary of records of gasoline loss was:

November, 1985	485 gallons
December, 1985	4,770 gallons
January, 1986	4,742 gallons
February, 1986	<u>1,877 gallons</u>
TOTAL	11,839 gallons

(Transamerica Brief at 5). From these records, the insured surmised that the initial break occurred in late November, 1985. The break was repaired in early February, 1986.⁵ (Gridley Brief at 6.)

A comparison of the facts in Gridley with the facts now before this Court illustrate that Defendants' position is untenable.

⁵ Relevant portions of Plaintiff/Appellee's brief in Gridley is attached hereto as Exhibit "C" (the "Gridley Brief").

Although the final breach in the line at the Gridley station was apparently due to earth movement, the pipe which ruptured had been subject to the process of gradual corrosion. Had this pipe not been corroded, it, like the adjacent lines, would not have been ruptured by the hypothesized earth movement. It follows, therefore, that the line in question at the Gridley station was subjected to the same gradual processes of corrosion as the line at the LaSal Station. Had the line at the LaSal Station been subjected to some sort of earth movement which cracked the line in the same place where the corrosion occurred, and if this crack had occurred only one day prior to the day when the release of gasoline actually occurred, under Defendants' theory the release would have been "sudden and accidental," thereby falling within the exception to the pollution exclusion.

The indefensibility of Defendants' position is further illustrated by comparing the quantities of gasoline released at the Gridley station and at the LaSal Station. It is undisputed that nearly 12,000 gallons of gasoline were lost during the two and one-half month period prior to discovery of the leak at the Gridley station. The insured in Gridley, consequently, was on notice at least since the beginning of December, 1985, that it had a major leak. Nevertheless, the insured did not attempt to find and fix the leak until February, 1986. Under LaSal's insurers' theory, because the rupture in the Gridley line is characterized as a "clean break," the insured in Gridley falls within the exception to the pollution exclusion despite the fact that the insured had been on notice for several months regarding the presence of a leak and

regardless of the fact that nearly 12,000 gallons of gasoline were lost. In contrast, under Defendants' analysis, because the rupture at the LaSal Station is characterized as a "corrosive" leak, LaSal does not fall within the exception to the pollution exclusion even though it had no record of gasoline shortages prior to discovery of the leak, LaSal acted immediately to find and fix the leak as soon as there was evidence of a leak and gasoline losses were so minute they had not been detected.

The flaw in the insurers' position is further illustrated by their attempt to distinguish Wagner v. Milwaukee Mutual Ins. Co., 427 N.W.2d 854 (Wis.Ct.App. 1988), review denied, 436 N.W.2d 30 (Wis. 1988) from the case now before this Court. According to Defendants, Wagner, like Gridley, is distinguishable because the gasoline leak began "immediately" after an underground line was cracked in 1981. As noted by the Wagner court, the underlying facts were not well developed; accordingly, the amount of released gasoline is not found in the opinion. The leak was discovered approximately three years after the presumed initiation of the release when gasoline odors were detected on surrounding properties. Given these facts, although concededly not known, it is reasonable to assume that the initial volume of gasoline released from the cracked line was minuscule; hence, the failure to discover the pollution for some three years. It is likely, therefore, that the broken line in Wagner initially resulted in "a gradual drip or trickle." Gridley v. Transamerica, 828 P.2d at 527. Thus, the distinction drawn in Gridley between a release from a "clean break," which the Gridley court apparently presumed

necessarily results in an initial release of large volumes of gasoline, and a release from a "corrosion break," which the court presumed to result in a "gradual drip or trickle," does not in fact exist.

The likely scenario in Wagner is thus in sharp contrast to that in Gridley despite the fact that both apparently involved clean breaks. In Gridley significant amounts of gasoline were initially lost within the first few months after the line ruptured, whereas initial losses in Wagner were apparently small. These factual differences between Wagner and Gridley with respect to total amounts released, rate of release and duration of release prior to discovery illustrate precisely why the cause of a rupture, the initial volume released, and the duration of the release are irrelevant to a determination as to whether the release was "sudden."

B. The Proposition That "Gradual is the Opposite of Sudden" Is Both Incorrect and Irrelevant.

LaSal's insurers contend that because "gradual is the opposite of sudden," any discharge from an underground gasoline line caused by corrosion of the pipe is gradual, not sudden. Although the juxtaposition of "gradual" and "sudden" is, on its face, clever, this is a false dichotomy.⁶

According to this "gradual-versus-sudden" analysis, LaSal's reasoning leads to unacceptable results--at least in the view of

⁶ The term "gradual," of course, is found nowhere in the definition of "occurrence" or in the pollution exclusion of the CGL policies at issue. (See R. 2146 for the Omaha pollution exclusion and definition of "occurrence" and R. 2023, 2078 for the Carriers pollution exclusion.)

the insurers, the clear implication being that any such logical analysis will somehow upset the cosmic balance with inevitable tragic consequences. (Defendants' Brief at 18-19). Nevertheless, under any logical analysis of the "sudden and accidental" exception to the pollution exclusion it is incontestable that: (1) the length of time for the process (whatever that process may be) to create a rupture in a containment vessel from which pollutants are released is irrelevant as to whether the release is "sudden," (2) the volume of pollutants released is irrelevant as to whether the release is "sudden," (3) the duration of time between initiation of the leak and discovery of the leak is irrelevant as to whether the release is "sudden," and (4) whether the damages occur immediately after the release or gradually accrue over a period of time is irrelevant as to whether the release is "sudden." The sole pertinent inquiry is whether the release itself was "sudden." It therefore follows, as LaSal's insurers correctly observe, that an initial release from a containment vessel is always, as a matter of law, "sudden." The fact that this logical analysis leads to what the insurers contend is an "unacceptable" conclusion is the insurers's problem, not LaSal's. It is, after all, LaSal's insurers who drafted the pollution exclusion.

The fact that unexpected and unintended releases from containment vessels may all be "sudden" does not mean that all releases of pollutants are "sudden and accidental," nor does it necessarily eliminate the temporal component from "sudden." As recognized by numerous courts, routine, day-to-day discharges of pollutants which are part of the insured's business operations are

neither sudden nor accidental. See, e.g., Anaconda Minerals v. Stoller Chemical Co., 773 F.Supp. 1498 (D. Utah 1991), *aff'd*, 990 F.2d 1175 (10th Cir. 1993); Hartford Accident and Indem. Co. v. U.S. Fidelity and Guar. Co., 675 F.Supp. 677 (D. Utah 1991), *aff'd*, 962 F.2d 1484 (10th Cir. 1992). Thus, the insurers' ominous prediction that LaSal's argument will eviscerate the meaning of "sudden" is a red herring.

Controversy surrounding the interpretation of "sudden and accidental" has been exacerbated by decisions wherein the courts have used the word "gradual" imprecisely, thereby conflating separate, distinct notions: the process resulting in a rupture of a containment vessel, the initial discharge of pollutants from the vessel, the duration of the discharge and the damages resulting from the discharge of pollutants.

The decision in ALC Technologies, Inc. v. Northbrook Property and Casualty Ins. Co., 17 Cal.App.4th 1773, 22 Cal.Rptr. 206 (1993), *petition for review denied*, ____ Cal.Rptr. ____ (Cal. 1993), cited by LaSal's insurers, exemplifies this problem. In ALC Technologies, the court failed to distinguish between pollution of the environment--which may be gradual--with the initiation and duration of a discharge. This confusion is illustrated by the following quotations:

[The] "sudden and accidental" language in the CGL pollution exclusion does not allow for coverage for gradual pollution.

Id. at 212 (emphasis added) (cited in Defendants' Brief at 21).

[T]he release of contaminants was a result of holes in the tanks which developed over time as a result of rust. Corrosion is, by definition, a gradual process.

Id. at 219 (emphasis added).

Similarly, in Shell Oil v. Winterthur Swiss Ins. Co., 12 Cal.App.4th 715, 15 Cal.Rptr. 2d 815 (1993) (cited by both LaSal and by the insurers), the court at one point found that "sudden" refers to the commencement of a discharge. Id. at 841. Nevertheless, the Shell court stated that,

If a sudden and accidental discharge continues for a long time, at some point it ceases to be sudden or accidental. . . . Still, a sudden and accidental discharge of a dangerous pollutant could continue unabated for some period because of a negligent failure to discover it, technical problems or a lack of resources that delay curtailment, or some other circumstance. Liability from such an event could well be covered.

15 Cal. Rptr. at 842 (citation omitted).

It is clear that the Shell court struggled with the distinction between the initial discharge of pollutants and the possibility that the discharge might continue for a lengthy period of time. Thus, although the Shell court agreed with Lumbermens Mutual Casualty Co. v. Belleville Indus., Inc., 407 Mass. 675, 555 N.E.2d 568, 572 n. 6 (1990), *cert. denied*, ____ U.S. ____, 112 S.Ct. 969 (1992) that "'sudden' refers to the pollution's commencement," the Shell court did not adequately come to grips with the problem of the duration of a release.⁷

⁷ The insurers attempt to distinguish three additional cases cited by LaSal: Goodman v. Aetna Casualty and Surety Co., 412 Mass. 807, 593 N.E.2d 233 (1992); Petr-All Petroleum Corp. v. Fireman's Ins. Co., 593 N.Y.S.2d 963 (N.Y.App.Div. 1993); and Colonie Motors, Inc. v. Hartford Accident and Indemnity Co., 538 N.Y.S.2d 630 (N.Y.App.Div. 1989). Without belaboring the points raised above in LaSal's discussion of ALC Technologies and Shell, LaSal merely notes that the decisions in Goodman, Petr-All and Colonie Motors lend further credence to LaSal's observation that courts have had considerable problems in dealing with the sudden and accidental exception to the pollution exclusion. The insurers' statement that "[t]he Goodman decision is consistent with Wagner

Under any logical analysis of the "sudden and accidental" exception to the pollution exclusion, it is inescapable that the salient inquiry is whether the release was "sudden." The insurance companies attempt to characterize the leak at the LaSal Station as gradual because the corrosive process leading up to the release was gradual is irrelevant. The volume of pollutants released, the duration of time until discovery of the leak and the damages caused by the leak are equally irrelevant to whether the release itself was "sudden and accidental." This Court should hold that the release of gasoline at the LaSal Station was "sudden and accidental."

C. The Fact the Rupture in LaSal's Pipe Resulted From Corrosion is Irrelevant to Determining Whether the Leak Was "Sudden"

The insurers contend that the inception of the leak at the LaSal Station occurred sometime between February, 1983 and September, 1984 (Defendants' Brief at 27-28). As pointed out by LaSal, *supra* at 2-4, EarthFax's calculations regarding the date of onset of the leak must be placed in context. EarthFax's conclusion that the onset of the leak occurred sometime between February, 1983 and September, 1984, is based entirely on the hypothetical presumption that all of the gasoline pollution in the Moab area came solely from the LaSal Station. Given the small size of the holes in LaSal's underground line and the fact that inventory

and Gridley in differentiating between a gradually developing leak through corrosion and one which is abrupt and immediate" (Defendants' Brief at 25) underscores the analytical problem. It is not the leak which gradually develops through corrosion but, rather, the weakening of the pipe walls which gradually develops through corrosion. Once the leak begins, irrespective of the cause and the initial volume, it is sudden."

records for the month immediately preceding discovery of the leak indicated no loss of product, it is likely (as LaSal has always maintained) that the rupture occurred much more recently than September, 1984.

As the insurers correctly point out, both LaSal and Omaha presented expert testimony from two metallurgists regarding the condition of the pipe segment which ruptured. Both Dr. Pitt and Dr. Alex agreed that the pipe segment had been subjected to general and pitting corrosion, the result of which was the thinning of the pipe wall at the base of the thread roots to the point where the pipe failed at these thinned areas (R. 3236, 3253).

According to the testimony of Dr. Pitt, LaSal's expert, the release of gasoline at the LaSal Station was sudden:

. . . 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. And in my opinion that's what caused at least one of the holes present.

Q: Okay. Now, you say that it burst suddenly through the pipe caused by the -- you have a corroded pipe and you have pressure inside, and at some point because of that pressure the hole was burst through it and suddenly created in that pipe?

A: Simply the metal is not strong enough to hold the interior pressure.

. . .

Q: But prior to the failure, gasoline was moving through that pipe with no leakage?

A: That's right.

. . .

Q: (By Mr. Hansen) Do you have an opinion to a reasonable degree of scientific certainty as to whether or not, prior to the event that you just described, there was a leak in that pipe? Calls for a "yes" or "no" answer.

A: Yes.

Q: Okay. What is that opinion?

. . .

A: My opinion was that there was no leak prior to the one that occurred at that time.

. . .

A: If the pipe were not under pressure, I believe the leak would also have been sudden because at one instance it's there and in the next instance it's not. It's not there and then it's there.

R. 3235-3238.

Dr. Alex, the insurers' expert, further testified as follows:

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 is 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.

According to the testimony of both experts, at one moment in time, the underground gasoline line at the LaSal Station was intact and at the next moment, when a small opening appeared, it was not. Only one logical conclusion may be drawn from this testimony: if a containment vessel at one point in time has integrity, that is,

it is intact, and at the next moment its integrity is destroyed thereby releasing pollutants, the event in question can only be characterized as "sudden." One can only conclude that the release at the LaSal Station was "sudden."

CONCLUSION

The release of gasoline at the LaSal Station falls within the exception to the pollution exclusion irrespective of whether the term "sudden" is susceptible to more than one reasonable interpretation or whether the term "sudden" is found to have a temporal component. If the phrase "sudden and accidental" means "unintended or unexpected," the release of gasoline at the LaSal Station was accidental and was neither intended nor expected. Because the language in question 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. Alternatively, if the term "sudden" is deemed to have a temporal component, it is undisputed that the initial discharge of gasoline occurred immediately or "suddenly." It is irrelevant that the process whereby the initial fracture appeared was caused by erosion; similarly the length of time which elapsed between discovery of the discharge, the volume of the discharge, the rate of discharge and the time which elapsed for the discharge to contaminate the environment are irrelevant as to whether the release itself was "sudden and accidental." Accordingly, the gasoline release falls within the "sudden and accidental" exception to the pollution exclusion. This Court must hold that both Omaha and Carriers have a duty to defend and to indemnify LaSal in the

actions brought against it by the State of Utah and by Hartford Leasing Corporation.

DATED this 1st day of March, 1994.

A handwritten signature in cursive script, reading "Claudia F. Berry", is written over a horizontal line.

J. MICHAEL HANSEN, Esq.

CLAUDIA F. BERRY, Esq.

of and for

SUITTER AXLAND & HANSON

Attorneys for Plaintiff/Appellant

LaSal Oil Company, Inc.

CFB35.32

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 1st day of March, 1994, 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

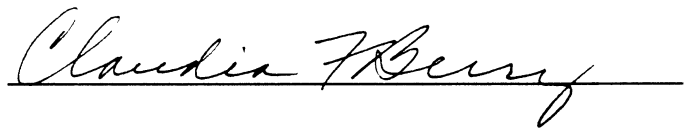
Tim Dalton Dunn, Esq.
Carlton R. Ericson, Esq.
DUNN & DUNN
230 South 500 East, Suite 460
Salt Lake City, Utah 84102
Attorneys for Utah Property and Casualty
Insurance Guarantee Association

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

A handwritten signature in cursive script, reading "Claudia F. Berry", is written over a horizontal line.

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Tab A

ORIGINAL

IN THE UTAH COURT OF APPEALS

GRIDLEY ASSOCIATES, LTD.,
PETROLEUM MANAGEMENT, INC.,
and VERNON G. W. DICKMAN,

Plaintiffs and Appellees,

vs.

TRANSAMERICA INSURANCE
COMPANY,

Defendant and Appellant.

Appellate Court No. 910121-CA
Priority No. 16

BRIEF OF APPELLANT

On Appeal from the Judgment of the
Third Judicial District Court
In and for Salt Lake County
Judge James S. Sawaya

Stephen B. Mitchell, Esq.
BURBIDGE & MITCHELL
139 East South Temple
Suite 2001
Salt Lake City, Utah 84111
Attorneys for Appellee

Neil H. Selman, Esq.
SELMAN, BREITMAN & BURGESS
 Kenneth A. Okazaki, Esq.
 Barbara K. Berrett, Esq.
PURSER, OKAZAKI & BERRETT, P.C.
 39 Post Office Place, #300
 Salt Lake City, Utah 84101
 Attorneys for Appellant

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JUN 6 1991

PARTIES

Gridley Associates, Ltd., Petroleum Management, Inc.
and Vernon G. W. Dickman
Plaintiffs/Appellees

Transamerica Insurance Company
Defendant/Appellant

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I. JURISDICTION OF APPELLATE COURT

The Utah Court of Appeals has jurisdiction in the present case pursuant to Utah Code Ann. Section 78-2a-3 (1953, as amended).

II. ISSUE FOR REVIEW

The issue presented on appeal is whether the gradual damage caused by a gasoline line leak is barred from coverage by the pollution exclusion contained in an insurance policy issued to Plaintiffs and Appellees Gridley Associates, Ltd., Petroleum Management, Inc., and Vernon G. W. Dickman (hereinafter "Gridley Associates") by Defendants and Appellant Transamerica Insurance Company (hereinafter "Transamerica"). There are no issues of material fact disputed by the parties.

III. STANDARD OF APPELLATE REVIEW

Transamerica seeks a review of the entry of partial summary judgment by the trial court below. Under the standard of review for conclusions of law, the Court of Appeals should accord the trial court's conclusions "no particular deference, but review them for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

IV. DETERMINATIVE PROVISIONS

No constitutional provisions, statutes, ordinances, or regulations are determinative of this appeal.

V. STATEMENT OF THE CASE

This appeal arises from an insurance coverage dispute between Transamerica and Gridley Associates. Gridley Associates filed the instant action seeking insurance coverage from Transamerica for liability they faced arising from a gasoline leak. Transamerica then filed a Motion for Partial Summary Judgment, seeking judgment on Gridley Associates' Claims for Relief for breach of contract and declaratory relief. The only issue raised in Transamerica's motion was that the pollution exclusion in its policy precluded coverage of Gridley's claim. (Affidavit of Eric Olson, Exhibit A in the Addendum filed concurrently with this brief, page 3, paragraph 7; Motion for Partial Summary Judgment, Exhibit B in the Addendum filed concurrently with this brief, Motion pages 1-2). The trial court, basing its ruling upon undisputed facts, held the leak was "sudden and accidental" under its interpretation of those terms and accordingly denied Transamerica's Motion. (Affidavit of Eric Olson, Exhibit A in the Addendum filed concurrently with this brief, page 4, paragraph 9; Minute Order, Exhibit C in the Addendum filed concurrently with this brief.)

In response to the trial court's ruling, the parties entered into a Settlement Agreement and Release whereby Transamerica agreed to pay a certain sum toward cleanup of the site of the leak, while Gridley Associates agreed to dismiss their causes of action for bad faith, fraud,

and negligent misrepresentation. The Agreement also provided that in the event the agreed-upon sum was insufficient to pay for the cleanup, Transamerica would have the option of notifying Gridley Associates of its intent to appeal the trial court's ruling on the pollution exclusion. (Affidavit of Eric Olson, Exhibit A in the Addendum filed concurrently with this brief, page 5, paragraphs 10-11; Settlement Agreement and Release, Exhibit D in the Addendum filed concurrently with this brief, page 7, paragraph 3.) This provision came into effect upon Transamerica's payment of the full agreed amount, and Transamerica exercised its option, notifying Gridley Associates that it intended to appeal the ruling. To place the action in a posture from which it could be appealed, the parties stipulated to a Partial Summary Judgment, entered by the trial court on December 13, 1990. Specifically, the parties stipulated to entry of judgment in Gridley Associate's favor as to the two Claims for Relief for breach of contract and declaratory relief. (Affidavit of Eric Olson, Exhibit A in the Addendum filed concurrently with this brief, pages 5-6, paragraph 12; Record at 593-94, Stipulation; Record at 595-97, Partial Summary Judgment.) The Partial Summary Judgment is a final order, entry of which disposed of the case. Transamerica now appeals from that Judgment as planned.

The undisputed facts pertinent to this appeal are essentially as set out in Transamerica's Motion for

Partial Summary Judgment. For all relevant time periods, Gridley Associates owned a self-service gasoline station in Gridley, California ("the Gridley station"). (Record at 200, paragraph 9, Amended Complaint.) From February 7, 1985 through March 7, 1986, the Gridley station was covered by a policy of insurance issued by Transamerica ("the Policy"). (Record at 199-200, paragraphs 6-7, Amended Complaint; Record at 342, paragraph 3, Affidavit of Michael Dean ["Dean affidavit"].) The Policy provided coverage for liability arising from injuries to third persons in three different sections: (a) Section II -- Comprehensive General Liability ("CGL") (schedule B), (b) Section III -- Garage Insurance (schedule F), and (c) Section V -- Commercial Umbrella Policy Declaration. (Record at 342, paragraph 4, Dean affidavit.) With respect to the CGL and Commercial Umbrella coverages, the Policy contained the following exclusion:

This insurance does not apply:

. . .

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

(Record at 342, paragraph 5, Dean affidavit.)

With respect to the Garage Insurance, the Policy contained the following exclusion:

This insurance does not apply to:

. . .

Bodily injury or property damage caused by the dumping, discharge or escape of irritants, pollutants or contaminants. This exclusion does not apply if the discharge is sudden and accidental.

(Record at 343, paragraph 6, Dean affidavit.) This quoted language together with that quoted above from the CGL and Commercial Umbrella coverages are hereinafter referred to collectively as "the pollution exclusion."

For the months of November 1985 through February 1986, the Gridley station recorded the following shortfalls between the volume of regular leaded gasoline purchased and placed in its underground storage tank and the volume of such gasoline actually sold:

November 1985	485 gallons
December 1985	4,770 gallons
January 1986	4,742 gallons
February 1986	<u>1,877 gallons</u>
TOTAL	11,839 gallons

(Plaintiffs' Answers and Objections to Defendant's Second Set of Interrogatories, Exhibit E in the Addendum filed concurrently with this brief, pages 6-7, No. 9, and Tank Inventory Summary attached thereto.)

In early February, 1986, Gridley Associates engaged Dockendorf Equipment Co. ("Dockendorf") to locate any leak in the regular leaded fuel system at the Gridley station that would account for the shortfalls.

(Deposition of Calvin Clifton Bolley, Exhibit F in the Addendum filed concurrently with this brief, page 7.) Dockendorf proceeded to test the regular leaded fuel system at the Gridley station. Dockendorf determined that gasoline had leaked from a pipe connecting a gasoline storage tank and submerged pump with the gasoline dispensers. (Deposition of Billy Gene Hankins ["Hankins deposition"], Exhibit G in the Addendum filed concurrently with this brief, pages 8, 38-39, 47-48.) The leak occurred in a section of the pipe which had been weakened by the gradual process of electrolysis. (Hankins deposition, Exhibit G in the Addendum filed concurrently with this brief, pages 49-52.) Gasoline would flow out of the leaking area of the pipe only when the fuel system was activated to pump gasoline thereby putting pressure on the line. The leakage would stop when the pump was not activated and pressure was taken off the gasoline line. (Hankins deposition, Exhibit G in the Addendum filed concurrently with this brief, pages 10-11.) On or about February 12, 1986, Dockendorf repaired the leak in the gasoline line at the Gridley station. (Hankins deposition, Exhibit G in the Addendum filed concurrently with this brief, page 6.)

In March, 1986, large quantities of gasoline were discovered on property adjacent to the Gridley station. (Record at 201, paragraph 10, Amended Complaint.) Gridley Associates were ordered by governmental agencies to clean up the gasoline on the adjacent property. They

undertook to do so by hiring America Environmental Management Corporation. (Record at 201, paragraph 11, Amended Complaint.) The City of Gridley and Nevada Construction & Mining filed actions against plaintiffs Vernon G. W. Dickman and Gridley Associates, Ltd., to recover damages allegedly caused by the gasoline leakage. These actions have been settled. (Record at 202, paragraph 15, Amended Complaint; Plaintiffs' Answers and Objections to Defendant's Second Set of Interrogatories, Exhibit E in the Addendum filed concurrently with this brief, 1-2, No. 1(2)).

VI. SUMMARY OF ARGUMENTS

The sole issue facing the Court of Appeals is the interpretation of the pollution exclusion's "sudden and accidental" language. Although Gridley Associates have indicated that they intend to argue that Transamerica is estopped from raising the pollution exclusion as a ground for coverage, that is not an issue in this appeal. The trial court below ruled solely on the issue of the pollution exclusion based on undisputed facts. In order for the Court to consider the issue of estoppel, it would have to act as a fact finder, which is clearly outside its appropriate role.

The Court should adopt an interpretation of the pollution exclusion which precludes coverage of the subject claim. To say what we all know, namely, "'sudden' means 'sudden,'" is not meant to be funny but

rather is meant to point out that the plain meaning is obvious. A "plain meaning" approach to interpreting the insurance policy at issue is appropriate under Utah principals of contract interpretation. The plain meaning of the phrase "sudden and accidental" includes a temporal element, requiring that the discharge of pollutants, rather than the cause of the discharge or the resulting damage, happen abruptly. Where contaminants are discharged on a continual, intermittent basis in the course of regular business, as in the present case, such discharge is plainly not "sudden." Certainly such facts do not succeed in carrying the insured's burden of proving that the discharge was "sudden and accidental."

Moreover, by so interpreting the exclusion, the Court would be in keeping with the rule of construction that all parts of a contract should be given effect where possible. If the word "sudden" is interpreted as synonymous with "accidental," then it becomes meaningless surplusage in the phrase "sudden and accidental."

Such an interpretation of the pollution exclusion is supported by the holdings of the majority of courts across the country, particularly the more recent of such holdings. No appellate court has ruled on this issue in Utah. A federal district court sitting in Utah, however, has recently addressed this issue and has ruled in accordance with the interpretation proposed by Transamerica. Although this case has no precedential value, it does show a trend toward the proper

interpretation of the pollution exclusion, particularly in Utah. The Court of Appeals should adopt reasoning similar to that of all these cases and rule that the leak at the Gridley station is not covered by the Policy.

VII. ARGUMENT

A. The Leakage at the Gridley Station Was Not a "Sudden Discharge" and Thus Is Not Covered Under the Policy.

The relevant facts regarding the leak at the Gridley station are not in dispute. The loss claimed resulted from the intermittent discharge of gasoline into the ground in the vicinity of the Gridley station over a period of approximately four months. Further, for purposes of this appeal, Transamerica does not dispute that the alleged loss was an "occurrence" under the Policy or that the discharge was "accidental." Similarly, Plaintiffs must concede that the gasoline leak at the Gridley station falls within the terms of the pollution exclusion absent application of the conditional language regarding a "sudden and accidental" discharge. The simple issue before the Court is whether the leak at the Gridley station was a "sudden discharge."

1. The Court Should Use a Plain Meaning Approach to Interpret the Terms of the Policy.

As the relevant facts are undisputed, the issue of whether the leak at the Gridley station was a "sudden

discharge" is one of contract interpretation for the Court. See Saunders v. Sharp, 806 P.2d 198 (Utah 1991). In determining the meaning of "sudden," the Court should be guided by general principles of interpretation recognized by Utah courts. As stated by Utah's Supreme Court, "[u]nless there is some ambiguity or uncertainty in the language of an insurance policy, the policy should be enforced according to its terms." St. Paul Fire and Marine Insurance v. Commercial Union Assurance, 606 P.2d 1206, 1208 (Utah 1980) (footnote deleted). That court has also held that "all of [a contract's] parts should be given effect insofar as that is possible." Larrabee v. Royal Dairy Products Co., 614 P.2d 160, 163 (Utah 1980). See also Marriott v. Pacific National Life Assurance Co., 24 Utah 2d 182, 467 P.2d 981 (1970). Most importantly, policy language should be given "its usual and ordinary meaning." Fire Insurance Exchange v. Alsop, 709 P.2d 389, 390 (Utah 1985). As the Utah Supreme Court stated in Government Employees Insurance Co. v. Dennis, 645 P.2d 672, 675 (Utah 1982) quoting from Jamestown Mutual Insurance Co. v. Nationwide Mutual Insurance Co., 266 N.C. 430, 146 S.E.2d 410, 416 (1966):

In the construction of contracts, even more than in the construction of statutes, words which are used in common, daily, non-technical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they may have acquired in legal usage.

See also Fuller v. Director of Finance, 694 P.2d 1045, 1047 (Utah 1985) ("words are to be given their ordinary meaning").

2. The Pollution Exclusion Precludes Coverage of Non-Sudden Discharges of Pollutants.

The pollution exclusion contains two basic provisions: (1) an exclusion from coverage of all claims arising out of the "discharge, dispersal, release or escape" of pollutants of any kind; and (2) a narrow exception to the exclusion that preserves coverage only where such polluting discharges (not the damage or injury resulting from such discharges) are both "sudden" and "accidental." The language of the pollution exclusion is simple and straightforward, and leaves no room for any suggestion of "ambiguity." Moreover, when the exclusion is read in the context of the entire policy, there can be no question as to its meaning and effect. If a claim arises out of the discharge of waste materials or contaminants, it falls within the ambit of the pollution exclusion and is excluded from coverage unless the exception to the exclusion applies. As noted, that exception provides that

this exclusion does not apply if such discharge[, dispersal, release or escape] is sudden and accidental.

To show that such a claim falls within the exception to the pollution exclusion, therefore, an insured must show

both that the relevant discharge was accidental and that it also occurred suddenly.

Transamerica's position on the meaning of the pollution exclusion is that the word "sudden" describes an abrupt, brief, instantaneous discharge. This definition has been adopted by numerous courts that have analyzed the meaning of the word "sudden" in the pollution exclusion language now before this Court. Granted, some early decisions viewed "sudden" to be ambiguous, construing it against the insurer to find coverage. Others, finding no ambiguity, equated "sudden" with "unexpected" or "unintended" thus making it synonymous with "accidental."¹ However, in recent years, the majority of decisions have held that the word "sudden" as used in the pollution exclusion is neither ambiguous nor superfluous.² It is this authority which Transamerica asks the Court to follow.

¹A helpful summary of these two lines of authority is set forth in International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co., 168 Ill. App. 3d 361, 522 N.E.2d 758, 765-66 cert. denied, 122 Ill. 2d 576, 530 N.E.2d 246 (1988).

²This trend is recognized and discussed in Fireman's Fund Insurance Co. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1326 (E.D. Mich. 1988). A comprehensive list of current case law on the pollution exclusion is attached as Exhibit H hereto.

a. The Exception to the Pollution Exclusion Applies to the Discharge of Pollutants.

The terms "sudden and accidental" clearly describe the discharge of pollutants rather than the cause of such a discharge or the damage experienced. This is in contrast to the "occurrence" requirement which states that the damage must be neither expected nor intended. In a well-reasoned decision by the Supreme Court of Massachusetts, the court discusses this distinction as follows:

The sudden event to which the exception in the pollution exclusion clause applies concerns neither the cause of the release of a pollutant nor the damage caused by the release. It is the release of pollutants itself that must have occurred suddenly, if the exception is to apply so as to provide coverage. The exception thus focuses on the circumstances of the release. In deciding whether there was an occurrence, on the other hand, the focus of the inquiry is on the property damage, asking whether it was expected or intended from the insured's point of view. Courts that have failed to appreciate this distinction have led themselves to identify an ambiguity in the policy language that does not exist.

Lumbermens Mut. Cas. Co. v. Belleville Industries, Inc., 407 Mass. 675, 679, 555 N.E.2d 568, 571 (1990). See also United States Fid. & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (1988) ("It must also be emphasized that the focus of this 'sudden and accidental' exception to the general pollution exclusion clause is on the nature of the discharge of the pollution itself, not on the nature

of the damages caused"); Fireman's Fund Ins. Companies v. Ex-Cell-O Corp., supra, 702 F. Supp. at 1326-27 (E.D. Mich. 1988) ("The focus of the pollution exclusion is on the discharge or release of pollutants into the environment. When the discharge or release of a pollutant is brief or lasts only a short time, it comes within the meaning of the first element of the 'sudden and accidental' exception of the pollution exclusion."); United States Fid. & Guar. Co. v. Murray Ohio Mfg. Co., 693 F. Supp. 617 (M.D. Tenn. 1988) (damage caused by a "gradual release," etc., is excluded), aff'd, 875 F.2d 868 (6th Cir. 1989); Transamerica Ins. Co. v. Sunnes, 77 Or. App. 136, 711 P.2d 212 (1985), review denied, 301 Or. 76, 717 P.2d 631 (1986) (the pollution exclusion focuses upon the discharge of pollutants, not upon the resulting damage or injury); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374 (the pollution exclusion precludes any coverage obligation where discharges had occurred repeatedly "over the course of time," focusing upon the polluting event itself -- the discharge of pollutants -- rather than on any resulting injury or damage or its cause), reh'g denied, 316 N.C. 386, 346 S.E.2d 134 (1986).

b. The Term "Sudden" Means the Opposite of "Gradual".

Some courts claim that the word "sudden" within the exception is itself ambiguous. The plain, common, daily, non-technical meaning of "sudden" is not ambiguous. In

"daily usage," "sudden" denotes an abrupt or precipitous event. As the Sixth Circuit stated in USF&G v. Star Fire Coals, supra, 856 F.2d at 34 (6th Cir. 1988):

We do not find the pollution clause to be riddled with ambiguities despite the best efforts . . . to create them. . . .

We believe the everyday meaning of the term "sudden" is exactly what this clause means. We do not believe that it is possible to define "sudden" without reference to a temporal element that joins together conceptually the immediate and the unexpected.

That court recently reiterated its understanding of the term "sudden" in FL Aerospace v. Aetna Cas. & Sur. Co., 897 F.2d 214, cert. denied, __ U.S. __, 111 S. Ct. 283, 112 L.Ed.2d 238 (1990). The court held that the plain, everyday meaning of "sudden" is "happening . . . quickly, without warning, unexpectedly; abrupt." Id. at 219. Accordingly, "a sudden and accidental event is one that happens quickly, without warning, and fortuitously or unintentionally." Id. Accord Grant-Southern Iron & Metal Co. v. CNA Ins. Co., 905 F.2d 954 (6th Cir. 1990).

A federal court sitting in another Tenth Circuit state has recently come to a similar conclusion. It held:

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

United States Fid. & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437, 446 (D. Kan. 1990) (citing C. L. Hawthaway & Sons v. American Motorists Ins., 712 F. Supp. 265, 268 (D. Mass. 1989)).

The court in International Minerals, supra, 522 N.E.2d at 769 (Ill. 1988), explained this temporal requirement even more fully, holding as follows:

"[S]udden" is understood in its ordinary, most common and popular sense, to have a temporal significance. Webster's dictionary defines "sudden" as "happening without previous notice or with very brief notice;" "abrupt"; "characterized by and manifesting hastiness"; (Webster's Third New International Dictionary, 2284 (1976)); and we decline to ignore these temporal-focused definitions or hold that because the word might also have other contextual uses, it is ambiguous and thus must be interpreted to provide coverage where the policy language read as a whole clearly intends to exclude such coverage.

The Ex-Cell-O court similarly declared: "'[S]udden' in the pollution exclusion includes the temporal component of briefness, and means 'brief, momentary, or lasting only a short time.' 'Sudden' is to be contrasted with 'gradual.'" 702 F. Supp. at 1326 (footnote omitted).

The Second Circuit court has also very recently adopted this plain meaning of "sudden." Rejecting the insureds' argument that the "sudden and accidental" exception should be interpreted to mean "unexpected and unintended," the court held that "[f]or a release or discharge to be sudden, it must 'occur[] over a short

period of time.'" Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39, 42 (2d Cir. 1991) (citing Technicon Electronics Corp. v. American Home Assur. Co., 141 A.D.2d 124, 533 N.Y.S.2d 91 (N.Y. App. Div. 1988), aff'd, 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (1989)). A district court in this circuit has similarly held in a recent opinion that "the word 'sudden' implies a temporal element. Thus an event which lasts for an extended period of time is not 'sudden.'" Olin Corp. v. Ins. Co. of North America, No. 84 Civ. 1968, slip op. at 13 (S.D.N.Y. April 23, 1991) (available on Westlaw at 1991 WL 63420). The court further recognized that such an interpretation "is in keeping with the emerging majority view among the courts." Id.

In American Motorists Ins. Co. v. General Host Corp., 667 F. Supp. 1423 (D. Kan. 1987), motion to vacate denied, 120 F.R.D. 129 (D. Kan. 1988), aff'd, No. 88-1053 (10th Cir. March 21, 1991), the insured cited cases in support of the contention that the pollution exclusion was "ambiguous." After reviewing these authorities, the court wrote:

The Court has carefully considered these and similar cases, yet cannot conclude that the pollution exclusion clause is ambiguous. The language is clear and plain, something only a lawyer's ingenuity could make ambiguous.

Id. at 1429.

The General Host court went on to summarize the interplay between the definition of "occurrence" in the policies and the pollution exclusion itself:

The contract is clear: "occurrences," as defined, are covered unless the occurrences arise out of pollution events; those are not covered unless such pollution events are sudden and accidental. Read as a whole, the policy covers "continued and repeated exposures" except for exposures to pollution; then it covers only "sudden and accidental" events. The Court declines to contort the plain language of the policy.

Id. (emphasis in original). Accord Olin, supra, No. 84 Civ. 1968, slip op. at 8. Declining the insured's invitation to "contort the plain language of the policy," the General Host court applied the "clear and plain" terms of the pollution exclusion, and held that the word "sudden" is "objective" and requires that, to be covered, the polluting discharge must occur "on brief notice" and not "gradually or over an extended time." Id. at 1428. See also Waste Management v. Peerless, supra, 315 N.C. at 699, 340 S.E.2d at 382 (1986) ("[t]he exception also describes the event -- not only in terms of its being unexpected, but in terms of its happening instantaneously or precipitantly"); Lower Paxton Township v. United States Fid. & Guar. Co., 383 Pa. Super. 558, 577, 557 A.2d 393, 402 (1989) ("[t]o read 'sudden and accidental' to mean only unexpected and unintended is to rewrite the

policy by excluding one important pollution coverage requirement -- abruptness of the pollution discharge").³

c. The Term "Sudden" is Not Superfluous.

To read "sudden" to mean only "unexpected" or "unforeseen" would violate the maxim that every part of a contract be given effect. See Larrabee, supra, 614 P.2d 160 (Utah 1980). As the court in International Minerals, supra, 522 N.E.2d at 769 (Ill. 1988), observed:

[I]nterpreting "sudden" as "unintended and unexpected" renders it synonymous with "accidental," as that term is employed in the policy and thus, the word "accidental" can be read out of the exception as nothing more than redundant surplusage. Such a reading does not comport with fundamental rules of contract construction requiring that to the extent possible, all words used in a contract be given effect.

The Supreme Court of Massachusetts agreed with this reasoning, stating that:

For the word "sudden" to have any significant purpose, and not to be surplusage when used generally in conjunction with the word "accidental,"

³The history of the pollution exclusion underscores that the term "sudden" was used in the exception to the exclusion precisely to differentiate abrupt, isolated discharges of pollutants, for which coverage might exist, from those that occurred continuously or repeatedly over a period of time, and for which coverage was excluded. See generally Note, The Pollution Exclusion Clause Through the Looking Glass, 74 Geo. L.J. 1237 (1986). The EPA itself acknowledges the distinction. In pollution insurance regulations promulgated under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921 et seq., the EPA has thus defined the term "sudden accidental occurrence" as "a[] [polluting event] which is not continuous or repeated in nature." 40 C.F.R. § 265.141(g) (emphasis added).

it must have a temporal aspect to its meaning, and not just the sense of something unexpected. We hold, therefore, that when used in describing a release of pollutants, "sudden" in conjunction with "accidental" has a temporal element. The issue is whether the release was sudden. The alternative is that it was gradual.

. . .

. . . If the word "sudden" is to have any meaning or value in the exception to the pollution exclusion clause, only an abrupt discharge or release of pollutants falls within the exception.

Lumbermens v. Belleville, supra, 407 Mass. at 679-81, 555 N.E.2d at 571-72 (1990). See also Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984) (words "sudden" and "accidental" have plain, discrete, and readily ascertainable meanings, rejecting the argument of ambiguity); Technicon v. American Home, supra, 141 A.D.2d at 533, N.Y.S.2d at 97 (1988) ("a discharge of toxic waste could take place accidentally over an extended period of time but . . . there would be no coverage since the discharge was not 'sudden'"); Techalloy Co. v. Reliance Insurance Co., 338 Pa. Super. 1, 487 A.2d 820, 826-27 (1984) ("the language of the policy unambiguously states that there will be no coverage for toxic discharge into the environment unless that discharge is both sudden and accidental"); Lower Paxton v. USF&G, supra, 393 Pa. Super. at 577, 557 A.2d at 402 (1989) ("Reading 'sudden' in its context, i.e. joined by the word 'and' to the word 'accident', the inescapable conclusion is that 'sudden', even if

including the concept of unexpectedness, also adds an additional element because 'unexpectedness' is already expressed by 'accident'. This additional element is the temporal meaning of sudden, i.e. abruptness or brevity").

The cases discussed above are only some of the most recent to reject the "ambiguity"/"superfluousness" arguments and to give effect to the pollution exclusion in cases of repeated or continuous discharges of wastes. Other courts similarly have concluded that the pollution exclusion means what it says, and that it excludes coverage except in those cases where polluting discharges were truly "sudden" as well as "accidental." See, e.g., Borden Inc. v. Affiliated F.M. Insurance Co., 682 F. Supp. 927, 930 (S.D. Ohio 1987) (pollution exclusion "is clear and should not be twisted simply to provide insurance coverage when the courts deem it desirable"), aff'd, 865 F.2d 1267 (6th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 68, 107 L.Ed.2d 35 (1989); Becker Electronics Mfg. Corp. v. Granite State Ins. Co., No. 86-CV-1294 (N.D.N.Y. June 12, 1989) (available on Westlaw at 1989 WL 63671) (citing New York v. Amro Realty Corp., 697 F. Supp. 99 (N.D.N.Y. 1988) for unambiguous reading of "sudden and accidental" such that "sudden" means happening on very brief notice whereas "accidental" means happening unexpectedly). These views are, of course, in accord with black-letter Utah law providing that courts should not strain to create an ambiguity where none exists. See, e.g., Overson v. United States Fidelity &

Guaranty Co., 587 P.2d 149 (Utah 1978). Those courts following this rule have had no trouble understanding and applying the simple language of the exclusion.

3. A Federal Court Sitting in Utah Has Very Recently Agreed With Transamerica's Interpretation of the Pollution Exclusion.

On February 28, 1991, the United States District Court for the District of Utah, Central Division, issued its opinion in Hartford Acc. & Indem. Corp. v. United States Fid. & Guar. Co., No. 88-C-1051J (available at 5 Mealey's Lit. Rep., Insurance (Mealey) No. 18, 3/12/91, at B-1). In a coverage dispute between Hartford and its insured, the court granted summary judgment for Hartford on the basis of the pollution exclusion. In agreement with the arguments presented herein, the court noted that:

The courts adopting the plain and simple definition of sudden and accidental have uniformly found the regular and repeated discharge of waste to be excluded from coverage by the pollution exclusion. . . .

Likewise, this court finds that [the insured's] continuous and routine discharge of pollutants upon or into the ground cannot be construed as sudden and accidental.

Id. at 7, 5 Mealey's No. 18 at B-4. In reaching this conclusion,

the court emphasize[d] that the focus of the sudden and accidental exclusion clearly related to the nature of the "discharge, dispersal, release or escape" of the pollution

itself, not to the nature of the damages caused. [The insured's] claim that the damages were sudden and accidental mischaracterizes the relevant question before the court. The focus of the pollution exclusion, by its plain terms, is on the polluting discharges. If the discharge is not sudden and accidental, the exclusion is applicable and the resultant injury or damage is not within policy coverage.

Id. at 8, 5 Mealey's No. 18 at B-4. The court directly disagreed with any argument that the "sudden and accidental" language was ambiguous. The court cited Star Fire Coals, supra, 856 F.2d at 34, for the contention that that language "is clear and plain, something only a lawyer's ingenuity could make ambiguous. . . . It's strange logic to perceive ambiguity in this clause." Hartford at 9. While the Hartford case holds no precedential value in the instant action, in the absence of any Utah state appellate authority regarding the interpretation of the pollution exclusion, this Court should consider the Hartford case persuasive authority and should follow the rule cited therein.

By following the Hartford case, the Court of Appeals would join the swelling ranks of those courts performing a genuine interpretation of the policy language before them. Transamerica urges the Court of Appeals to follow this line of reasoning, accepting at face value the plain and clear language of the policy at issue.

4. The Pollution Exclusion Bars the Instant Claim.

The loss for which Gridley Associates seek recovery resulted from a discharge of gasoline that was not "sudden." Over a period of four months, from pipe at the Gridley station which had suffered denigration caused by the electrolytic process, fuel leaked into the soil surrounding the Gridley station as the gasoline pump was activated. (See supra pages [4-5]). It was not any one of these minor discharges, standing alone, that caused injury to the adjacent property. Rather, it was the cumulative effect of countless such periodic discharges that produced the contamination and accompanying liability for which Gridley Associates insist Transamerica must answer. However, this loss did not result from a "sudden discharge" as those words are commonly used. The leak occurred every time the pump was activated, and stopped every time the pump was turned off.

The pollution at the Gridley station occurred over the course of several months as part of Gridley Associates' business operations. As such, the discharge of pollutants was not "sudden and accidental" as required for coverage. In fact, in Industrial Indem. Ins. v. Crown Auto Dealerships, 731 F. Supp. 1517 (M.D. Fla. 1990), the court found that the pollution at issue, which was very similar to the pollution at the Gridley station, had occurred gradually and as a normal result of the

insured's business operations. The insured in that case had presented evidence that:

. . . a number of accidental overflows occurred during the filling of the used oil holding tanks, some of which resulted in fairly large spills. . . . There were also occasional spills due to leak hose and pipe connections. . . . Also despite our efforts to impress on our employees the need for safety at all times, occasional carelessness by employees resulted in accidental spills during the transfer of used oil from trucks to storage tanks.

Id. at 1521. In upholding the pollution exclusion, the court held that:

. . . [t]hese spills and leaks appear to be common place events which occurred in the course of daily business, and therefore cannot, as a matter of law, be classified as "sudden and accidental." That is, these "occasional accidental spills" are recurring events that took place in the usual course of [business].

Id.

Moreover, although the insurer nominally bears the burden of showing that the exclusionary language in the pollution exclusion is applicable, the exception to the exclusion is in substance a grant of coverage, and the insured thus bears the burden of proving that exception. Courts have so held specifically with respect to the insured's burden to prove the "sudden and accidental" exception in the pollution exclusion. Fischer & Porter Co. v. Liberty Mutual Ins. Co., 656 F. Supp. 132, 140 (E.D. Pa. 1986). See also Cooper Dev. Co. v. Employers

Ins. of Wausau, No. C901330SC, slip op. at 4 (N.D. Cal. April 16, 1991) (available at 5 Mealey's Lit. Rep., Insurance (Mealey) No. 24, 4/23/91, at E-1, E-2); Detrex Chemical Industries, Inc. v. Employers Ins. of Wausau, 746 F. Supp. 1310, 1319 (N.D. Ohio 1990); Northern Ins. Co. v. Aardvark Associates, Inc., 743 F. Supp. 379 (W.D. Pa. 1990); Covenant Ins. Co. v. Friday Engineering Co., 742 F. Supp. 708 (D. Mass. 1990); A. Johnson & Co., Inc. v. The Aetna Cas. & Sur. Co., 741 F. Supp. 298 (D. Mass. 1990), aff'd, No. 90-1753 (1st Cir., May 14, 1991); Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., supra, 702 F. Supp. 1317 (E.D. Mich. 1988), motion for rehearing denied, 720 F. Supp. 597 (E.D. Mich. 1989); Borg-Warner Corporation v. Liberty Mutual Ins. Co., No. 88-539 (N.Y. Sup. Ct. February 1, 1991); 19 Couch on Insurance, Section 79:385 (2d Ed. 1983). Accordingly, Gridley Associates bears the burden of proving that the discharge of fuel was both "sudden" and "accidental" so that the exception to the exclusion comes into play. In other words, the main body of the pollution exclusion clearly applies to this claim. The damage at issue arises out of the discharge of pollutants; Transamerica has shown this without dispute from Gridley Associates. Transamerica has therefore met its burden of proof, and this burden has now shifted to Gridley Associates. The pollution exclusion applies unless Gridley Associates can convince the court that the facts lift this claim out of the exclusion.

As explained above, the facts presented do not meet this burden. The only facts regarding the discharge of fuel show that the release of contaminants at the Gridley station occurred over a number of months. No evidence exists that the fuel was release in a sudden episode. In the normal course of Gridley Associates' business operations, customers on innumerable occasions activated the gasoline pumps to dispense fuel. Time after time, on a daily basis, gasoline ran through the system, gradually leaking out bit by bit through the leak in the pipe into the surrounding soil.

This is the Industrial Indemnity case. A continuous series of releases, even if one in isolation may be considered sudden, becomes not sudden, i.e., gradual, and excluded. Inventory records kept by the insured certainly show an ongoing, long-term process ignored by the insured, leading to the large amount of oil going into the ground over a significant period of time. The pollution exclusion should not be emasculated so as to compensate the insured in contravention of the policy's clear language, especially in light of the insured's failure to reasonably and properly respond over such a longer period of time. Hence, as a matter of law, coverage of the loss at the Gridley station is excluded under the Policy.

B. The Interpretation of the Pollution Exclusion
is the Only Issue in this Appeal.

Gridley Associates have indicated that they intend to argue on appeal that Transamerica is estopped from raising the pollution exclusion. The estoppel argument has no merit on appeal and is not properly before the Court of Appeals. The sole issue to be decided is the interpretation of the pollution exclusion.

1. The Trial Court Ruled Upon the Sole Issue
of the Applicability of the Pollution
Exclusion.

Transamerica moved the trial court for Partial Summary Judgment on the sole ground that "each policy under which plaintiffs might seek coverage for the gasoline leak . . . contained a pollution exclusion limiting coverage arising from such leaks to those caused by a 'sudden and accidental' discharge." (Affidavit of Eric Olson, Exhibit A in the Addendum filed concurrently with this brief, page 3, paragraph 7; Motion for Partial Summary Judgment, Exhibit B in the Addendum filed concurrently with this brief, Motion pages 1-2.) Appropriately, the trial court based its ruling on that very issue:

The Court's decision turns on its interpretation of the contract document and the definition of the term "sudden" as used in the pollution exclusion of the insurance policy. . . . [U]nder the uncontroverted facts concerning the gasoline leak the Court finds that it was accidental and sudden within the meaning of the policy and does

not come under the pollution
exclusion as defendant contends.

(Affidavit of Eric Olson, Exhibit A in the Addendum filed
concurrently with this brief, page 4, paragraph 9; Minute
Order, Exhibit C in the Addendum filed concurrently with
this brief.)

As a result of this ruling and the structure of the
parties' Settlement Agreement and Release (Exhibit D in
the Addendum filed concurrently with this brief),
Transamerica stipulated to a Partial Summary Judgment:

That the gasoline leak . . . is
covered under . . . the subject
insurance policy issued by
Transamerica. . . .

(Affidavit of Eric Olson, Exhibit A in the Addendum filed
concurrently with this brief, pages 5-6, paragraph 12;
Record at 595-97, Partial Summary Judgment.)
Accordingly, the court entered judgment for Gridley
Associates on their causes of action for breach of the
insurance contract and declaratory relief, the First and
Sixth Claims for Relief, respectively.

While Gridley Associates argued that Transamerica is
estopped from denying coverage (Record at 366-451,
Plaintiffs' Memorandum in Opposition to Motion for
Partial Summary Judgment), the trial court declined to
reach that issue, presumably for the simple reason that
it had no need to do so. Only if the court had agreed
with Transamerica that the policies did not cover the
gasoline leak would it have needed to determine if a
question existed as to whether Transamerica was estopped

from asserting this non-coverage. Instead the court ruled that the policies did cover the leak; it therefore did not need to rule on the other issues raised by Gridley Associates. As such, the court never reached nor ruled upon the issue of estoppel.

2. Estoppel Is Not an Issue in this Appeal.

As agreed in the Settlement Agreement and Release, Transamerica appeals the Partial Summary Judgment that the policy covers the gasoline leak on the sole ground that the pollution exclusion within the policy bars such coverage. (Affidavit of Eric Olson, Exhibit A in the Addendum filed concurrently with this brief, page 5, paragraph 11; Settlement Agreement, Exhibit D in the Addendum filed concurrently with this brief, pages 7-8, paragraph 3.) Transamerica anticipates that Gridley Associates will argue, however, that Transamerica is estopped from denying coverage on this ground, calling such argument an alternate basis to affirm the trial court's ruling. This is an inaccurate characterization of the posture of this case. This appeal concerns whether, under the terms of the policy, the pollution exclusion applies to preclude coverage. This was the issue decided by the trial court. Questions of estoppel have absolutely no bearing on this matter of contract interpretation. Estoppel is a separate, quasi-contractual issue, relevant on remand only if this Court determines that the pollution exclusion does apply. Moreover, an argument that an insurer is estopped from

Tab B

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

-ooo-

GRIDLEY ASSOCIATES, LTD.,)
a Utah limited partnership,)
PETROLEUM MANAGEMENT, INC.,) Civil No. C-88-1317
a Utah corporation, and)
VERNON G. W. DICKMAN,) DEPOSITION OF BILLY GENE
HANKINS
Plaintiffs,)
vs.)
TRANSAMERICA INSURANCE)
COMPANY,)
Defendant.)

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BE IT REMEMBERED, that on Tuesday, December 6, 1988, commencing at the hour of 1:05 p.m., the deposition of Billy Gene Hankins, called as a witness on behalf of the plaintiffs, was taken pursuant to stipulation and pursuant to the Utah Rules of Civil Procedure, before Ronald F. Hubbard, notary public and certified shorthand reporter in and for the State of Utah (License No. 32), at 139 East South Temple, Suite 2001, Salt Lake City, Utah.

That there were present as counsel:

For plaintiffs: Stephen B. Mitchell
Attorney at Law
139 East South Temple #2001
Salt Lake City, Utah 84111
Telephone: 355-6677

and

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Holly S. Burgess
Attorney at Law
Smylie & Selman
Two Century Plaza, Suite 2050
2049 Century Park East
Los Angeles, CA 90067-2592
Telephone: (213) 553-3758

For defendant: Eric C. Olson
Attorney at Law
Van Cott, Bagley, Cornwall &
McCarthy
50 South Main, Suite 1600
Salt Lake City, Utah 84414
Telephone: 532-3333

That the witness was duly sworn before examination
to testify to the truth, the whole truth, and nothing but
the truth.

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I N D E X

Examination by Mr. Mitchell	3
Examination by Mr. Olson	13
Examination by Mr. Mitchell	58

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1 SALT LAKE CITY, UTAH, TUESDAY, DECEMBER 6, 1988, 1:05 P.M.

2 -o0o-

3 BILLY GENE HANKINS

4 called as a witness on behalf of the plaintiffs,
5 being first duly sworn by the notary, testified
6 as follows:

7 EXAMINATION BY MR. MITCHELL

8 Q Will you please state your full name and home
9 address.

10 A Billy Gene Hankins. 3549 Esplanade, Chico. California
11 95926.

12 Q Are you employed, sir?

13 A Yes.

14 Q Where are you employed?

15 A I have a part-time employment with Duratest Lighting
16 Corporation.

17 Q I also understand you're under some kind of a disability?

18 A Yes. I'm partially disabled from a previous occupation.

19 Q You used to work for Dockindorf Equipment; is that
20 correct?

21 A Yes, sir.

22 Q What's the full name of that company?

23 A Dockindorf Equipment Company.

24 Q During what period of time did you work for Dockindorf?

25 A It was August of 1981 to June of '86.

1 Q What business was Dockindorf in?

2 A He's a service station equipment and maintenance.

3 Q What were your duties with Dockindorf during the time
4 you were employed there?

5 A Maintenance of equipments that have to do with the
6 operation of gasoline service stations and overhead lube
7 equipment. General maintenance of air compressors and other
8 equipment that would be in a service station.

9 Q What type of work did you do prior to joining Dockindorf
10 in 1981?

11 A I worked for part of the year under the name Norcal
12 Equipment Company as self-employed doing service station
13 maintenance, removing of service stations, and fuel tanks,
14 dispensers, general installation as well as demolition.
15 Previous to that, from 1977 to a time in 1981, I worked with
16 Petroleum Equipment Company, who was at that time based in
17 Chico. And I was doing the same basic work of installing
18 fueling systems, maintaining service stations and their
19 equipment.

20 Q All right.

21 A And previous to that I had my own business of heating
22 and air conditioning under a state license of California,
23 which included a substantial amount of controls electrical.

24 Q Did you work with gas lines in your heating and air
25 conditioning business? Plumbing type work?

1 A Well, I have worked with plumbing type work since
2 approximately 1953, '54, in general construction of homes
3 and buildings, including all types of piping work in the
4 homes, as well as natural gas lines, and then the petroleum
5 lines when I went to work for Petroleum Equipment Company.

6 Q Now, I asked you to come up from your home in California
7 to appear at this deposition here today; is that correct?

8 A Yes.

9 Q And I paid your airline ticket?

10 A Yes.

11 Q And so we wouldn't all have to go down to California
12 to your residence?

13 A Yes.

14 Q I'm also in addition paying you an hourly rate; is that
15 correct?

16 A Yes.

17 Q And that's \$30 an hour?

18 A Yes.

19 Q For your time?

20 A Yes.

21 Q You understand that my agreement to pay you your time
22 has nothing to do with how you testify today?

23 A No. I will not allow it to.

24 Q We only want you to tell the truth. I'm going to ask
25 you a series of questions about this Gridley station

1 occurrence. If you'll just indicate to me if you don't
2 understand the question, I'll try to rephrase it.

3 A Okay.

4 Q You made the repairs to a gas line at the Gridley
5 station in approximately February of 1986, on or about
6 February 12, 1986; is that right?

7 A Yes. I did work on a service station in Gridley.

8 Q All right. And that was the Gridley Gas And Save?

9 A Yes.

10 Q Tell me how you became involved in making those
11 repairs.

12 A I was given a work order from Mr. Dockindorf to test
13 the lines in that station, because they indicated that they
14 thought they were losing fuel. So I was given a work order
15 to test the petroleum lines in the station.

16 Q So you then went out to the station?

17 Were there any employees with you, or were you alone?

18 A Initially I had one other man with me.

19 Q Who was that?

20 A There were two different men on the job. I believe
21 the first man that was on the job was my son Leon, who was
22 working temporarily for Dockindorf Equipment Company.

23 Q Can you tell me what you did after arriving at the
24 station?

25 A Well, the first thing we do is talk with the station

1 maintenance personnel, who at that time was Cal Boley, and
2 to determine what they thought their problem was, and
3 indicated he thought he had an underground leak.

4 Then we proceeded to test the lines for indication of
5 leak. This would mean blocking off the fuel line both at
6 the submersible pump and capping off the dispenser,
7 pressurizing the line in between. And we were unable to
8 maintain a pressure on the line.

9 Q Which line was that?

10 A It was a line leading to a dispenser on the outside
11 island, and I believe it was the north dispenser on the
12 outside island. I don't remember which product it was.

13 Q What did you then do?

14 A Well, our next procedure is to find if we have a leak.
15 We have some indication that there was a leak in the area
16 of the dispenser. So we dug out an area alongside of the
17 island and we found no leak in that area, but indication
18 that fuel was running in--alongside the lines from someplace
19 other than the area we were at.

20 And at that point we determined we would remove as much
21 fuel from the lines as we could to get a free air capacity
22 in the lines, which is standard procedure, and that would
23 give us an ability to pressurize the lines.

24 Since the fuel will not be forced up through the
25 concrete or the pavement, but air will raise through those

1 areas, we put a sufficient amount of air to allow it to leak
2 out of wherever the leak would be, and then by watering down
3 the area we will find the bubbles of where it comes up. And
4 in this procedure we determined we had a leak some distance
5 away from where we had initially started at the dispenser.

6 Q How far away from the dispenser was it?

7 A Approximately 40 foot in line of sight. It would have
8 been closer to 50 foot as the lines were run.

9 Q What did you then do?

10 A Well, it's a process then of digging down in that area
11 to expose whatever lines there are in that area, as we had
12 exposed an amount of line at that time, but then we had to
13 dig down and expose the line to find where the leak was.

14 Q Did you find where the leak was?

15 A Yes, we did.

16 Q How far underground was it?

17 A Let's see. Approximately 18 inches.

18 Q Did you determine what caused the leak?

19 MR. OLSON: Objection. No foundation.

20 A I wasn't sent out to determine what caused the leak.
21 I was sent out to repair a leak if it existed.

22 Q (By Mr. Mitchell) What I'm asking you is, did you
23 determine the source of the leak?

24 A We determined the source of the leak, yes.

25 Q What was that?

1 A We had a broken fitting--or, a broken pipe alongside
2 of a fitting.

3 Q Can you describe the break for me?

4 A The break was in the pipe right next to the fitting,
5 which is the weakest part of any pipeline.

6 Q Was it a clean break?

7 A Yes. There was a clean break.

8 Q In your opinion was that break caused by--in your
9 opinion, what was that break caused by?

10 MR. OLSON: Objection. No foundation.

11 A I--

12 Q (By Mr. Mitchell) Let me rephrase that. In your
13 opinion was that break caused by something sudden?

14 MR. OLSON: Objection. No foundation.

15 Q (By Mr. Mitchell) Go ahead.

16 A A break of this sort would have had to have been caused
17 by an adjustment of the area in which it is in. Something
18 would have had to have moved that area.

19 Q Movement of the earth?

20 MR. OLSON: Objection. Object to the leading
21 nature of the question.

22 Q (By Mr. Mitchell) You're talking about movement of
23 the earth when you say "adjustment of the earth"?

24 MR. OLSON: Objection. Leading.

25 Q (By Mr. Mitchell) Just for your information, he's

1 entitled to make objections for the record, and they will
2 be ruled on at an appropriate time; but that has nothing
3 to do with you. So when I ask a question, he's put his
4 objection on the record, and then you can go ahead and
5 answer it.

6 A Okay. I understand. In that case--when we would have
7 a break of this sort, it would most logically be caused by
8 a movement of the ground such as would be caused by usually
9 heavy equipment. If heavy equipment has rolled across an
10 area, we could--we would have the possibility of a movement
11 enough of the ground to have caused this sort of a break.

12 Q Was there any evidence that the pipe had been tampered
13 with? Any intentional damage to the pipe?

14 A No work had been done in that area before we came. Any
15 disturbance of the ground was done at the time that we came
16 there. No previous work had been done in any short period
17 of time.

18 Q This leak was actually in the gas line; is that correct?

19 A Yes.

20 Q Would the gas leak constantly or only when the pump
21 was activated?

22 MR. OLSON: Objection. No foundation.

23 A A leak of this sort would occur only if there was
24 pressure on the line.

25 Q (By Mr. Mitchell) How would that pressure be caused?

1 A Because a dispenser was turned off.

2 Q In other words, you lift the lever of the dispenser,
3 and gas would flow through, and then it would leak through
4 the break?

5 A Yes, because this is a submersible pump system.

6 Q Then conversely, when you turned the pump off, what
7 would happen?

8 A Well, the pressure relieves from the system down to
9 the point of whatever pressure is usually static on the line.

10 Q So when the pump was off, the leak would stop?

11 A It would stop if there--if there were a leak present,
12 it would stop only when there were no pressures on the line.

13 Q I'm talking about this particular leak.

14 A Yes. They would go down to zero pressure on the line.

15 Q What did you do to repair the leak?

16 A Remove the broken fittings, replace the line from that
17 point to the dispenser, and at that point put in new fittings
18 and pipeline to the point that we could re-establish the
19 system and safely function without a leak.

20 Q Are you aware of the fact that there was an earthquake
21 in the Gridley area sometime prior to this gas leak?

22 MR. OLSON: Objection. No foundation.

23 A Yes, there was an earthquake in that area.

24 Q (By Mr. Mitchell) Did you experience that earthquake?

25 A I didn't personally experience it, but it was highly

1 publicized by the news producers.

2 MR. OLSON: Motion to strike the answers to the
3 last two questions on the grounds that there was no
4 foundation. This witness is without personal knowledge.

5 Q (By Mr. Mitchell) Where did you read about the
6 earthquake?

7 MR. OLSON: Objection. Hearsay.

8 A It was in the newspapers. It was on the news, for some
9 period of time.

10 Q (By Mr. Mitchell) Where did you reside at the time?

11 A In Chico, where I reside now.

12 Q All right. Did the newspapers give accounts of damage
13 that had been caused by the earthquake?

14 MR. OLSON: Objection. Hearsay.

15 A Yes. They gave accounts that there was damage.

16 Q (By Mr. Mitchell) Would the break in the pipe which
17 you saw at Gridley station be consistent with a break caused
18 by an earthquake?

19 MR. OLSON: Objection. No foundation.

20 A It could have caused it.

21 Q (By Mr. Mitchell) At least, it would not be
22 inconsistent with having been caused by an earthquake; is
23 that true?

24 MR. OLSON: Same objection.

25 A It would be feasible that it could have been done.

1 Q (By Mr. Mitchell) Was there any evidence that the leak
2 had been caused simply by the pipe deteriorating and
3 eventually rotting through?

4 A There was deterioration, but it was not a complete
5 deterioration through the line.

6 Q And the break that you've described was a clean break?

7 A Yes.

8 Q Did you keep any of the parts that were on the old line?

9 A As a rule we remove all materials from the station area
10 and return them to the yard. It's a safety factor. What
11 happens to them thereafter we're not concerned with. If
12 it laid around the yard very long, Mr. Dockendorf would have
13 salvaged it with whatever used pipe we had, which was a
14 common practice.

15 Q Did anyone request that you keep the parts for any
16 purpose?

17 A No.

18 MR. MITCHELL: I don't have anything else.

19 EXAMINATION BY MR. OLSON

20 Q Mr. Hankins, my name is Eric Olson. I represent
21 Transamerica Insurance Company, and we're the defendant in
22 this case. I would like to ask you a few questions,
23 following up on some things that Mr. Mitchell has asked you.

24 First of all, when were you first made aware of the
25 fact that this lawsuit existed?

1 A I don't recall, but it's been at least a year.

2 Q Who told you about it?

3 A I received a call from Cal Boley's superior, and I
4 don't--I'm trying to think of the man's name.

5 MR. MITCHELL: Vern Dickman?

6 THE WITNESS: Yes. Vern Dickman.

7 Q (By Mr. Olson) This was about a year ago?

8 A It's been at least a year ago.

9 Q What did Mr. Dickman say to you in that telephone
10 call?

11 A He wanted to know if I remembered the job and if I
12 remembered any specifics about the job.

13 Q At that time did you remember the job?

14 A I remembered the job. It was--it was a particularly
15 difficult job. And so I remembered what we went through
16 to--to correct the problem.

17 Q What was it about the job that made it particularly
18 difficult?

19 A Part of the fact that the lines that we were working
20 on were buried underneath other lines. You have not that
21 much area to work with, and it becomes difficult to repair
22 an area without tearing up too large an area and yet keep
23 the station in business. And the primary concern of the
24 customer is to keep their station in business. And so it
25 becomes a problem to repair the extent of the damage and

1 put the station back--or, keep the station active while you
2 are working, because you always have the hazard of traffic
3 in and out. Those things are present in your mind when you
4 nearly get run over a time or two at a station.

5 Q Other than the fact that these lines were below other
6 lines that were necessary to operate the station, was there
7 any other aspect of the job that made it unusual or
8 particularly difficult?

9 A Part of it is the fact that the lines were in that
10 station. Some of the original lines were buried in native
11 soil, which is a clay material, and it's--it doesn't dig
12 out easily. It sticks to your shovel, sticks to your feet
13 and your shoes. It's difficult to work with.

14 Q Did that present some problems in this particular
15 instance in digging out to the lines?

16 A It presented time.

17 Q Now, you talk about the original lines. Were there
18 some lines you understood to have been placed at some point
19 in time earlier than other lines?

20 A Yes, because there had been rebuilding work done in
21 the stations, other dispensers had been added. There were
22 newer lines in the station.

23 Q Were the lines at which this break had occurred, were
24 those among what you considered the original lines, or the
25 subsequent lines that were put in in the rebuilding process?

1 A I don't have any means by which to know at what time
2 the line was put in, other than there was probably 25 percent
3 corrosion on the lines, sufficient that we could not thread
4 the lines. We needed to replace them.

5 Q When you say the lines, you're talking about the lines
6 you had to replace?

7 A Pipelines, yes.

8 Q Now, was the line you were working on where this break
9 occurred, were these among the oldest lines that you observed
10 on the property?

11 A No. There were older lines on the property.

12 Q But these lines, in any event, were buried underneath
13 some newer lines; is that correct?

14 A Yes.

15 Q Now, in your conversation with Mr. Dickman, did he ask
16 you any other questions other than, "Did you remember the
17 particular job?"

18 A He wanted to know if I had remembered the work and
19 process that we went through to get to it. I don't remember
20 him giving me any reason for his call, until later on in
21 our conversation. He--he just wanted to know about the work,
22 and I was--I was trying to remember it, because, depending
23 on the work that has previously been done, at times if we
24 needed information we would go back and find people who had
25 done work on stations before and ask them what they had done.

1 It greatly simplifies the work you're doing in the future.

2 Q And you remembered this particular job; is that correct?

3 A Yes.

4 Q Did you describe to Mr. Dickman essentially what you've

5 told us today in answer to Mr. Mitchell's questions?

6 A Yes.

7 Q Had you ever spoken to Mr. Dickman before?

8 A I knew of him because of his position in the maintenance

9 of the stations and because I had been sent to different

10 stations. I was not personally acquainted with him.

11 Q I take it that about the time or around the time that

12 the work was done on this Gridley station you had done other

13 work on other stations of Mr. Dickman's; is that correct?

14 A Not that I was aware of, because I was not really

15 acquainted with Mr. Dickman. He was in a higher position

16 than we usually deal with. The people we usually deal with

17 are in the position of Cal Boley or their--their the local

18 maintenance individual. We seldom have contact with those

19 of higher level.

20 Q So was this occasion about a year ago when you spoke

21 with Mr. Dickman the first time that you had actually

22 spoken with Mr. Dickman?

23 A To my knowledge it is.

24 Q Was it also the first time after the occasion on which

25 you made the repairs to the pipe that you spoke with anyone

1 about that repair?

2 A It was only just briefly before that. Cal called me
3 and asked me to call Mr. Dickman. Left a number for me to
4 call him. That would be the only fact in it. He just said
5 it to Mr. Dickman he wanted to talk to me at the station.

6 Q You called Mr. Dickman rather than--

7 A I called him back, because he had tried calling me,
8 and we had not made contact.

9 Q And Cal Boley had called you just before that occasion
10 to ask you to call Mr. Dickman; is that correct?

11 A Yes.

12 Q And prior to Mr. Boley calling you to ask you to call
13 Mr. Dickman, had you spoken with anyone else about this break
14 in the pipe there at that Gridley station?

15 A I don't recall any knowledge of it, any concern on it.

16 Q All right.

17 A By the time I was no longer working for Mr. Dockindorf.

18 Q There was mention at the outset of your deposition of
19 a disability. What's the nature of that disability?

20 A I have a sprained disk in the fourth and fifth lumbar
21 from running jackhammer on service station repair.

22 Q When did you suffer that injury?

23 A I believe it was April 21 of '86.

24 Q Did that result in your eventually leaving
25 Mr. Dockindorf's employ?

1 A Yes. In a month I was off of work, and I have not
2 returned to work for him since.

3 Q Are you presently employed in any way?

4 A Well, I--I--I do have a--I sell for Duratest Lighting
5 Corporation, which is not a full-time, but they would like
6 to have it be a full-time, but it's what time I can work.

7 Q And that's a sales position?

8 A Sales.

9 Q I take it from the background that you described in
10 response to Mr. Mitchell's questioning that you spent
11 approximately nine years give or take a few months in the
12 business of servicing service station type equipment; is
13 that correct?

14 A Yes.

15 Q In the course of that employment did you have occasion
16 to make the type of repair that we're talking about here
17 in this particular litigation on a fairly regular basis?

18 A Yes.

19 Q Was there other than what you've already described about
20 the particular location of the pipes in relation to other
21 pipes and the type of soil, was there anything else about
22 this particular repair that is notable in your mind or
23 distinct from your normal experience with these types of
24 repairs?

25 A Normally when we have a leak, it would be a corrosion

1 that had ate through the pipe; but on this occasion we had
2 not only corrosion, but we had a clean break, and this is
3 not a normal circumstance.

4 The ground in the Gridley area across the river into
5 the west side into Willows and those areas is what we in
6 the layman's term call hot earth, because it is more
7 susceptible to grounding, and it causes more rusting in the
8 pipes, which is actually an electrolysis than usual.

9 We have replaced multiples of lines that have literally
10 rotted through, but these are usually always because the
11 rust has become so great that there is no longer any tensile
12 strength for the pipe to hold the fuel. In this case we
13 had a clean break, along with the corrosion.

14 Q Now, you indicated that you were joined on at least
15 one--strike that. Let's go back. How many occasions did
16 you actually go to the property either to evaluate where
17 the leak was at or to make the repairs?

18 A I don't remember the length of time, but we went to
19 the property, determined we had a more extensive problem
20 than we could repair in that day. And from that point it
21 takes authorization to do a greater amount of work.

22 We went back. I'm not certain if it was the next day.
23 I believe it was another day or two later. We went back,
24 prepared to tear up the area and do whatever work that was
25 needed to do to put that line back in service.

1 Q How many days total were occupied, then, in doing this
2 repair? I'm not talking about--

3 A I really don't remember, but by the time we dug it out,
4 repaired the lines, and finished back both the concrete and
5 the blacktop, it could have been ask much as three days.

6 Q So this would be three days total; is that correct?

7 A Yes, it's a little far back for me to remember, and
8 I didn't have any other information that recorded that.

9 Q Well, was your time billed out on an hourly basis to
10 the customer?

11 A I don't--I don't know how Mr. Dockendorf billed that
12 out, but in a case like this it would usually be time and
13 material.

14 Q Time and material?

15 A Yes.

16 Q Did you have any involvement then in the billing of
17 this?

18 A No. All I did was write out a material and labor record,
19 describe what I did, describe the materials that I used,
20 and write down the time of myself and men that were on the
21 job. Off of that material and labor record Mr. Dockendorf
22 would make his bill to the company.

23 Q And Mr. Dockendorf would have all those documents at
24 this time, is that correct, if anybody has them?

25 A Mr. Dockendorf had a habit of throwing away those

1 documents once he had made a bill. That's just his way of
2 doing business. Whatever is on the written bill that was
3 given to the company would be most possibly the only record
4 that would be available presently.

5 Q You mean whatever Mr. Dickman's company received would
6 be the only available record in your experience?

7 A Mr. Dockindorf had a habit of throwing away the labor
8 and material records.

9 Q It's your belief that in this instance that's probably
10 what he did?

11 A Yes. It would be the greatest possibility.

12 Q In the course of your visits to the property to make
13 the repair, were you the only person that made that visit?
14 I think you indicated that at least on one occasion you were
15 accompanied by your son?

16 A I believe my son Leon was with me on the job, and also
17 a Sam Sumner I believe was on that job, too. He's another
18 one of the maintenance men from Mr. Dockindorf.

19 Q Do you know if Mr. Sumner still works for Mr. Dockindorf?

20 A He does.

21 Q Where does he reside? Does he live in Chico there?

22 A No. He lives in the McGalia area. Paradise Pines.

23 Q Is your son still with Dockindorf?

24 A No. No. He's working with Griffin Equipment. Barry
25 Griffin, that's doing the same kind of work.

1 Q In any event, he still lives in the area, is that
2 correct?

3 A Yes.

4 Q Where does he live?

5 A He lives I think it's 1647, I believe it is, East
6 Avenue.

7 Q East Avenue?

8 (Witness nods head.)

9 Q In Chico?

10 A Yes.

11 Q Now, did both your son Leon and Mr. Sumner observe this
12 break that you have described for us?

13 A Leon may have. I don't believe that Sam did.

14 Q Why is it you draw that distinction in your mind?

15 A Sam came on the job a little later to help us finish
16 up on the main construction after we found the--anything
17 that Sam would have seen would have probably been out of
18 the ground and a removed piece of pipe. If he had any
19 recollection, that would have been what he saw.

20 Q Have you discussed this particular repair with your
21 son at all to see what his recollection is?

22 A No. He had his head in the air at that time. All he
23 wanted was payday and Friday was all he was interested in.

24 Q Let's go back to something before I forget. After
25 Mr. Dickman called, do you know when was the next time you

1 heard from anybody about this case?

2 A We had another conversation. He called me again, wanted
3 to know if I had been contacted by anybody in reference to
4 it.

5 Q Was this recently, or was this--

6 A It was after--no. It was--no, that would have been,
7 oh, six or eight months ago. The time element--his first
8 contact with me may have been longer than that. I really
9 don't remember.

10 Q Do you recall in that first contact he mentioned
11 ultimately there was litigation about this question?

12 A There was a comment that there was a question as to
13 what the losses were and who was going to pay for them.

14 Q Did he say there was actually a lawsuit filed, or did
15 he just say--

16 A I don't remember whether he did or not.

17 Q Do you recall anything else that Mr. Dickman said to
18 you in that first conversation other than what you've already
19 indicated to us?

20 A No. I--I don't. I think I'm probably getting mixed
21 up in my mind conversations with him and conversations with
22 Mr. Mitchell.

23 Q You did at some point in time speak with Mr. Mitchell
24 as well; is that correct?

25 (Witness nods head.)

1 Q Did you speak with anyone else other than Mr. Mitchell
2 from Mr. Mitchell's office?

3 A No. Not that I remember. He is the only one I've
4 talked to.

5 Q How many times have you spoken with Mr. Mitchell about
6 this?

7 A I believe it was twice.

8 Q What was the first time that you spoke to Mr. Mitchell?

9 A Well, I don't remember the time element on that, sir;
10 but it was at the very least early spring of this year.

11 Q It was after the last time you had spoken with
12 Mr. Dickman; is that correct?

13 A Yes.

14 Q Do you recall what you and Mr. Mitchell talked about
15 during the course of that conversation?

16 A Basically the conversation we have had here is
17 questions he asked me, wanted to know about it.

18 Q Did he give you any information in the course of that
19 conversation other than just ask you questions?

20 A No, I don't recall any information on that, other than
21 that there was litigation involved. He did tell me that
22 there was litigation involved.

23 Q Then Mr. Mitchell spoke with you a second time after
24 that?

25 A I reference to arrangements for this meeting.

1 Q At that time did you get into a conversation about the
2 facts of the break, or was it just simply setting up the
3 time for the deposition that we're here at today?

4 A No, we usually referred back to the previous
5 conversation that there was a necessity for a deposition.

6 Q Did Mr. Mitchell have an opportunity to meet with you
7 today prior to this deposition, as well?

8 A Yes.

9 Q Did you at that time again discuss the questions that
10 he had about the break at the Gridley station?

11 A We basically discussed the same thing we discussed here.
12 He wanted to know why I felt that way, what my background
13 was, my work background, the period of time I had worked,
14 the length of my background, what I was doing presently.

15 Q So you basically went over essentially what's been
16 covered already in this deposition; is that correct?

17 A Everything we covered has pretty well been brought out
18 here.

19 Q Did Mr. Mitchell at any time show you any documents
20 or send you any documents?

21 A I don't believe so, other than a plane ticket.

22 Q I see.

23 A He just sent me that. A letter saying that he wanted
24 me to come. I don't remember anything else.

25 Q Do you know if Mr. Mitchell has spoken with your son

1 Leon?

2 A I don't believe he has.

3 Q Now, going back to the actual circumstances that
4 occurred back--I believe the testimony was February of 1986
5 --do you recall specifically in your mind that it was
6 February of 1986 that this occurred?

7 A I don't--I don't recall the definite date of the work
8 at all.

9 Q Do you even recall the year that it occurred?

10 A I wouldn't commit myself to that, sir. At the period
11 of time, I was not keeping a log book, which I have at times,
12 but I was not keeping a log book at that time. So it would
13 be difficult for me to put a date on that as to when we
14 worked. Any information as far as the time of the work would
15 have had to have come out of Mr. Dockindorf's records. I
16 really don't have a definite date on it.

17 Q Are there any records that you're aware of today that
18 Mr. Dockindorf would have that would reflect the time of
19 the work?

20 A Just the date on his bill.

21 Q Does he maintain that bill as a part of his records
22 in your experience?

23 A Oh, yes. He keeps records on those.

24 Q So to the extent that in the course of your testimony
25 elicited by Mr. Mitchell, there was a mention of a date,

1 you were simply adopting whatever counsel's suggestion was
2 as to the date of that repair; is that correct?

3 A Yes. I never researched anything on that. If any
4 comment was made as far as the date was concerned, it had
5 to come out of somebody else's records than mine, because
6 I didn't--in fact, when--and I don't remember the date that
7 he asked, but I did go back over my log books to see if I
8 had recorded anything. And from that six months period of
9 time, at that time I had not kept a log book.

10 Q You say six months period of time. And that period
11 of time we were referring to?

12 A Basically in that range of time. I didn't have any
13 records in my books. There were times when I faithfully
14 kept a log book. There were times when I flaked out.

15 Q Did you know Cal Boley before you did this particular
16 repair?

17 A No. I had heard the name, but I didn't know him.

18 Q Now, when I speak of this repair, so we understand each
19 other, I'm referring to the repair of the Gridley station
20 that we've been talking about here.

21 (Witness nods head.)

22 Q I don't want to say that whole sentence every time.
23 All right? Had you done work at Mr. Boley's request on any
24 prior occasion before you did this particular repair?

25 A I wouldn't know that, sir, because--unless Mr. Boley

1 had been on a job, which he was not on any job. I don't
2 know what stations he has control over. Mr. Dockindorf would
3 have given me a work order to do work on a certain station.
4 Whether it belonged to that company or not I would not have
5 knowledge of.

6 Q So to the best of your knowledge as you sit here today,
7 you don't know whether prior to this repair you've done any
8 repairs for any other stations owned by Mr. Dickman or run
9 by Mr. Boley; is that correct?

10 A I wouldn't have any knowledge as to who had control
11 of the stations.

12 Q Is Mr. Boley still operating that station?

13 A Mr. Boley is still in the area. The only reason I know
14 that is because I bought some musical equipment from him,
15 and other than that I don't know whether he's tied up with
16 the station or not. He had been a professional musician.
17 I just bought some of his equipment.

18 Q Now, who actually gave you the assignment to go out
19 to that station and look at the problem you've testified
20 about?

21 A Craig Dockindorf.

22 Q Is he the Dock ndorf from Dockindorf Equipment?

23 A Yes.

24 Q Now, what did he tell you you were supposed to go do?
25 What was his comment to you about what you were supposed

1 to go do?

2 A Craig just says: "Just go find out what the problem
3 is. Let me know what it is." He has a radio in his truck.
4 If you've got a problem, you call him. He tells you what
5 to do.

6 Q Was Dockindorf Equipment limited to simply doing repairs,
7 or did they also do installations, sell gas, service station
8 equipment, as well?

9 A He sells all forms of equipment that had to do with
10 the petroleum industry. All forms, whether it's a fuel truck,
11 aviation, whatever. He has equipment and repair parts for
12 all of them. A substantial amount of his work was new
13 dispensers, or used dispensers and pumps, and the control
14 systems that went with them. He got as little underground
15 work as he could get away with.

16 Q But your responsibilities would be both in the form
17 of installing--

18 A Installation.

19 Q --as well as doing the type of maintenance work that
20 we're talking about here today; is that correct?

21 A Yes.

22 Q So after he had directed you to go to the Gridley
23 station, you went to the station?

24 (Witness nods head.)

25 Q What did you do? You've indicated generally what you

1 did. But if you could specifically tell me the first thing
2 you did in order to pinpoint wherever this particular leak
3 was.

4 A Well, the first step was to have a conversation with
5 Mr. Boley as to what he felt his problem was, because he
6 is the local maintenance man of that area. From that point,
7 then we would proceed to close down the system that we were
8 working on, which entailed nonoperation signs on the
9 dispenser and things of that sort, which would keep anyone
10 from turning on the system. Shut down that system, so that
11 we would have a clean opportunity to pressure-test the lines.

12 Q How many service islands were there at this particular
13 location?

14 A There are two islands.

15 Q Two islands. How many pumps on each one?

16 A I believe there's two pumps on each. I'm not certain
17 of that. Two dispensers, I should say. Not pumps. They're
18 dispensers.

19 Q So a total of four dispensers in the entire system?

20 A I don't remember there being any more than that.

21 Q Now, aside from the dispensers, is there like a building
22 of some sort where they operate or they receive the money
23 and so forth?

24 A There is a mobile home, which is established and could
25 be used as a living quarters there on the premises, which

1 has an office in it where you pay for the gas.

2 Q At the time you visited the location, did they do
3 anything at the location other than--to your observation
4 was there any business conducted there other than just
5 selling gasoline?

6 A Not other than the usual coke machine or things of that
7 sort would be in the area.

8 Q There wasn't a little market or anything like that?

9 A No.

10 Q There was no garage or--

11 A Cigarettes or coke, or something of that sort they had,
12 but no--not beyond that.

13 Q There was no maintenance bay there, I take it?

14 A No, no.

15 Q How large are the premises to the best of your
16 observation?

17 A Oh, close to 150, 175 foot of road frontage and 90 to
18 100 feet deep is about the area.

19 Q Is the entire property being used in one form or another
20 for the service station operation?

21 A The station backs up into an orchard area, and how much
22 of that area belongs to the service station area I have no
23 idea.

24 Q But the 170 feet by 90 feet you've described is being
25 used in its entirety for the service station operation in

1 one form or another?

2 A It divides off into somewhat of an angle from the south
3 side toward the north side, where the north side has a little
4 less use of the area than the south side.

5 Q So the road just runs in a north-south direction; is
6 that correct?

7 A Yes. It is Highway 99E.

8 Q Are the two fuel islands also oriented in a north-south
9 direction?

10 A Yes.

11 Q Does this mobile home office you've described, is that
12 on the rear side of the property?

13 A Yes.

14 Q It sort of runs parallel with the fuel islands as well;
15 is that correct?

16 A Yes.

17 Q Now, of the two fuel islands, which one is the island
18 that has the dispenser that was experiencing the pressure
19 difficulties?

20 A Well, both islands had the dispenser on it, but our
21 initial work began on the outside island, because that's
22 where the evidence was. But the line divided and went to
23 both islands, because it is a submersible pump system.

24 Q Was this line carrying leaded or unleaded fuel, do you
25 know?

1 A I don't remember.

2 Q Now, you've basically described a rectangular piece
3 of property. Is that correct?

4 A Yes. Pretty close to it. I think it's a little bit
5 further north and south than it is east and west.

6 Q Now, is it correct, my understanding, that the fuel
7 islands are essentially in the middle of the property?

8 A Essentially, yes.

9 Q From the two fuel islands, how does one proceed to get
10 to the tank where the fuel was stored that was leaking?

11 A The tanks lay on the south side of the lot, centered
12 nearly on the inside, on the south side of the inside island,
13 but close to the property line on the south side.

14 Q Was there more than one tank?

15 A Yes, there is. But I don't remember how many. Two
16 or three. I don't remember.

17 Q So when you arrived at the property and you spoke to
18 Mr. Boley, what specifically did he tell you about the
19 problem that he was experiencing?

20 A He was experiencing a loss of fuel. Their totalizers
21 on the dispensers and their fuel going into the tank was
22 not corresponding.

23 Q Discrepancy there?

24 A There was a discrepancy between the product being sold
25 and the product coming in.

1 Q Did he tell you precisely what sort of discrepancy they
2 were experiencing?

3 A If he did, I don't recall.

4 Q Do you recall in general his indicating that was a large
5 discrepancy or a small discrepancy?

6 A It was a sizable discrepancy, yes.

7 Q Did he indicate for what period of time they had been
8 experiencing that discrepancy?

9 A He made a comment that he thought it had--it had been
10 some--there had been some time. I don't remember any time
11 element being given as to that.

12 Q Just the general comment that it had been some time?

13 A A comment that they were--it had--there had been enough
14 discrepancy that they had taken definite consideration that
15 there was a time element in which they would check to see
16 if they lost any, which is standard procedure in service
17 stations. A leak you will check a certain period of time
18 with the totalizers against the fuel to make certain that
19 your bookwork is proper, and then the bookwork is the first
20 thing we look at.

21 Q I see. You as the maintenance person?

22 A Yes. The first thing we request is: "How does your
23 totalizers match with your product? Is all of your product
24 being sold? Are you selling less product than what you're
25 bringing in? How does your totalizer match with the product

1 you're bringing in?"

2 Q Did he actually show you the bookwork, or simply
3 characterize it for you?

4 A No. We just admonished him to go back and check his
5 bookwork.

6 Q Did he indicate he had such bookwork to check?

7 A Oh, yes.

8 Q But you never actually consulted that yourself or
9 discussed it with him other than to tell him to check it?

10 A No.

11 Q After you had checked it--or, after you had discussed
12 that with him--and you had them, I guess, shut down the fuel
13 system; is that correct?

14 (Witness nods head.)

15 MR. MITCHELL: You have to answer.

16 Q (By Mr. Olson) You have to say yes or no.

17 A Yes. We shut down the system.

18 Q Describe to me again what it was you did once the system
19 was shut down in order to make the first step towards
20 identifying the nature, if any, of the problem.

21 A Well, this type of system, our first thing would be
22 to shut off the safety valves on the dispenser and close
23 off the check valve at the pump and pressurize the tank--or,
24 the lines from the dispenser to the tank. And in doing so
25 we did not have a stable pressure.

1 Q You have drawn a distinction between the dispenser and
2 the pump. I take it the dispenser is the thing that I pull
3 the nozzle out of and stick in my car. Is that correct?

4 A The distinction between a dispenser and a pump is that
5 a dispenser has no pumping unit within it. A pump would
6 draw fuel from a tank. A dispenser would receive it
7 pressurized from the tank.

8 Q So in this type of system where is the pump located?

9 A Submerged in the tank.

10 Q In the tank. So it's some 40 or 50 feet away from the
11 dispenser?

12 A Close to 75 feet, at least, on this system.

13 Q When you took the readings of this uneven pressure,
14 that's an indication there is some sort of a fault in the
15 system; is that correct?

16 A If the line will not hold the pressure, then you have
17 to find out why.

18 Q Where do you first look then in order to try to make
19 a determination of the reason why that would not hold
20 pressure?

21 A Well, this type of system, there is an access plug on
22 the safety valve under the dispenser, and that is on the
23 pipe side of the valve, closing the valve. And closing the
24 valve at the submersible pump, you have the possibility of
25 gaining pressure, positive pressure on the line that should

1 be able to maintain easily 50 pounds.

2 Q So you basically close off at the plug and close off
3 at the pump, and then you induce some pressure into the line?

4 A Induce air into the line. Pressurize it. You have
5 a close off valve with the pressure at the gauge, and the
6 pressure gauge should maintain the pressure that you put
7 into it.

8 Q In this case that's what you did? You closed off those
9 two valves?

10 A Yes.

11 Q Put the pressure in, and I take it the line would not
12 maintain the pressure?

13 A The line would not maintain pressure, no.

14 Q So what then did you do next to identify why the line
15 was not maintaining pressure?

16 A At that point we looked for fuel losses, and the
17 indication was that there was fuel under the dispenser. So
18 we dug out on the side of the dispenser in the island drive
19 slab area to find the lines and be able to dig into those
20 lines to determine if we had a leak at that point.

21 Q And what you found is there was no leak at that point?

22 A We found no leaks at that point. And when you find
23 no leak at that point, you progress further back the line.
24 As we progressed further back of the line, we began to find
25 evidence of fuel flowing from further down the line into

1 that area.

2 Q What was the evidence? Was it just the fuel itself,
3 or was it a higher concentration--

4 A Fuel flowing out of the pipeline area into the ditch
5 we were working in.

6 Q Was it large amounts of fuel?

7 A Yes.

8 Q So are we talking about as you trenched, you would
9 actually have gasoline pooling in some form in your trench;
10 is that right?

11 A Yes.

12 Q How deep was the trench that you were digging?

13 A Probably 12 inches at the island area.

14 Q That's about how deep the pipe was buried; is that
15 correct?

16 A Yes, usually at that area where you cover it. If we
17 can't cover it with concrete, we like it to be deeper.

18 Q Now, in this particular service station was the paving
19 a concrete paving, or was it an oil paving, or what?

20 A There was concrete on the drive areas between the
21 dispensers and the islands. There is asphalt from that area
22 over to the tanks, which are, once again, covered with
23 concrete.

24 Q You indicated that a 12-inch depth for the pipes in
25 the area covered by concrete is an acceptable depth?

1 A By code you can go down to six inches.

2 Q How about on those areas where it's covered by asphalt,
3 is there a greater depth of burying the pipe?

4 A Not on this size of pipe, but it is a general practice
5 that we do go down with it. If we cannot get it lower, then
6 we concrete over it before we put asphalt in it.

7 Q Now, you say "this size of pipe." Will you give me
8 the size of pipe you're talking about?

9 A Inch and a half galvanized.

10 Q And it's a galvanized pipe from the point of the
11 dispenser all the way back to the pump; is that correct?

12 A Yes.

13 Q Is it galvanized steel?

14 A Yes.

15 Q Did you make any determination as you worked with this
16 pipe as to how long it had been in the ground?

17 A That's difficult to do with the type of group and with
18 the condition of other pipes around it; and not having any
19 history of the station, it's difficult to make a
20 determination.

21 Q Is that important to know in making the repairs?

22 A Only as it has to do with whatever corrosion may be
23 on the pipelines.

24 Q Did you ask Mr. Boley, for instance, how long the pipe
25 had been in the ground?

1 A If I did, I don't recall the conversation.

2 Q You indicated earlier there were some pipes that ran
3 over the top of the pipe that was being repaired; is that
4 correct?

5 A Yes, sir. There had been other work done in the
6 station after this line was in there, and they were newer
7 pipes. They were newer lines and above this line.

8 Q Were these also galvanized one and a half inch pipe?

9 A Yes.

10 Q Was it observable as you look at the two sets of pipe,
11 the difference in age between the two?

12 A There was difference in age of the two as they were
13 in the ditch. As we come to the place where the break was,
14 I don't remember that the new piping was alongside of the
15 old piping, although there were--the piping was very close
16 to each other, which contributed to the difficulty of working
17 with it.

18 Q Just to look at the two sets of pipe, did the old pipe
19 look older than the new pipe?

20 A The pipe where the break was was definitely an older
21 pipe.

22 Q What was it about that looked older, as you observed
23 the two?

24 A As I said before, approximately, maybe 25, 30 percent
25 of corrosion on it. And by that I mean the thickness of

1 the pipe, the life of the pipe material.

2 Q When you used the term corrosion, just for my
3 visualizing in my mind, are we talking about a decomposition
4 of the material in the pipe?

5 A You call it rust.

6 Q Rust?

7 A Yes.

8 Q Is that what it is?

9 A Yes.

10 Q Now, you indicated you did some form of testing to
11 determine exactly the location of the break; is that correct?

12 A Yes.

13 Q Apart from putting the pressure into the pipe, what
14 else did you do in order to find the precise location of
15 the break?

16 A Well, the first step you do is take as much fuel out
17 of the line as you can get out. You want as much air in
18 the line as you can. It's the volume of air that will give
19 you the ability to find the leak. And as we interject a
20 volume of air into the system, then that volume of air will--
21 it will go out where the leak is.

22 At that point, by using water and hosing down the area,
23 the air will come up through the asphalt where the fuel
24 would not tend to come up through the asphalt. It would
25 tend to follow wherever the pipe ditches fill. It comes

1 up wherever it relieves with air. But the air will come
2 up. And so you would find the bubbles. And wherever those
3 bubbles are, that's where you would excavate.

4 Q So you were just wetting down the asphalt and pulling
5 air through the pipe and watching where the bubbles came
6 out of the asphalt?

7 A Yes, because we have no idea in a system like this where
8 the pipelines run.

9 Q Did that take you several hours to get to the point
10 where when you first talked to Mr. Boley and arrived at the
11 scene until the time you found out where it was?

12 A Oh, yes. Yes. We were later on in the day before we
13 finally found the power leak was not where we thought it
14 was.

15 Q And you thought it was there where you found the first
16 gasoline near the dispenser; is that correct?

17 A Yes.

18 Q Now, on that first day that you were there, did you
19 actually excavate and locate the portion of pipe that these
20 bubbles were coming out of?

21 A I don't remember that we got that far the first day
22 or not.

23 Q At least--

24 A It would have been feasible to have gotten that far,
25 but I don't remember that we did.

1 Q At a minimum you do recall that you had seen the bubbles
2 at that point and had an idea of where it would be; is that
3 correct?

4 A Yes.

5 Q All right. But at some point in time you did excavate
6 it down to the pipe itself; is that correct?

7 A Yes.

8 Q Describe for me how you went about excavating it. Was
9 this with a machine, or did you do it by hand?

10 A We dug it by hand.

11 Q This is you and your son?

12 A Yes. We take off the asphalt off the top, usually lay
13 it aside, because that, we haul off. And it's a case of
14 shoveling down to the area where you can get to the pipe.

15 Q How thick was the asphalt that was over that particular
16 area?

17 A It was two and a half, three inch.

18 Q You testified that the pipe was about 18 inches deep;
19 is that correct?

20 A Approximately.

21 Q That's 18 inches from the top of the asphalt to where
22 the pipe was located?

23 A Close. Yes.

24 Q So you dug about a foot and a quarter of actual dirt
25 material before you reached the pipe itself; is that correct?

1 A As I remember the job, yes.

2 Q Now, was it in the course of this digging that the
3 difficulty arose with the other pipes being around the pipe
4 you were attempting to fix?

5 A Well, you have to dig around all of the pipes, and you
6 have to clean the pipes off to be able to find where the
7 leak is. And even then the leak may not be visible. It
8 may be on the bottom side of the line. Most of the times
9 it is. And then you would have to clean around the lines,
10 clean off the lines enough to be able to find where your
11 leak is at.

12 Q I guess it would be necessary, would it not, to
13 actually dig under the pipe, so that you can get some
14 perspective on the pipe?

15 A Usually we will dig down to the pipes and clear as much
16 on the pipes as we can. And once we're down to that
17 location, we go back to our testing procedure, so that we
18 find closer to where we're at. And once you've found the
19 area, you know where you have to work, what you have to work
20 with and where you have to work.

21 Q Do you recall doing that on this occasion?

22 A Yes.

23 Q After you dug down and exposed the pipes, then you went
24 back to testing and blowing air through the system again?

25 A This pinpoints the very point. We would do that, or

1 we would have pressure on the line when we're digging down
2 close to that area, so that we don't dig in the wrong
3 direction. You dig toward where the area is coming out,
4 and then once you get down to the point that you've found
5 your problem, you prospect that very area to see what you
6 have, because it's just common practice. You don't dig any
7 more than you have to.

8 Q Sure. So you would actually keep water running so that
9 you would have the bubbles coming up as an indicator of where
10 you're supposed to be headed?

11 A No. Once you have found the basic area, you would
12 remove the water, because it's difficult to work in. And
13 then you would work in that. Other than that, what we have
14 found was fuel. You're working in a level of fuel.

15 Q So you were working through the fuel towards the hole?

16 A Yes.

17 Q In this instance was it necessary to dig under the pipe
18 at all in order to get out the particular break?

19 A Oh, yes. We had to dig around them to be able to get
20 to the break.

21 Q Did there come a time when you could actually then see
22 the point at which the pipe had broken?

23 A Yes.

24 Q Was that on the first day that you were digging, or
25 was that on the next occasion that you visited the site?

1 A It would have been logical that we got that far on the
2 first day, but considering the extent of what we did to find
3 this leak, it might have been the second day.

4 Q What did you see then when you finally saw the leak?
5 Describe for me what you observed.

6 A Well, we observed the fact that we had a leak in the
7 pipe next to a fitting. It become evident that we had to
8 remove the pipe and the fitting to be able to do any sort
9 of repair at that point. And this means we clear out as
10 much around the line as is possible, so that we can get into
11 the area and cut off the pipe, prepare to either put a
12 section in it, replace the fittings, or repair the--replace
13 it complete.

14 Q You use the word fitting. A fitting is essentially
15 a connecting--piece of pipe that connects two other pieces
16 of pipe?

17 A You have either a coupling that connects the two pieces
18 of pipe or an elbow that the pipe comes in and makes a turn
19 upon. Either one of them would be termed a fitting.

20 Q Was this a coupling, or was this an elbow?

21 A I don't remember.

22 Q But do you recall that the break you observed was in
23 the proximity of the fitting? Is that correct?

24 A Yes.

25 Q Are we talking about within a matter of inches or

1 fractions of an inch?

2 A Fractions of an inch.

3 Q Fracticons of an inch?

4 (Witness nods head.)

5 Q Was it on the underside of the pipe, or was it on the
6 top side of the pipe, or had the pipe actually made a clean
7 break?

8 A The pipe was broke.

9 Q When you talk about a clean break, you refer to a clean
10 break as what?

11 A The pipe had broken to the extent that it was--the only
12 thing keeping anything into it was the surrounding area of
13 the--what was packed around it.

14 Q So the pipe was no longer touching?

15 A They would have been touching, but it would have been
16 basically sheared off.

17 Q Was it sheared at all points around the pipe, however?

18 A Yes. That it was completely sheared, I do not remember;
19 but it was substantially broken. There may have been a small
20 portion of it holding on, but the majority of it was a shear
21 break.

22 Q Do I understand correctly that this shear did not
23 actually include the coupling, but was so close to the
24 coupling that it necessitated removal of the coupling as
25 well?

1 A Yes, because the threads of the remainder of that pipe
2 would be in that coupling; and it's almost impossible to
3 remove those out of it and use that fitting again. We would
4 not choose to do that. We would choose to remove that and
5 replace that fitting.

6 Q Was this break a smooth break? Was it on an even plane,
7 just like a straight line, or was it cracked in its uneven
8 fashion, like teeth or something?

9 A Well, breaks in that case don't break as though you
10 had cut them. They would be somewhat uneven.

11 Q On previous occasions where you had done this type of
12 repair had you seen this type of break?

13 A Yes, we've seen this type of break before. It's not
14 very often. It was mostly they would be corrosion where
15 the pipe was literally ate up.

16 Q How does a corrosion break in your experience as you
17 observed one differ from the type of break you're describing
18 here?

19 A Well, to explain that you would have to understand the
20 procedures of electrolysis, where this procedure of
21 electrolysis the metal materials are basically eaten up by
22 the electrical discharge at that point to where you'd have
23 basically only the carbon of the metal left, which becomes
24 a crusted material, which has no tensile strength. And at
25 that point it gets to the point that the pressure will

1 actually push that away from the material, and the fuel will
2 leak out of it.

3 Q In the case of a corrosive break, are they generally
4 complete breaks throughout the pipe, or can it be--

5 A No. No. They're generally just small areas, and many
6 of those will look like a little crater that's just down
7 from a large area on the outside of the pipe down to maybe
8 a pinhole the size of a pencil lead at the inside, and other
9 than that you will find serpentine areas along the pipe for
10 a distance where it is corroding where you will have little
11 crack lines running parallel with the line. And those
12 corroded areas will force out or chip out.

13 Q Did Mr. Boley observe this break when you had
14 encountered it and identified where it was at?

15 A He was present at the station.

16 Q Did you point it out to him and say, "Here's your
17 problem"?

18 A Yes.

19 Q So he would have knowledge also in terms of observation
20 of what the nature of the break was; is that correct?

21 A He should have.

22 Q Anybody else that would have observed the break other
23 than Mr. Boley and your son and perhaps Mr. Sumner at least
24 in seeing the pipe after it was taken out of the ground?

25 A Well, a piece of material like this becomes what we

1 would call show and tell. And we talk about the
2 circumstances of "This is what we found on the job, and this
3 is the extent to which the corrosion was," or the break,
4 or that sort. And usually in shop talk, if you had bad
5 corrosion and you had a loss of, "Well, this is the area
6 that was lost and we found it in this kind of condition,"
7 whether it was dirt that had been left in the line when there
8 should have been sand around the lines, or whether it was
9 buried in a native soil, it does make a difference. If
10 any dirt is against a line, even though you're in a sanded
11 area, it will ground at that point of dirt, and you will
12 get a leak.

13 Q What do you mean when you say "Grounded at that point"?

14 A Well, all fuel traveling in a pipe generates electricity
15 and that electricity has to discharge somewhere, and it will
16 discharge where there is a clear grounding source. Sand
17 is not a clean grounding source. But wherever it would touch
18 an earth, then there would be enough there for it to start
19 going through the pipeline and into that grounding source.
20 When that takes place, electrolysis sets in. Corrosion of
21 the line begins. And at some time in the future you will
22 have a hole in that line.

23 Q Now, was that particular set of circumstances present
24 at the point where you dug up this particular break?

25 A There was some level of corrosion on the pipeline.

1 Q Was there any indication from what you observed of the
2 break that that level of corrosion had any impact on the
3 fact of the break had occurred?

4 A It would weaken the line. It would make it susceptible
5 to damage.

6 Q Now, on the previous occasions where you had seen this
7 type of break in your work, in any of those circumstances
8 had you been in possession of facts to indicate exactly what
9 had caused those breaks to occur, like a car ran over it
10 or somebody dropped a heavy object in the vicinity or an
11 earthquake or whatever?

12 A Occasionally we would have information of that type.
13 But sometimes we didn't. And to what reason wouldn't be
14 available. Occasionally we would know that there had been
15 a problem in the area. Occasionally we wouldn't know why
16 it was there.

17 Q In those situations where you knew what had caused the
18 particular break that was similar to the one we're talking
19 about in this case, what type of circumstances historically
20 had you had knowledge of that would cause those kinds of
21 breaks?

22 A Well, we had a Shell sort of station in Willows that
23 was a rather open area, and we had a lot of corrosion
24 problems in that station. And occasionally we would find
25 fittings that were corroded through. We had a lot of

1 fittings corroded through there. I don't remember whether
2 we had any breaks in there, but we did have heavy equipment
3 roll over that area, and those lines were not buried as
4 deeply as they should have been. Consequently, we had a
5 few breaks in those areas; but if the line was broken, the
6 ground had to be substantially moved to cause that.

7 Q Was there anything about the manner in which you
8 observed the maintenance of this particular pipe now at the
9 Gridley station that would indicate to you that it had not
10 been properly maintained?

11 A No. Maintenance is not a question. Once it's
12 underground, maintenance is not a question.

13 Q Had it been buried sufficiently deep?

14 A This line was buried fully sufficiently, yes. The lines
15 above it I questioned, but they were not broken.

16 Q Are these lines all running parallel to each other?

17 A Yes.

18 Q Immediately above this particular clean break that
19 you've described on the older line, there were newer lines
20 that remained intact; is that correct?

21 A Yes.

22 Q Did you undertake at the time of the repairs that you
23 were making on this line to determine what had caused the
24 break? Did you ask anybody questions, "Why did this
25 happen?"

1 A No. No, that's not a--my problem is to repair the
2 problem. My problem is not to--Mr. Dockindorf is a man who
3 is concerned with lawsuits, as he has been sued a number
4 of times for frivolous things. And his view is: "We don't
5 care what caused it. Fix it." And he's very pertinent about
6 that.

7 Q Apart from your official performance in this case in
8 this matter, where you didn't officially try to find out
9 what happened, did you unofficially or just as a matter of
10 your own curiosity attempt to find out what had happened,
11 why this break had occurred?

12 A Well, when you are working in the maintenance work that
13 we are, it may run through our mind: "Why did this happen?"
14 And if I was installing the system, what could I have done
15 to prevent it? But that would be probably the extent of
16 our consideration of it, especially on an old station that's
17 been there for a number of years. That runs you into
18 problems in itself.

19 Q Is this what you would characterize as an old station
20 that had been there for a number of years?

21 A It's been there quite a while.

22 Q So in this instance I take it you didn't attempt to
23 figure out in your mind where the break had happened at the
24 time you were repairing the break; is that correct?

25 A No. I don't recall any discussions concerning it or

1 anything else of the sort. The point is: "How long am I
2 going to be out of service? When can we get back?" So you
3 don't spend time worrying about how it happened. You spend
4 the time worrying about how you can get it back in service.

5 Q Now, when Mr. Dickman called you about this problem,
6 did he ask you, "Do you have an opinion as to why that break
7 occurred?"

8 A He may have--he may have asked me, but I told him,
9 "That's not my responsibility."

10 It just seems to me that he did ask me if I thought
11 it was, and I said: "It's not my responsibility to determine
12 why.. It's my responsibility to repair it."

13 Q Did he suggest to you any explanations for why it
14 occurred? Did he say, "Well--"

15 A No, I don't--I don't remember that he did.

16 Q How about your conversations with Mr. Mitchell? Has
17 he suggested to you any explanations for why this break
18 occurred?

19 A He questioned me as to whether the possibility of the
20 earthquake could have caused that; but, once again, it's
21 not my determination, and I told him so.

22 Q How far is Gridley from Chico?

23 A Approximately 37 miles.

24 Q You didn't reside in--

25 A Pardon me. 27 miles.

1 Q You didn't reside in Gridley back in the 1986-1985
2 period, did you?

3 A No. I was not residing there.

4 Q And you didn't work there either, did you, other than
5 going from time to time to customers that might require your
6 services; is that correct?

7 A Maintenance calls.

8 Q To the extent that there may have been any sort of
9 earthquake in the Gridley area, your knowledge of that was
10 merely based on whatever you might have read in the papers
11 or had been told; is that correct?

12 A Yes. That would be the extent of my knowledge.

13 Q I should ask you, are you all right. We've been going
14 for a while here.

15 (Discussion off the record.)

16 Q At the time that you did these repairs, did you observe
17 any construction on property adjacent to this Gas'n'Save
18 property?

19 A No, I don't believe I did.

20 Q What type of soil was actually there at the point at
21 which the break had occurred?

22 A This area is an adobe clay. There was--there was
23 substantial amount of native soil around the lines.

24 Q Did you ever speak with anybody from a company known
25 as American Environmental Management?

1 A I don't recall having done so.

2 Q The only repair that you did was of this particular
3 break in the pipe at that time?

4 A No. We placed the entire lines from that point up to
5 the dispensers.

6 Q But that entire repair was solely because of the fact
7 that there was a break at that point in the pipe; is that
8 correct?

9 (Witness nods head.)

10 Q Yes?

11 A Yes. It's a simpler situation to put in a new line
12 than to repair the old line.

13 Q When you found the particular leak, did you have any
14 occasion to put gas back into the system to observe how much
15 gas would come out at any given interval?

16 A We do not put fuel back in the lines until we have a
17 final--the dispensers are back on line and we are ready to
18 test for leaks. By that time we have tested our lines with
19 pressure tests and have found no leaks. And then thereafter
20 we would put fuel into the lines and see if there was by
21 chance anything that we had missed before the system would
22 be covered up.

23 Q Have you ever heard of a person named Evyleen Payne?

24 A It doesn't strike anything in my recollection.

25 Q How about Ray Rolls?

1 A I've heard the name, but it's not--it's not anything
2 that I associate with anything.

3 Q Not with this case, I take it?

4 A No. There is an engineering company in Chico by the
5 name of Rollis, I think it is. Other than that, I don't
6 associate it with anything.

7 MR. OLSON: I believe that's all I have.

8 EXAMINATION BY MR. MITCHELL

9 Q In your testimony, sir, you stated that you would
10 estimate there was 25 percent corrosion to the gas line at
11 the place where you repaired it; is that correct?

12 A Yes.

13 Q What do you mean by 25 percent corrosion?

14 A Approximately 25 percent of the pipe in areas there
15 would be approximately 25 percent of the pipe was not there.
16 In other words, it had rusted away probably 25 percent of
17 the existing thickness of the pipe.

18 Q When there has been 25 percent corrosion in the pipe,
19 does that mean that the pipe has to be replaced, or is it
20 still fit to remain in the ground?

21 A Oh, no. No. 25 percent corrosion is just enough that
22 you can't sufficiently rethread the pipe to get a fitting
23 on it. There would be deep areas in it that would not
24 possibly thread, and you would have notches into your thread.
25 So it wouldn't seal.

1 Q So the pipe still maintains its strength?

2 A A substantial amount of its strength, yes.

3 Q And it's perfectly okay to remain in the ground and--
4 (Witness nods head.)

5 MR. OLSON: Object to the leading nature of the
6 question.

7 A It's there and would be there and probably in more
8 stations than we would like to know of.

9 Q (By Mr. Mitchell) Would that be essentially 25 percent
10 of its life?

11 A No, sir.

12 MR. OLSON: Objection.

13 A No, it wouldn't have anything to do with its life.

14 Q (By Mr. Mitchell) Was this break caused by corrosion?

15 MR. OLSON: Objection. No foundation.

16 A It would be illogical.

17 Q (By Mr. Mitchell) Illogical?

18 A Illogical.

19 Q Why?

20 MR. OLSON: Objection. Again, no foundation.

21 A Corrosion does not cause a clean break.

22 Q (By Mr. Mitchell) That's based upon your experience
23 over many years?

24 A My experience in dealing with the product.

25 MR. MITCHELL: I don't have anything further.

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MR. OLSON: Nothing further.

(At 2:37 p.m. the deposition ended.)

Witness

County of Salt Lake)
) ss.
State of Utah)

This is to certify that the witness read the foregoing deposition; and if there are any changes to be made, they are indicated by the witness on the attached correction sheet.

Subscribed and sworn to before me this ____ day of _____, 1988.

Notary Public

My commission expires _____.

Tab C

GRIDLEY ASSOCIATES, LTD.,
PETROLEUM MANAGEMENT, INC.,
and VERNON G.W. DICKMAN,

Plaintiffs/Appellees,

-vs-

TRANSAMERICA INSURANCE
COMPANY,

Defendant/Appellant.

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
The Honorable James S. Sawaya, presiding

STEPHEN B. MITCHELL, Esq. (#2278)
BURBIDGE & MITCHELL
139 E. South Temple, Suite 2001
Salt Lake City, Utah 84111
Attorneys for Appellees

NEIL SELMAN, Esq.
SELMAN, BREITMAN & BURGESS

KENNETH A. OKAZAKI, Esq.
BARBARA K. BERRETT, Esq.
PURSER, OKAZAKI & BERRETT, P.C.
39 Post Office Place, Suite 300
Salt Lake City, Utah 84101
Attorneys for Appellant

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I.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Annotated § 78-2-2(3)(j) and (4) (1987).

II.

ISSUES FOR REVIEW

1. Was the district court correct in granting Appellees Gridley Associates, Ltd., Petroleum Management, Inc. and Vernon G.W. Dickman (hereinafter collectively referred to as "Gridley Associates") summary judgment on the basis that the gasoline spill at Gridley Associates' self-service gasoline station in Gridley, California, which was discovered in February of 1986, was "sudden" within the meaning of the insurance policy issued by Appellant Transamerica Insurance Company ("Transamerica") as a matter of law under the undisputed facts and was thus covered under the policy?

2. In the alternative, even if it is assumed for purposes of argument that the gasoline spill was not "sudden" within the meaning of the policy, is Transamerica barred from denying coverage on that basis as a matter of law because Transamerica never raised that contention until over three years after the spill when Transamerica filed its motion for partial summary judgment in the district court?

3. Can issue 2 above properly be decided on this appeal?

The foregoing issues present questions of law which this court reviews without according any particular deference to the district court's decision.

III.

DETERMINATIVE STATUTES

There are no constitutional provisions, statutes, rules or regulations which are determinative of the issues raised by this appeal.

IV.

INTRODUCTION

This case arose out of a gasoline spill from an underground metal pipe running from an underground storage tank to a gasoline pump at Gridley Associates' self-service gasoline station in Gridley, California. The spill, which was discovered in February of 1986, resulted from a clean break in the pipe caused by some type of earth movement such as that caused by an earthquake or heavy equipment. The Transamerica policy issued to Gridley Associates provided coverage for gas spills if they were "sudden and accidental." Transamerica initially agreed that the loss was covered by its policy and in fact paid a

portion of the cleanup costs. However, several months later Transamerica reneged on its coverage agreement and refused to pay the very substantial cleanup costs necessary to clean up the spill or to defend Gridley Associates in two lawsuits commenced by third parties to recover damages caused by the spill.

The various positions taken by Transamerica over the years in denying coverage under the policy for the spill were a tribute to the ingenuity of Transamerica and its counsel. Transamerica tried on for size at one point or another literally every defense to coverage possible. Then, three years after the spill and three law firms later, Transamerica filed a Motion for Partial Summary Judgment in the district court shortly before the scheduled trial date of this case. In that Motion, Transamerica raised for the first time the argument that the gasoline spill was not covered under the policy because the policy only provided coverage for spills which were "sudden and accidental" and the Gridley spill was supposedly not "sudden."

For the reasons hereinafter set forth, it is respectfully submitted that the district court correctly rejected Transamerica's contention and determined as a matter of law that the spill was indeed "sudden." In the alternative, Transamerica is barred as a matter of law based upon the undisputed facts below from arguing that the spill was not "sudden" because that contention was not raised for over three years after the spill occurred.

STATEMENT OF THE CASE

A. The Proceedings in the District Court.

Gridley Associates commenced this lawsuit in 1988 seeking a determination that the gasoline spill at the Gridley Station was covered under Transamerica's policy and to recover damages from Transamerica on various theories, including breach of contract, fraud, bad faith refusal to pay, declaratory relief and estoppel. [R. 2-71] Thereafter, Gridley Associates filed an Amended Complaint. [R. 198-268] Substantial discovery was completed by the parties and the case was scheduled for trial on June 13, 1989. [R. 324]

In April, 1989, shortly before the scheduled trial date, Transamerica filed a Motion for Partial Summary Judgment, contending for the first time that the gasoline spill was not covered under Transamerica's policy because it was not "sudden." [R. 327-365] On May 12, 1989, the district court issued a minute entry denying Transamerica's motion and ruling as a matter of law that the gasoline leak was "sudden." [R. 542] Because the district court had rejected the only ground upon which Transamerica then relied to avoid coverage, the effect of the ruling was to grant summary judgment in favor of Gridley Associates that the gasoline spill was in fact covered under Transamerica's policy.

Transamerica and Gridley Associates then entered into a Settlement Agreement pursuant to which Transamerica agreed to pay a minimum agreed to amount towards the damages and cleanup costs of the spill. Transamerica reserved the right, however, in the event that the cleanup costs exceeded the agreed to settlement amount, to appeal the district court's ruling that the gasoline spill was "sudden." Transamerica agreed that the only contention it would thereafter be entitled to make in this litigation was that the gasoline spill was not covered because, as a matter of law, it was not "sudden."

The cleanup costs in fact exceeded the agreed to minimum settlement amount and Transamerica exercised its right to appeal the district court's ruling. The parties stipulated to the entry of a final judgment in favor of Gridley Associates and on December 13, 1990, the district court entered a partial summary judgment in favor of Gridley Associates which was certified as final under Rule 54(b) of the Utah Rules of Civil Procedure. It is from this judgment that Transamerica has appealed.

B. Objection to Transamerica's Factual Statements.

Gridley Associates objects to the following factual statements contained in Transamerica's Brief.

1. Transamerica states that the "leak occurred in a section of the pipe which had been weakened by the gradual process of electrolysis," implying that the underground gasoline pipe simply gradually corroded away. [Transamerica Brief, p. 6]

fact, little Gene Hankins, who was the only witness on this issue, testified that all metal pipes gradually corrode over the years through the process of electrolysis and that there had been approximately 25% corrosion in this pipe, meaning that approximately 25% of the existing thickness of the pipe had rusted away. However, Mr. Hankins testified that the pipe still retained a substantial amount of its strength and that the break was not caused by corrosion because corrosion does not cause a clean break. The break was caused by some type of movement of the earth. [Hankins Depo., Appendix G to Transamerica Brief, pp. 9-10, 58-59]

2. Transamerica states that the gas spill continued over a period of four months. [Transamerica Brief, p. 24] In fact, although the precise period of time which the spill continued is unknown, it appears from the records of gas lost that the underground pipe broke in late November of 1985. [See summary of gasoline lost set forth on page 5 of Transamerica's Brief] The break was discovered and repaired in early February, 1986. Thus, the spill continued for a period of approximately 2 1/2 months.

C. Statement of Facts.

The following facts were undisputed in the court below:

1. At all relevant times, Gridley Associates owned and still owns a self-service gasoline station located in Gridley,

California (the "Gridley Station"). [R. 200; Transamerica Brief, p. 4]

2. During the period of time from February 7, 1985 through March 7, 1986, the Gridley Station was covered under a policy of insurance issued by Transamerica (the "Policy"). The Policy was a renewal Policy and covered other gas stations as well. [R. 199-200; Transamerica Brief, p. 4]

3. In early 1986, Gridley Associates suspected gas may be leaking at the Gridley Station. In February, 1986, Gridley Associates asked Dockindorf Equipment Company to conduct an investigation to determine if it could find any gas leak. During the course of the investigation, Dockindorf discovered that an underground metal gas line running from the underground gasoline storage tank containing regular gasoline to a fuel pump had broken. As a result of this break, every time the gasoline pump was activated by a customer, gasoline leaked underground. [Hankins Depo., Appendix G to Transamerica Brief, pp. 6-12]

4. The underground pipe had a clean break caused by some type of earth movement such as is caused by an earthquake or heavy equipment. [Hankins Depo., Appendix G to Transamerica Brief, pp. 10-12]

5. After the leak was discovered, Gridley Associates was required to undertake an extensive cleanup program. Gridley Associates hired American Environmental Management Co. to handle the cleanup which has not yet been completed. In March, 1986, Gridley Associates made claim under the Policy for the costs of

cleanup. Robert Lakata ("Lakata") at the Sacramento office of Transamerica initially handled the claim. [R. 604, Lakata Depo., p. 10]

6. During April and early May of 1986, Lakata investigated the claim and had various communications with Ray Yenchick ("Yenchick") who was a senior casualty underwriter for Transamerica in the Denver office. Yenchick in turn had communications concerning the claim with Ray Hood, the casualty claims supervisor for the Denver region. [R. 604, Lakata Depo., pp. 17-28 and Ex. 4 thereto; Yenchick Depo., Appendix A hereto, pp. 12, 25-35]

7. The Policy contained a general pollution exclusion which excluded coverage for pollution spills unless they were "sudden and accidental." Unbeknownst to Gridley Associates or to Transamerica's agent, Transamerica had also inserted into the Policy a separate "absolute" pollution exclusion endorsement (not the pollution exclusion which Transamerica now relies upon) not contained in the prior policies which absolutely excluded any coverage for pollution spills and which Transamerica initially believed excluded any and all pollution claims under the Policy. However, after discussion between the Transamerica personnel, Transamerica determined that the Gridley Associates' claim was in fact covered under the "garage" coverage portion of the Policy to which the absolute pollution exclusion did not apply. It was further decided by Transamerica that Transamerica should not attempt to escape coverage by contending that the

general pollution exclusion contained in the Policy (upon which Transamerica now relies) applied on the basis that the spill was not "sudden and accidental." In this regard, on May 1, 1986, Yenchick noted in a file memo that:

In checking through file, we have pollution exclusion on G.L. [general liability] coverage, but not on garage.

5-1-86

I discussed this claim w/Ray Hood-Denver claims. Since we do not have the absolute pollution excl. on the garage coverage, he does not believe the "sudden and accidental" provision in the policy will hold up. . . .

Called Bob Lakata-advised him to provide coverage rather than risk causing a legal battle.

. . .

[R. 604, Lakata Depo., pp. 28-29; R. 398, Yenchick Depo., Appendix A hereto, pp. 33-35 and Ex. 3] [Emphasis added]

8. On May 2, 1986, Yenchick sent Lakata a memorandum, which stated:

Per our phone conversation, I believe we should go ahead and provide coverage for this claim. I discussed the situation with Ray Hood-Denver casualty claims supervisor - and he is of the same opinion. Since we do not have the absolute pollution exclusion on the garage coverage, we do not believe the policy's "sudden and accidental" provision will carry much weight in court. Rather than get tied up in a legal battle, which could be costly, I believe it would be much wiser to settle the claim.

[R. 604, Lakata Depo., p. 28 and Ex. 7 thereto; R. 400, Yenchick Depo., Appendix A hereto, pp. 33-37] [Emphasis added]

9. Based upon the communications between Lakata, Yenchick and Hood, Lakata advised Gridley Associates in early

May, 1986 that the claim was, in fact, covered and that Transamerica would pay the cleanup costs to be incurred. [R. 604, Lakata Depo., pp. 28-29] In this regard, Lakata wrote a note to his file on May 5, 1986 stating:

Received Yenchick's 5/2/86; was contacted by Richard Burbidge (801-355-6677) insured's personal attorney. Informed him that our present position was that coverage applicable. I told him that we would not pay for testing or repairing the tanks or gas lines, only for cleaning up the adjoining property.

[R. 604, Lakata Depo., pp. 26-29 and Ex. 4 thereto]

10. In October, 1986, eight months after the spill was discovered, Transamerica issued Gridley Associates a check for \$23,473.49 in payment of cleanup costs which had been billed to that date. At the same time, Transamerica attempted to reverse its previous agreement to provide coverage. Barbara Gilbert, an environmental claims attorney with Transamerica's home office, wrote Gridley Associates a letter dated October 9, 1986 advising Gridley Associates that Transamerica took the position that cleanup costs were not covered because: (a) the absolute pollution exclusion excluded coverage; and (b) that to the extent any alleged damages occurred on property owned or leased by Gridley Associates, there would be no coverage under the Policy. Transamerica did not take the position that the spill had not been "sudden and accidental." [R. 603, Gilbert Depo., pp. 50-51 and Ex. 12 thereto]

11. On the same date that Ms. Gilbert advised Gridley Associates that the claim wasn't covered, she wrote a letter to

Transamerica's coverage attorney in Philadelphia, Michael Gallagher, acknowledging that Transamerica had, in fact, previously agreed to provide coverage. Ms. Gilbert stated, among other things, that:

As you can see, we have gone ahead and paid for the cleanup costs associated with this oil spill. You will recall that there was some considerable confusion as to whether our Sacramento office had agreed to cover this claim. On September 28, 1986, I spoke with Mr. Bob Lakata of our Sacramento field office and he confirmed that he did, in fact, advise the insured's personal counsel that we would be covering the claim.

[R. 603, Gilbert Depo., p. 53-54 and Ex. 13 thereto]

12. On November 25, 1986, Transamerica's coverage attorney in Philadelphia, Michael Gallagher, sent Gridley Associates a letter denying coverage under the Policy for cleanup costs. Mr. Gallagher stated that cleanup costs "do not come within the definition of damages as provided for in the Transamerica policy" and that the absolute pollution exclusion excluded any coverage. Again, Transamerica did not take the position that the spill had not been "sudden and accidental."

[R. 603, Gilbert Depo., p. 56-57 and Ex. 15 thereto]

13. By letter dated December 23, 1986, Gridley Associates' counsel disputed the denial of coverage. [R. 413-414]

14. Thereafter, during the first part of 1987, Transamerica retained the firm of Smylie & Selman in Los Angeles, California as new coverage counsel with respect to the matter. [R. 602, James Depo., p. 10]

Set of Interrogatories, Transamerica specifically stated that the grounds relied upon for its contention that the losses suffered by Gridley Associates as claimed in this action are not covered under the Policy were stated in the letters from Transamerica's counsel referred to above, dated November 25, 1986, September 25, 1987, October 1, 1987, January 21, 1988, and May 11, 1988. Again, there was no mention of any claim that the Gridley spill was not "sudden and accidental." [R. 376-77; Appendix C hereto]

VI.

SUMMARY OF ARGUMENT

1. The gasoline spill was "sudden" as a matter of law. The spill resulted from a clean break in the gas line caused by some type of earth movement such as caused by heavy equipment or an earthquake. The pollution exclusion in the Policy issued by Transamerica is generally used by insurance companies throughout the United States. Many courts have found the word "sudden" in the policy to be ambiguous because the word has more than one meaning and have therefore determined the word must be interpreted in favor of the insured. These courts have defined "sudden" to mean "unexpected" by the insured, and have found that the pollution exclusion simply excludes coverage for intentional pollution by the insured. This court should adopt that line of cases. Other courts have found the word "sudden" as used in the Policy to be unambiguous. Most of these courts

have defined "sudden" as "happening without prior notice or with brief notice."

Under either line of cases, Gridley Associates is entitled to coverage in the present case. The gasoline spill was "sudden" because the gas line break and the resultant discharge of gas was unexpected and happened without any previous notice. The fact the spill continued undetected for 2 1/2 months does not mean the discharge was not "sudden." The important point is whether the commencement of the spill was "sudden." No case has denied coverage under facts even approaching those in the present case.

2. Even if it is assumed for purposes of argument that the gasoline spill was not "sudden" within the express terms of the Policy, nevertheless Transamerica is barred as a matter of law from denying coverage on that basis because Transamerica did not raise that ground for denying coverage for over three years after the gasoline spill occurred. Transamerica did not even raise that ground for denial of coverage in its Answers to the Complaint or Amended Complaint or in its Answers to Interrogatories in this case. An insurer is barred from raising an additional ground for denial of coverage after commencement of litigation which would have been uncovered by a reasonable investigation. Transamerica was fully aware of the facts surrounding the gasoline spill and made the conscious decision back in 1986 not to assert that the spill was not "sudden" as a defense to coverage.

3. Gridley Associates' argument that Transamerica is barred as a matter of law from denying coverage on the basis the Gridley spill was not "sudden" was properly before the district court and is properly part of this appeal. Although the district court did not reach the bar issue because the court determined that the spill was "sudden" as a matter of law, Gridley Associates asserted the bar argument below and this court can affirm the district court's judgment on any proper ground, whether or not relied upon by the district court.

VII.

ARGUMENT

A. THE GASOLINE SPILL WAS "SUDDEN" WITHIN THE MEANING OF THE POLICY AS A MATTER OF LAW.

Transamerica does not (and could not under the settlement agreement between the parties) seek reversal of the summary judgment on the basis that material issues of fact exist. Rather, Transamerica argues that the district court erred in determining based on the undisputed facts that the gasoline spill was "sudden" within the meaning of the Transamerica policy issued to Gridley Associates. For the reasons set forth below, it is respectfully submitted that the district court's ruling was entirely correct and should be affirmed.

The Policy issued to Gridley Associates by Transamerica was a standard "occurrence" based policy utilized throughout the insurance industry. The general coverage provisions of the Policy provided that Gridley Associates was entitled to recover any losses for property damage caused by an "occurrence." "Occurrence" was, in turn, defined in the Policy as:

An accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.
[Emphasis added]

The Policy also contained various exclusions which limited its general scope of coverage. One of these exclusions was an "absolute" pollution exclusion which Transamerica originally relied upon in denying coverage to Gridley Associates and which excluded all pollution spills from coverage. The absolute pollution exclusion is not relied upon by Transamerica on this appeal, nor was it relied upon by Transamerica in moving for partial summary judgment below because, as Transamerica itself finally recognized, that exclusion did not apply to the garage coverage portion of the Policy. Rather, Transamerica contended for the first time in its Motion for Partial Summary Judgment that another more narrow pollution exclusion contained in the Policy excluded coverage. That pollution exclusion provided that:

This insurance does not apply . . . 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 any water course or

body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental. [Emphasis added]

The evidence was uncontradicted in the district court that the Gridley gas spill was caused by a clean break in the underground gas line running from the underground gasoline storage tank to one of the fuel pumps at the Gridley Station. The spill continued for approximately 2 1/2 months each time that the fuel pump was activated. Based upon these undisputed facts, Transamerica erroneously contended below and reasserts on this appeal that the spill was not "sudden" because it continued for more than a "brief" period of time. Transamerica cites numerous cases trying to support this position. There is, however, a glaring omission from Transamerica's brief. With one exception, Transamerica carefully omits to recite for the court any of the facts of the cases upon which Transamerica relies. The reason for this omission is transparent. The facts of those cases bear no resemblance to the case at bar. Each case relied upon by Transamerica in which coverage was denied on the basis that a spill was not "sudden" involved intentional pollution occurring as part of the regular course of business over a number of years.

Transamerica tries to make the battleground issue of this appeal whether this court should adopt the reasoning of the many courts which have held the use of the word "sudden" in the standard insurance policy to be ambiguous or whether this court should follow the reasoning of other cases finding the language

to be unambiguous. Although Gridley Associates believes this court should adopt the reasoning of the former cases, it is respectfully submitted that the gasoline spill in the present case was "sudden" under either line of cases and that Transamerica's position that the gasoline spill is not "sudden" unless it is of brief duration finds no support in the vast majority of decisions rendered under both lines of cases.

1. Many Cases Have Found the Undefined Use of the Word "Sudden" to Be Ambiguous and to Mean "Unexpected" by the Insured.

Many courts have found that the undefined use of the term "sudden" in the standard insurance policy is ambiguous because the word has more than one meaning. These courts have interpreted that ambiguous term in favor of the insured to mean "unexpected" by the insured, thus only precluding intentional pollution from coverage. Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 688 (Ga. 1989).

The case of Broadwell Realty Services, Inc. v. The Fidelity and Casualty Co. of New York., 528 A.2d 76 (N.J. 1987) is directly on point and is a good example of the position which Gridley Associates believes this Court should adopt. In Broadwell, gasoline had leaked for several months through fissures in an underground gasoline tank on the insured's

property. The insurance company contended that the gasoline spill was not covered because it was not "sudden."

The Broadwell court rejected the insurance company's contention. The court reasoned that the meaning of the word "sudden" as used in the policy was ambiguous, that the meaning had received a great deal of attention in the cases over the years and had created a substantial amount of controversy. Nevertheless, the insurance industry had not seen fit to settle the issue by including more precise wording in its policies, which would have put the controversy beyond reasonable question. Therefore, the court said that any ambiguity had to be resolved against the insurer.

In arriving at a definition of "sudden" as used in the insurance policy, the Broadwell court reviewed in depth the history of the general comprehensive liability policy and the pollution exclusion utilized by the insurance industry. The court noted that prior to 1966 the standard policy in the industry covered only property damage and personal injury "caused by accident" and that the word "accident" was undefined, leaving the definition up to the courts. In 1966, the standard policy was revised to provide for "occurrence" based coverage in response to consumer demands for broader liability protection and in acquiescence to the judicial trend toward a more expansive reading of the word "accident." [528 A.2d at 84] The standard occurrence based policy defined "occurrence" the same as does Transamerica's Policy in the present case.

The general pollution exclusion relied upon by Transamerica in the present case was added by the 1973 revision to the general comprehensive liability policy. The Broadwell court noted that according to the commentators, "the exclusion was designed to decrease claims for losses caused by pollution by providing an incentive to industry to improve its manufacturing and disposal processes." [528 A.2d at 85] Thus, the insured could not recover under the policy if he knowingly polluted the environment. The court concluded that the exclusion was only designed to eliminate coverage for pollution which was expected or intended by the insured, observing:

There is substantial authority supporting the thesis that the pollution exclusion was intended to be co-extensive with the scope of the definition of occurrence. [Citation omitted] Citing statements made by the Insurance Service Office, commentators have argued that "limitation of coverage was intended to apply only to the intentional polluter." The pollution exclusion is [thus considered] an intentional polluter's exclusion, and, as such, [is] inapplicable to entities which neither expect nor intend their conduct to result in bodily injury or property damage. [Citations omitted] Although this argument has its detractors [Citations omitted], most commentators "view the [policy limitation] as only a typical exclusion for intentionally caused damage by industrial or commercial dumpers." [Citation omitted]

We agree with this analysis. In our view, the pollution exclusion focuses upon the intention, expectation and foresight of the insured. If an insured knows that liability incurred by a foreseeable polluting event is covered by his policy, he is tempted to diminish his precautions and relax his vigilance. Conversely, we perceive no sound basis anchored in the policy language which requires prescience or clairvoyance on the part of the insured. Where the insured has taken reasonable precautions against contaminating the environment and the dispersal of pollutants is both accidental and unforeseen, we are of the view that

the "sudden and accidental" exception to the exclusion is applicable and the loss is thereby covered by the policy.

[528 A.2d at 85-86]

In United Pacific Ins. Co. v. Ban's West Lake Union, Inc., 664 P.2d 1262 (Wash. 1983), the court affirmed a summary judgment that loss caused by gasoline leaking out of the insured's gasoline line over a period of several months was covered under the policy. In so ruling, the court concluded that the courts considering the pollution exclusion clause had "almost unanimously held it to be ambiguous." [664 P.2d at 1265] The court then observed that:

In the case before us, the liability insurance policy on the one hand covers an "occurrence", which by policy definition includes conditions which are continuing in nature (as the insured argues), while on the other hand the pollution exclusion clause in the policy excludes from coverage damages arising out of the escape of liquids, gases and other substances unless the escape is sudden (as the insured argues is the situation presented). Both cannot be true yet both positions are reasonable, hence, the policy is ambiguous and requires judicial interpretation. It then follows that ambiguities in the policy are to be construed against the insurer which wrote the policy and in favor of the insured -- particularly where an exclusion is involved as it is here.

. . .

The pollution exclusion was also added by the 1973 standard revisions. The exclusion "eliminates coverage for damages arising out of pollution or contamination, where such damages appear to be expected or intended on the part of the insured and hence are excluded by definition of 'occurrence.'"

[664 P.2d at 1264-1266]

In New Castle County v. Hartford Accident and Indemnity Co., 673 F.Supp 1359 (D.Del. 1987), the court held the pollution

exclusion was inapplicable under the facts of that case, observing:

. . . [A]n ambiguous term in an insurance contract is considered in favor of the insured and strictly against the insurer. [Citations omitted] An ambiguity is created when the terms of a contract permit two or more reasonable interpretations. [Citations omitted]

The primary dictionary definition of the word "sudden" is "happening without previous notice" or "occurring unexpectedly." Webster's Third New International Dictionary, at 2284 (1971); See Black's Law Dictionary, at 1284 (1979). While other definitions indicate that the word has connotations of brevity, this only suggests that the word has more than one reasonable definition.

In summary, the Court holds that the plain meaning of the word "sudden" as used in the pollution exclusion is ambiguous. Resolving the ambiguity in favor of the insured, the Court rules that the term "sudden" means a discharge, dispersal, release or escape of pollutants that is unexpected.

[673 F.Supp. at 1362-1364]

In Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686 (Ga. 1989), the City of Jacksonville, Florida contracted to use property owned by Claussen as a landfill. Beginning in 1971, the city dumped industrial and chemical waste there almost exclusively. The city closed the site in 1977 and returned it to Claussen entirely filled, graded and seeded. Claussen had no knowledge that the site was used for dumping hazardous wastes. In 1985, the Environmental Protection Agency informed Claussen that he was responsible for cleaning up the site. Claussen then brought an action seeking a declaratory judgment that the pollution was covered under his insurance policy, which contained the same pollution exclusion as does Transamerica's

Policy. The Claussen court concluded that the pollution exclusion was capable of more than one reasonable interpretation and therefore "sudden and accidental" must be construed in favor of the insured to mean "unexpected and unintended." The court rejected Aetna's argument that the dumping of toxic wastes occurring over several years was not "sudden" within the policy language. In reaching this conclusion, the court said:

Georgia courts have long acknowledged that insurance policies are prepared and proposed by insurers. Thus, if an insurance contract is capable of being construed two ways, it will be construed against the insurance company and in favor of the insured. [Citations omitted]

What is the meaning of the word "sudden" as it is used in the insurance policy? Claussen argues that it means "unexpected." Aetna asserts that the only possible meaning is "abrupt." This seemingly simple question has spawned a profusion of litigation. The majority of courts considering the issue have adopted the meaning asserted by Claussen. [Citations omitted] Other courts have decided that "sudden" cannot be defined without its temporal connotation. [Citations omitted]

The primary dictionary definition of the word is "happening without previous or with very brief notice; coming or occurring unexpectedly; not foreseen or prepared for." [Citations omitted] The definition of the word "sudden" as "abrupt" is also recognized in several dictionaries and is common in the vernacular. Perhaps, the secondary meaning is so common in their vernacular that it is, indeed, difficult to think of "sudden" without a temporal connotation, a sudden flash, a sudden burst of speed, a sudden bang. But, on reflection one realizes that, even in its popular usage, "sudden" does not usually describe the duration of an event, but rather its unexpectedness: a sudden storm, a sudden turn in the road, sudden death. 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. [Citation omitted] Thus, it appears that "sudden" has more than one reasonable meaning. And, under the pertinent rule of construction, the meaning favoring the insured must be applied, that is, "unexpected."

[380 S.E.2d at 688]

The Claussen court also rejected the contention raised by Transamerica in the present case that this interpretation of "sudden" just restated the definition of "occurrence":

The policy goes on to describe "occurrence" as "property damage neither expected nor intended from the standpoint of the insured." Aetna contends that if "sudden" is interpreted as "unexpected," it simply restates the definition of "occurrence." We do not agree. The pollution exclusion clause focuses on whether the "discharge, dispersal or release" of the pollutants is unexpected and unintended; the definition of occurrence focuses on whether the property damage is unexpected and unintended. The pollution exclusion clause therefore has the effect of eliminating coverage for damage resulting from the intentional discharge of pollutants.

[380 S.E.2d at 688-689]

In Summit Assoc. v. Liberty Mut. Fire Ins., 550 A.2d 1235 (N.J. 1988), a developer purchased real estate which had been used as a sewage treatment facility twenty years earlier. The developer did not know that any portion of the sewage treatment facility remained buried at the site, nor that there was any sludge or hazardous substance buried there. In the course of preparing the site for development, an underground pipe leading from a large underground sludge pit was disturbed and began leaking hazardous liquid which continued for a substantial period of time. The court rejected the insurance company's contention that the spill was excluded from coverage by the pollution exclusion, ruling that the exclusion only

eliminated coverage where the damage appeared to be expected or intended by the insured.

In Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. 1989), the court affirmed a summary judgment against the insurance company determining that the leakage of toxic by-products through holes in a corroded underground storage tank which continued for a period of weeks was in fact "sudden" as used in the pollution exclusion clause because the leak was unexpected.

Numerous other courts have adopted the same interpretation of "sudden" as meaning "unexpected" by the insured. See, e.g., Benedictine Sisters v. St. Paul Fire and Marine Ins., 815 F.2d 1209 (8th Cir. 1987) (soot discharged from boiler over a period of six months was "sudden"); Shapiro v. Public Service Mut. Ins. Co., 477 N.E.2d 146 (Mass. 1985) (oil leaking from corroded underground fuel tank into surrounding waterways over a period of time was "sudden"); Kipin Industries v. American Univ. Ins., 535 N.E.2d 334 (Ohio 1987); Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S.2d 603 (1980) (gasoline leaking from underground storage tank over a period of time was "sudden"); Du-Wel Products v. U.S. Fire Ins., 565 A.2d 1113, 1117 (N.J. 1989) (all that is required to qualify for the exception to the exclusion is that the continuous discharge of the pollutants be unintended (i.e. accidental) and unexpected (i.e. sudden)); Headley v. St. Paul Fire and Marine Ins. Co., 712 F.Supp 745 (D.S.Dak. 1989); Reliance Ins. Co. of Illinois v.

Martin, 467 N.E.2d 287 (Ill. 1984); Buckeye Union Ins. v. Liberty Solvents and Chemicals Co., Inc., 477 N.E.2d 1227 (Ohio 1984); Grinnell Mut. Reinsurance Co. v. Wasmuth, 432 N.W.2d 495 (Minn. 1988); New England Gas & E. Assoc. v. Ocean Acc. and Guar. Corp., 116 N.E.2d 671, 680 (Mass. 1953).

This court recently stated in C.J. Realtor Inc. v. Willey, 758 P.2d 923, 928-929 (Utah App. 1988) that a contract is ambiguous when it admits of two or more plausible meanings. The most that can be said about the pollution exclusion in the present case from Transamerica's standpoint is that it is ambiguous. Therefore, the exclusion must be interpreted in favor of the insured. See, e.g., Fuller v. Director of Finance, 694 P.2d 1045 (Utah 1985); Utah Farm Bureau v. Orville Andrews and Sons, 665 P.2d 1308, 1309 (Utah 1983).

2. The Gridley Spill Was "Sudden" Even Under The Decisions Which Have Found the Word "Sudden" to be Unambiguous.

Other courts have found that the word "sudden" as used in the standard insurance policy is not ambiguous. Most of these courts have defined "sudden" to mean "happening without prior notice or with brief notice," which is the primary dictionary definition of the word. Some of these courts have also added "abrupt" to the definition. However, the primary definition of "abrupt" is "occurring without warning: UNEXPECTED." [Webster's Ninth New Collegiate Dictionary, 1989]

Utilizing these definitions, the cases relied upon by Transamerica have denied coverage for intentional pollution occurring as part of the regular course of the polluter's business over a period of years even if the polluter did not intend or expect the resulting damage. These cases all involved pollution that occurred gradually rather than being sudden because of some accident such as a gas line break as in the present case. The facts involved in those cases are light years away from the facts in the present case.

For example, in Borden, Inc. v. Affiliated F.M. Ins. Co., 682 F.Supp 927 (S.D. Ohio 1987), a case relied upon by Transamerica, it was alleged that the insured had during the regular course of its business deposited radioactive waste on its property for years as part of its production of phosphoric acid. In fact, the radioactive waste was 35 feet high and covered an area of 30 to 40 acres. In denying coverage, the court said:

This Court does not find the pollution exclusion involved in this case to be ambiguous. The "sudden and accidental" exception expressly applies to the "discharge, dispersal, release or escape" of the pollutants rather than to the harm caused by the pollutants. "Sudden" in its common usage, means "happening without previous notice or with very brief notice," while "accidental" means "occurring sometimes with unfortunate results by chance alone."

. . .

Several other courts have held that the pollution exclusion applied to the release of waste on a regular basis or in the ordinary course of business. . . .

In the case at bar, Amoco's complaint alleges that Borden regularly deposited radioactive wastes on its property as part of its production of phosphoric acid. . . . Clearly, this is not an

allegation of a "sudden and accidental" event. Rather, it is precisely the type of activity which the pollution exclusion was drafted to preclude.

[682 F.Supp at 930] [Emphasis added]

In International Minerals and Chemical Corp. v. Liberty Mut. Ins., 522 N.E.2d 758 (Ill. 1988), another case relied upon by Transamerica, the insured as a normal part of its business and over a long period of time intentionally discharged hazardous waste onto the ground as part of its barrel reconditioning business. In holding that the discharge had not been sudden, the court noted that the dictionary defined "sudden" as "happening without previous notice or with very brief notice; abrupt, characterized by hastiness." [522 N.E.2d at 769]

In State of N.Y. v. Amro Realty Corp., 697 F.Supp 99 (N.D.N.Y. 1988), cited by Transamerica, the insured had polluted the environment by disposing of toxic solvents into drains and septic systems as part of the regular course of its business from the early 1950s through 1981. In denying coverage, the court determined that the word "sudden" was not ambiguous and remarked:

There can be very little dispute that "sudden" means happening without previous notice or on very brief notice; unforeseen; unexpected; unprepared for, Webster's New International Dictionary, (2d.Ed. Unabridged 1954), and that "accidental" is defined as happening unexpectedly or by chance; taking place not according to usual course, Id. Even if the term accidental is determined from the insured's point of view, there is no use of the word "sudden" which is consistent with events transpiring over a twenty year period. . . . This court doubts that the New York Court of Appeals would choose to emasculate an act of the

Legislature. Rather, the Court of Appeals would be persuaded by the logic of other courts which have addressed this issue and determined that allegations of continuous industrial pollution are clearly outside of the "sudden and accidental" exception to the pollution exclusion clause. [Citations omitted]

[697 F.Supp at 110] [Emphasis added]

In U.S. Fidelity and Guar. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988), another case cited by Transamerica, coal dust was generated by the normal operation of Star Fire's business and was routinely discharged on a regular, continuing basis. The court held that this discharge was not "sudden" because "sudden" meant "happening without previous notice or with very brief notice", and concluded:

Thus, we believe that such pollution exclusion clauses apply to the release of wastes and pollutants taking place on a regular basis or in the ordinary course of business.

[856 F.2d at 35]

Transamerica emphasizes Judge Jenkins' decision in Hartford Acc. & Indem. Corp. v. United States Fid. & Guar. Co., (U.S.D.C. Central District of Utah, Case No. 88-C-1051J) (available at 5 Mealey's Lit. Rep. Insurance (Mealey) No. 18, 3/12/91 at B-1). Transamerica's emphasis is surprising. In Hartford, the pollution had occurred over fifteen years in the normal course of business. Judge Jenkins defined "sudden" to mean "happening without notice and occurring by chance" and simply ruled that the regular, continuous and routine discharge of pollutants over fifteen years was not "sudden and accidental."

In Transamerica Ins. Co. v. Sunnes, 711 P.2d 212 (Ore. 1985), another case relied upon by Transamerica, the court construed the very Transamerica policy provisions at issue in the present case. In Sunnes, the insured had intentionally discharged waste materials regularly over a period of many years so the court found the discharge was not "sudden" and that the exception to the pollution exclusion did not apply. However, in so ruling, the court made the following comment about the pollution exclusion:

The sense of the cases is that the pollution exclusion clause is designed to exclude coverage for occurrences in which pollutants are intentionally discharged, whether or not they are believed to be deleterious, while the exception [i.e. "sudden and accidental"] provides coverage when the discharge of pollutants is not intended by the insured. The exception to the exclusion clause is concerned only with whether the discharge or release of pollutants is accidental or intended.

. . .

[711 P.2d at 214] [Emphasis added]

Transamerica places importance on Waste Management v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986). However, in that case, the polluter intentionally dumped contaminating materials at a landfill over a number of years during the normal course of its business.

Similarly, in F.L. Aerospace v. Aetna Cas. and Sur. Co., 897 F.2d 214 (6th Cir. 1990), cited by Transamerica, the polluter had intentionally transported liquid waste for storage during the normal course of its business for a period of approximately 2 1/2 years and it was alleged that the waste had

contaminated adjoining property. The court affirmed the judgment of the district court that there was no coverage because the polluter had presented no evidence as to how the contamination occurred.

Every case relied upon by Transamerica in which a court has rejected coverage for a pollution spill involved industrial pollution where the polluter intentionally discharged pollutants into the environment in the regular course of its business over a period of years and then sought protection under an insurance policy when faced with cleaning up or paying damages for the intentional pollution. See, Grinnell Mut. Reinsurance Co. v. Wasmuth, 432 N.W.2d 495 (Minn. 1988). Under such facts, it is not surprising that the courts held the polluters were not entitled to protection under the insurance policies and that the pollution discharges were not sudden under any sense of the word.

The facts of the present case are, of course, far different than the industrial polluter cases relied upon by Transamerica. Gridley Associates did not intentionally discharge gas into the ground during the normal course of its business. Rather, the discharge was an accident and resulted from a sudden break of a metal underground gas line caused by some type of earth movement continuing undetected for 2 1/2 months. Clearly, the gas spill "happened without previous notice or with very brief notice" or "abruptly" or

"unexpectedly" and is therefore covered under either line of cases discussed above.

Transamerica appears to argue that even though the Gridley spill commenced suddenly, the spill is not covered because it only continued each time the pump was activated. The cases don't support such hair-splitting. If a spill starts "suddenly", it isn't turned into a gradual spill because the spill consists of a series of sudden discharges when a pump is activated. Further, it makes no sense to hold that whether a spill is "sudden" depends on which side of a valve a gas line breaks; if the line breaks on one side of the valve so the spill continues uninterrupted it is sudden, but if the break is on the other side of the valve so that the spill only continues when the valve is turned on the spill is not sudden.

Realizing that the cases rejecting coverage for pollution all involved discharges occurring during the regular course of business of the insured, Transamerica incredibly attempts to argue in this case that the Gridley gas spill occurred simply as part of the normal business operations of the Gridley station. To characterize a sudden gas line break caused by movement of the earth in that manner is a little like calling a woodpecker a carpenter. Presumably, Transamerica would also argue that if a gas explosion occurred as a result of a customer smoking while filling his gas tank, the explosion was just a part of the normal operation of the business.

Transamerica asserts that the case of Industrial Indem. Ins. v. Crown Auto Dealerships, 731 F.Supp 1517 (M.D.Fla. 1990) (the one case from which Transamerica recites any of the facts) is "very similar" to the case at bar. In truth, the facts of the Industrial Indemnity case were far different. There, as a routine part of its business, the polluter continually poured oil into used oil holding tanks over a period of years. The employees routinely spilled small amounts of oil during the process of filling up the tanks. There were also occasional spills due to leaking hoses and pipe connections. Apparently the polluter did not take appropriate action to cleanup the spills as they occurred and over the years the pollution gradually built up. The court found that these spills occurring during the normal course of the daily business over a period of years were not "sudden and accidental." The Industrial Indemnity case may be similar to a situation where gas station employees or customers regularly spill small amounts of gas while they are filling up their gas tanks, but it is far different from the present spill which was caused by a "sudden and accidental" break in an underground gas line.

3. The Fact that the Gridley Spill Continued Undetected For 2 1/2 Months Does Not Mean the Spill Was Not Sudden.

Transamerica urges the court to rule that a gas spill cannot be "sudden" unless it lasts only for a brief period of

time. Such a definition is not in accordance with the primary dictionary definition ("happening without previous notice or with very brief notice; unexpected, unprepared for") or with the overwhelming case law. As the cases cited above demonstrate, a "sudden" discharge may continue for a substantial period of time and is not limited to an instantaneous happening. See, e.g., Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S.2d 603 (1980). The focus of the courts has been on whether the discharge started suddenly, not how long it lasted.

For example, in Just v. Land Reclamation Ltd., 445 N.W.2d 683 (Wis. 1989), the insured was sued for discharging pollution consisting of airborne dust and debris, noise, odor, and contaminated water in the course of its landfill business over a period of time. The complaint against the insured did not allege any dates of the alleged polluting events during the policy period, nor did the complaint allege how the pollutants were released into the environment. The court held there was no "sudden and accidental" event and denied coverage, observing:

When policies limit coverage to sudden and accidental events, Wisconsin courts limit coverage to "injuries caused by a sudden and identifiable event with respect to both location and time." [Citations omitted] The term "sudden and accidental" does not apply to pollution damage occurring over a substantial period of time. [Citation omitted] There must be an accidental and "immediate" discharge. [Citation omitted] "Sudden" is defined temporally and not in terms of unexpectedness.

[445 N.W.2d at 686]

Although the quoted language seems at first glance to lend some support to Transamerica's argument in the present case, the Just court went on to distinguish its earlier decision in Wagner v. Milwaukee Mut. Ins. Co., 427 N.W.2d 854 (Wis. 1988) because in Wagner the accident caused the discharge to begin immediately even though the discharge continued over a number of years. In other words, the commencement of the spill had been "sudden."

In Wagner, a case directly on point, an underground gas line at a self-service station was broken by construction work and leaked gas for three years before the break was discovered. The court held the spill was "sudden" and thus covered under the policy, saying:

Milwaukee Mutual . . . argues the discharge was not "sudden" because it occurred over a "substantial period of time." [Citations omitted] . . . Milwaukee Mutual reasons that even though the injury to the pipe may have been immediate, the discharge itself accumulated over a course of three years. . . .

We reject Milwaukee Mutual's position for several reasons. First, the discharge of gasoline was sudden. . . . The gasoline began leaking immediately after the pipe was damaged in 1981, and continued until it was discovered in 1984. . . . The length of time that elapsed before the leak was discovered is irrelevant to the suddenness of the discharge. The pollution exclusion clause does not preclude coverage where there is a sudden damage to a pipe and an immediate discharge of pollutants that continues uninterrupted for a prolonged period of time.

[427 N.W.2d at 857] [Emphasis added]

In Lumbermans Mut. Cas. v. Bellville Ind., 555 N.E.2d 568 (Mass. 1990), another case upon which Transamerica places

emphasis, Bellville was sued for contaminating New Bedford Harbor with PCBs used in its manufacturing plant in the mid 1970s. The United States District Court for the District of Massachusetts had certified to the Massachusetts Supreme Court the issue of the meaning of "sudden" as used in the pollution exclusion. The Massachusetts Supreme Court did not have before it the precise facts concerning the discharge of pollutants so it could not determine whether the discharge had been "sudden." The court did not rule that the length of time the discharge lasted was relevant. Rather, the court said:

Surely, the abruptness of the commencement of the release or discharge of the pollutant is the crucial element.

[555 N.E.2d at 572] [Emphasis added]

Only a very few cases have stated any requirement that a pollution discharge last for only a short period of time in order to be a "sudden" discharge. It is respectfully submitted that this court should reject any such requirement in accordance with the decisions of the vast majority of the cases. Moreover, these few cases did not even attempt to define what a "short period of time" means and they are all distinguishable from the case at bar.

For example, Transamerica relies heavily on Fireman's Fund Ins. Companies v. Ex-cell-o Corp., 702 F.Supp 1317 (E.D.Mich. 1988). That court had no facts before it so it was not called upon to nor did it decide whether the discharge in

that case was covered under the policy, nor did the court make any effort to define what a "short time" was.

Transamerica also relies on Technicon Electronics Corp. v. Am. Home Assur. Co., 141 A.D.2d 124, 533 N.Y.S.2d 91 (N.Y. App. Div. 1988), aff'd, 74 N.Y.2d 66, 544 N.Y.S.2d 531, 542 N.E.2d 1048 (1989). That case involved a manufacturer's intentional discharge of toxic wastes over several years during the regular course of its business. The Technicon court recognized and distinguished the previous New York case of Allstate Ins. Co. v. Klock Oil Co., supra, where the court had stated that the discharge could be sudden even though the discharge continued "undetected for a substantial period of time." [533 N.Y.S.2d at 99]

Transamerica also points to the case of Olin Corporation v. Insurance Company of North America, No. 84 Civ. 1968 (S.D.N.Y., April 23, 1991) which again involved intentional dumping of pollutants over many years during the regular course of business. The Olin court stated that "no use of the word 'sudden' or 'suddenly' could be consistent with an event which happened gradually over an extended period of time. . . . "

Transamerica has not and cannot point to one case which even implies that a gasoline spill which starts suddenly and accidentally is not covered just because it continues for a period of 2 1/2 months undetected. The cases, in fact, clearly reject such a notion.

For this court to limit the definition of "sudden" to spills which continue only a brief time would also lead to uncertain and arbitrary results. The important fact in this case is whether the commencement of the spill when the gas line broke was sudden (which it admittedly was), not how long the spill continued. If Transamerica's proposed standard is adopted, how long could a pollution spill continue after an accident and still be within the coverage of the insurance policy? For example, when the Exxon Valdez crashed, would the portion of the spill which occurred during the first few minutes or the first few hours only be covered, or would the portion of the oil spill which occurred over a matter of weeks be covered, or would the entire spill be excluded because it occurred over more than a "brief" period of time? In the case at bar, would only that portion of the gas spilling within the first few minutes after the line break be covered or the first few days or the first few weeks? Or, because the spill continued for more than a "brief" period of time, would the entire spill be excluded from coverage? How would you determine which gas leaked when as far as Transamerica's obligation to clean up the gas is concerned? How would you determine what damage to surrounding property was caused by the portion of the gas that leaked during the time period which the court determined to be "sudden?"

Finally, Transamerica's own interpretation of the "sudden" exception to the pollution exclusion is relevant to determining the meaning of that term in Transamerica's policy.

The undisputed evidence in the court below was that Transamerica consciously determined that it could not assert the Gridley spill was not "sudden" and instead agreed to provide coverage. For three years thereafter, Transamerica did not contend the spill was not "sudden."

For all of these reasons, the district court correctly determined the gasoline spill in this action was "sudden" as a matter of law.

B. TRANSAMERICA IS BARRED FROM DENYING COVERAGE ON THE BASIS THAT THE GRIDLEY SPILL WAS NOT "SUDDEN."

1. Transamerica Did Not Raise the "Sudden" Argument For Three Years After the Spill.

As set forth at length in Gridley Associates' Statement of Facts [pp. 8-16, supra], the undisputed evidence before the district court consisting entirely of Transamerica's own correspondence and pleadings demonstrated that although during the years after the Gridley Spill, Transamerica through three different coverage counsel threw out any number of reasons the gasoline spill purportedly was not covered under the Policy, Transamerica never contended that the spill was not "sudden" until over three years after the spill was discovered, when in April, 1989, shortly before the scheduled trial date, Transamerica filed its Motion for Partial Summary Judgment. Transamerica did not even raise this contention in its Answers