THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

LIQUIDATOR'S OBJECTION TO CLAIMANTS SHELDON HOLSON AND MELVIN HOLSON'S MOTION TO RECOMMIT

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the motion to recommit filed by claimants Sheldon Holson and Melvin Holson (the "Holsons") seeking recommital of the Referee's November 5, 2009 Order on the Merits (the "Order", attached as Exhibit A hereto). As reasons therefor, the Liquidator states:

Introduction

In the Order, the Referee held that Home had no duty to defend the KVL action against the Holsons because of the pollution exclusion. The Referee's ruling is correct. Under Connecticut law, the Holsons bear the burden of showing that the allegations of the KVL complaint bring the claim within the "sudden and accidental" exception to the pollution exclusion, which requires that there be allegations of rapid or otherwise abrupt discharges. In their motion, the Holsons make semantic changes to their argument before the Referee, but they continue to contend that a duty to defend exists because the allegations of the complaint do not foreclose a sudden and accidental discharge. This argument was rejected by the Connecticut Supreme Court in Schilberg Integrated Metals Corp. v. Continental Cas. Co., 819 A.2d 773, 788 (Conn. 2003). The Court accordingly should deny the motion to recommit.[1]

[1] The Holsons' and the Liquidator's merits submissions to the Referee (including exhibits) are included in the Appendix to Liquidator's Objection to Claimant Holsons' Motion to Recommit ("Appendix") filed herewith.

Background

The relevant facts are set forth at pages 1-5 of the Order. The Liquidator summarizes them here so that the citations to pertinent exhibits are before the Court. The Liquidator's Exhibits ("Liq. Ex.") are included at Tab 4 of the Appendix.

1. Facts

Home issued seven Manuscript Excess Liability Policies to the Holson Company ("Holson") in effect from 1973 to 1981 providing limits ranging from $3 million to $5 million excess of scheduled primary policies issued by Federal Insurance Company ("Federal") with limits of $50,000 from 1973-1976 and by Fireman's Fund Insurance Company ("Fireman's Fund") or Travelers Indemnity Company ("Travelers") with limits of $100,000 from 1976 through 1981. The available Home excess policy documentation is included in Liquidator's Exhibit 1 and the policies are discussed in the following section.

The Holsons were the primary shareholders, directors and principal officers of Holson for over thirty years until 1986. Liq. Ex. 2 at 1.

In 1968, Holson acquired a site in Wilton, Connecticut (the "Wilton site"). Holson operated a photograph album manufacturing facility on the Wilton site for a twenty-two year period from 1966 to 1988. Liq. Ex. 3 at 2. The Wilton site was sold to KVL Corporation ("KVL") in the late 1980s.

On February 1, 1991, KVL filed an action against Holson and the Holsons in the United States District Court for the District of Connecticut seeking damages relating to contamination at the Wilton site. K.V.L. Corp. v. The Holson Co., et al., C.A. No. 5:91CV59 (D. Conn.) (the "KVL Action"). The complaint in the KVL Action is Exhibit A to the Holsons' brief before the Referee (Appendix Tab 2).

In February, 1991, Holson notified its insurers of the KVL Action. The insurers declined to defend. See Liq. Ex. 4.

The KVL Action was tried in the Connecticut federal court in 1995. Liq. Ex. 2 at 2.

Holson later brought a declaratory judgment action against the primary insurers seeking coverage and defense for the KVL Action. Holsons Br. at 3. In 1999, while the KVL Action remained pending, Holson entered settlements with Fireman's Fund and Travelers.

The May 1999 settlement with Travelers is confidential and its amount is unknown.[2] According to a letter from Travelers, the parties to the settlement "agreed" that the two CGL policies issued by Travelers for the 1979-80 and 1980-81 periods were "deemed to be exhausted." Liq. Ex. 5; see also Liq. Ex. 7. The August 1999 settlement with Fireman's Fund "bought back" Fireman's Fund's policies.[3] The Holsons advised Home of the fact of the Fireman's Fund settlement and asserted that it exhausted the primary policies by letters dated September 27, 1999 and October 5, 1999. Liq. Ex. 8. See Liq. Ex. 7.

The settlements between the Holsons and the primary insurers did not involve KVL or resolve the KVL Action. None of the settlement amounts were paid to KVL or used to satisfy or extinguish KVL's liability claims. Liq. Ex. 3 at 3. The payments were used "solely" to defray a portion of the defense costs in the KVL Action. Id.

On August 3, 2000, the court in the KVL Action issued a decision against the Holsons on certain claims, including a finding that the Holsons "made fraudulent misrepresentations as alleged by KVL." Liq. Ex. 9 at CF 168. On April 25, 2001, the court entered a partial judgment holding them liable for an amount in excess of $2,000,000. Liq. Ex. 2 at 3.

---

[2] Travelers objected to production of the settlement, and the parties deferred motion practice regarding production of the settlement because it appeared the Referee could potentially resolve the dispute without it.

[3] The settlement was filed under seal as Liquidator's Exhibit 6 after the Referee granted the Liquidator's assented-to motion to file exhibit under seal on August 24, 2009. That exhibit is not included in the Appendix as it is not pertinent to the issues presented by the motion to recommit.

In September 2002, the Holsons reached a settlement with KVL that resolved the KVL Action for a payment by the Holsons of $612,500. See Liq. Ex. 2 at 3, Liq. Ex. 10.

2. The Home Insurance Policies

The Referee based her Order upon the pollution exclusion and Endorsement 2 to the Home excess policies. The other provisions set forth in the Order are relevant only to the issues regarding exhaustion of the underlying primary coverage that the Referee decided she did not need to reach. Order at 10.

a. Pollution exclusion. The Home policies contain by endorsement a pollution exclusion that excludes coverage for pollution claims unless they arise from a "sudden and accidental" release. The endorsement states:

> It is agreed that the 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 gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply, if such discharge, dispersal, release or escape is sudden and accidental.
>
> It is further understood and agreed that in no event shall coverage provided by this policy for Contamination or Pollution be broader than that provided by the Underlying Insurances set forth in the Schedule of Underlying Insurances. [Liq. Ex. 1 at CF46, 55, 62, 70, 80, 91 (emphasis added)][4]

b. Endorsement 2. Endorsement 2 to the policies in effect after August 12, 1977 added a new "Defense Settlement" provision:

> With respect to any occurrence not covered by the underlying policies listed on Endorsement 1 hereof or any other underlying insurance collectible by the insured, but which is covered by the terms and conditions of this policy . . . the Company shall:

[4] The available policy documentation in the possession of the Liquidator for the Home policy No. HEC9909110 for the 1980-1981 policy period does not include this endorsement. However, as stated on its declarations page (Liq. Ex. 1 at CF94), that policy was expressly a renewal of the 1979-80 Home policy No. HEC9831605 which, like all the other preceding Home excess policies, included the contamination and pollution endorsement (id. at CF91). Indeed, the Home underwriter's letter dated August 5, 1980 responding to the broker's renewal submission states that the renewal is subject to "[s]ame terms and conditions as expiring." Liq. Ex. 12. Accordingly, the 1980-81 policy, like the policy it renewed, included the standard pollution exclusion endorsement. The Holsons did not contend otherwise before the Referee.

(a) defend any suit against the insured alleging such injury or destruction and seeking damages on account thereof . . .

Coverage afforded under this Insuring Agreement shall not apply to defense, investigation, settlement or legal expenses covered by underlying insurances. [CF58 (emphasis added)]

3. Procedural History

The Holsons filed a proof of claim in the Home liquidation. The proof of claim appears to seek $612,500 for the KVL settlement, $25,000 in future monitoring/remediation expenses and $1,109,260.72 in defense expenses less the proceeds from the Fireman's Fund and Travelers settlements. Liq. Ex. 10; see Liq. Ex. 2 at 4. Holsons also seek "compensatory" damages, but such damages would not be a Class II claim under RSA 402-C:44.

The Liquidator issued a notice of determination denying the Holsons' claim on July 28, 2008. Liq. Ex. 11. The Holsons filed their objection on September 25, 2008.

On March 17, 2009, the Referee issued a scheduling Order directing the parties to brief coverage issues. Appendix Tab 1. After the Holsons and the Liquidator filed their briefs and exhibits (Appendix Tabs 2–4), the Referee heard telephonic oral argument on August 26, 2009.

The Referee issued the Order on November 5, 2009. The Referee held that Home did not have a duty to defend the Holsons because they had not demonstrated that the sudden and accidental exception to the pollution exclusion applied. Order at 6-9. The Referee accordingly did not need to reach the Liquidator's other grounds for denying a duty to defend. Id. at 10.[5]

[5] In addition to the exclusion of coverage under the pollution exclusion, the Liquidator contended that the Home policies had no obligation to defend the KVL case because the policies provide only excess coverage above the scheduled underlying insurance. See Order at 6. Those underlying policies have not been exhausted by payment as required to trigger Home excess coverage for defense expenses. Neither the refusal of primary insurers to defend nor the settlements with primary insurers for partial defense costs satisfies the exhaustion requirement. See Appendix Tab 3 at 13-23.

ARGUMENT

HOME HAD NO DUTY TO DEFEND BECAUSE THE HOLSONS FAILED TO SATISFY THEIR BURDEN OF SHOWING THAT THE KVL COMPLAINT ALLEGED A "SUDDEN AND ACCIDENTAL" RELEASE UNDER THE CONTROLLING SCHILBERG DECISION.

The Referee correctly held that Home owed no duty to defend the Holsons in the KVL action in light of the pollution exclusion in the Home policies. The Referee and the parties agreed that Connecticut law governs the insurance coverage issues in this matter, Order at 6 n.2,[6] and the Referee correctly applied the controlling decision of the Connecticut Supreme Court in Schilberg Integrated Metals Corp. v. Continental Cas. Co., 819 A.2d 773, 788 (Conn. 2003) (attached as Exhibit B hereto).

The Holsons' motion turns on the application of the Connecticut Supreme Court's decision Schilberg. That case specifically addressed how to determine a duty to defend in cases implicating the pollution exclusion. The Holsons seek to avoid the holding of Schilberg that they have the burden of showing allegations of the complaint that bring the case within the "sudden and accidental" exception to the pollution exclusion. In their motion, the Holsons repeatedly refer to cases regarding the general standard regarding a duty to defend. E.g., Motion at 1-2, 5, citing Community Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co., 757 A.2d 1074, 1081 (Conn. 2000) ("If any allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured."). However, they fail to acknowledge the complementary principle that, "[o]n the other hand, if the complaint alleges a liability which the policy does not cover, the insurer is not required to defend." Community Action, 757 A.2d at 1081. The second principle is critical here because the KVL action involved

[6] This dispute concerns coverage for contamination by Holson's operations at a site in Connecticut under policies issued to Holson, which was located and operating at the site during the policy years. See Liq. Ex. 1 at CF40, 48, 56, 65, 75, 84, 94. In the circumstances, New Hampshire choice of law principles provide for application of Connecticut law. See Ellis v. Royal Ins. Co., 129 N.H. 326, 330 (1987).

claims generally excluded by the pollution exclusion. Coverage could only exist if the claim fells within the "sudden and accidental" exception to the exclusion. Schilberg makes clear that under Connecticut law, in duty to defend cases involving the pollution exclusion, the burden is on the insured to show that allegations of the complaint bring the claim within the exception. As the Referee held, the Holsons fail to meet their burden here.

A. Under Schilberg, The Holsons Bear The Burden Of Showing That The Complaint's Allegations Raise The Possibility Of A Sudden And Accidental Release.

Reduced to its essence, the Holsons' position is that unless the underlying complaint excludes the possibility of a sudden and accidental release there should be a duty to defend. See Motion at 6 ("[U]nless the allegations exclude coverage, the insurer owes a duty to defend.") Before the Referee, the Holsons expressly contended that there was a duty to defend unless the allegations foreclosed a sudden and accidental release. See Holsons Br. at 17 (contending that the allegations "do not foreclose" an accidental and a sudden release and "do not eliminate the possibility that the exclusion may not apply") (Appendix Tab 2); see also Order at 7 (summarizing Holsons' arguments). While they have abandoned the "foreclosed" terminology in their motion, the Holsons' position has not changed. They still contend that a duty to defend exists if there is a "possibility" of a sudden accidental release, and they locate that "possibility" in the absence of allegations that preclude such a release. See Motion at 7 (asserting that the allegations of the complaint "encompass" the possibility of a sudden or accidental event). As explained below, the Connecticut Supreme Court rejected this approach in Schilberg. Under that case, the burden is on the insured to "demonstrate a reasonable interpretation of the complaint that brings the claim within the sudden and accidental discharge exception." 819 A.2d at 788. Without allegations that "bring the claim within" the exception, there is no duty to defend.

The pollution exclusion provides that:

> It is agreed that the 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 gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply, if such discharge, dispersal, release or escape is sudden and accidental. [Liq. Ex. 1 at CF46 (emphasis added)]

Under the plain language of this exclusion, claims arising from pollution are excluded from coverage unless the release of the contaminants was "sudden and accidental." In Connecticut, "the term 'sudden,' as used in [the "sudden and accidental" exception], requires that the release in question occur in a rapid or otherwise abrupt manner. The release of pollutants over an extended period of time cannot qualify as 'sudden' for purposes of the exception to the pollution exclusion." Buell Indus., Inc. v. Greater New York Mut. Ins. Co., 791 A.2d 489, 503 (Conn. 2001) (construing a sudden and accidental exception in a pollution exclusion identical to the Home pollution exclusions, see id. at 495 n.8). Because coverage could be found only under the exception to the pollution exclusion, the Buell court held that the insured bears the burden of showing that a release is "sudden and accidental" to obtain indemnity coverage. Id. at 504.

In Schilberg, the Connecticut Supreme Court took this approach and applied it to duty to defend issues under insurance policies with pollution exclusions identical to those at issue here. See 819 A.2d at 778 & n.2. The court first addressed the question of burden of proof. The policyholder argued that "under Connecticut law, the insurer bears the burden of establishing that the underlying allegations eliminate every reasonable possibility that the discharge of pollutants was 'sudden and accidental.'" Schilberg, 819 A.2d at 781 (emphasis added, punctuation and ellipses omitted). The court responded: "We disagree." Id. The court applied the logic of its decision in Buell, 791 A.2d 489, which had held in the indemnity context that "when a policy contains an exception [the "sudden and accidental" exception] within an exception [the pollution

exclusion], the insurer need not negative the internal exception; rather the insured must show that the exception from the exemption from liability applies." Schilberg, 819 A.2d at 782. The court held that this principle also applied to the determination of a duty to defend, so that "the burden of proving the applicability of the sudden and accidental discharge exception in the present [duty to defend] case properly rested with the plaintiff [policyholder]." Id at 783. (It also concluded that placing the burden on the insured in this situation was consistent with the general Community Action standard. Id.)

The court then applied this standard. It held that where, as here, the complaint alleges damages attributable to the discharge or release of a pollutant into the environment, "the burden shifts to the insured to demonstrate a reasonable interpretation of the underlying complaint potentially bringing the claims within the sudden and accidental discharge exception to exclusion of pollution coverage." Schilberg, 819 A.2d at 784 (emphasis added). The court explained:

> The relevant inquiry, therefore, is not whether the substance of the department's allegations rules out the possibility of a sudden and accidental discharge, as the plaintiff suggests, but, rather, whether the plaintiff has demonstrated that a reasonable interpretation of the substance of the department's allegations potentially would bring the claims within the purview of the sudden and accidental discharge exception to the policies. An insured does not satisfy its burden of proving the applicability of the sudden and accidental discharge exception, however, by the assertion of conclusory statements, or reliance on mere speculation or conjecture as to the true nature of the facts. In determining whether the underlying complaint can be read as even potentially bringing the claim within the sudden and accidental exception to the exclusion of pollution coverage, a court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable.

Id. at 784-85 (citations and quotations omitted) (emphasis added). The court's references to "reading" the complaint and "bringing" the claim within the exclusion show that the insured has a burden to identify allegations in the complaint that bring the claims within the sudden and accidental exception. In Schilberg, the court examined the allegations of the complaint before it

and concluded there was no duty to defend because the complaint did not show that the event that caused the pollution was sudden and accidental. Schilberg, 819 A.2d at 785-88.[7]

The Referee was thus correct to scrutinize the complaint for "specific allegation" of a dispersal, release or escape of pollutants that would demonstrate that the sudden and accidental exception applied. Order at 9. The Holsons' contrary position is rebutted by the Connecticut Supreme Court's language quoted above and its further statement that "the plaintiff cannot prevail on its claim merely by relying on the fact that the allegations in the underlying complaint do not eliminate all reasonable possibility of a sudden and accidental discharge of pollutants. Rather, the plaintiff must demonstrate a reasonable interpretation of the complaint that brings the claim within the sudden and accidental discharge exception." Schilberg, 819 A.2d at 788. Furthermore, the court expressly agreed with the Second Circuit's conclusion in Stamford Wallpaper Co. v. TIG Ins., 138 F.3d 75 (2d Cir. 1998) (applying Connecticut law), that "in order for the sudden and accidental [discharge] exception to apply, the allegations within the four corners of the complaint must raise the possibility that the event which caused the pollution-related property damage was sudden and accidental." Schilberg, 819 A.2d at 787 (quoting Stamford, 138 F.3d at 80). That the complaint may "not rule out" the possibility of a sudden and accidental discharge is not enough. Id.

B. The Referee's Ruling That Holsons Failed To Satisfy Their Burden Under Schilberg Was Correct And Should Be Sustained.

The Referee correctly concluded that the Holsons had not satisfied their burden under Schilberg. The KVL complaint plainly sought to recover damages on account of the release of contaminants at the Wilton site, so the pollution exclusion applies. As with the complaints at

[7] The Holsons' reliance (Motion at 8 n.2) on EDO Corp. v. Newark Ins. Co., 898 F. Supp. 952 (D. Conn. 1995), to undercut Schilberg is misplaced. The plaintiff in the Schilberg case relied on EDO, but the Connecticut Supreme Court rejected the EDO court's approach. Schilberg, 819 A.2d at 781 n.5.

issue in Schilberg and Stamford, the KVL complaint contains no allegations that reasonably raise the possibility that the event or events that caused the contamination at the Wilton site were in fact sudden and accidental. See Holsons Br., Ex. A (Appendix Tab 2). The complaint merely alleges that Holson manufactured photograph albums at the site from 1968 until 1988 (¶12); that contamination at the site is concentrated in areas surrounding several large underground concrete "vaults" connected to the building on the site through a network of underground piping, and that the vaults are constructed with pervious sidewalls designed to allow their contents to "leach" out into the surrounding soil (¶ 20); that a consultant concluded that "disposal practices" at the facility introduced solvent contaminated materials into the sump and vaults, which in turn resulted in contamination of soils and groundwater (¶ 22); that there has been a "release" of hazardous substances at the site (¶ 30); that there was "improper disposal" of the substances found around the vaults (¶ 44); that there were violations of environmental laws and/or standards at the site (¶ 51); and that there was "disposal or leakage" (sometimes alleged to be "improper") of hazardous substances at the site (¶¶ 57, 61, 62). The amended complaint is to the same effect.

These allegations do not suggest that the releases of contaminants were "sudden and accidental." As the Referee noted (Order at 7), the Holsons acknowledge – and acknowledge again in the motion – that the complaint "does not specify how the contamination occurred, at what point it occurred, or with what frequency it occurred. In other words, the allegations do not specify whether the contaminating event or events occurred over time or as a sudden event." Motion at 7; Holsons' Br. at 7 (Appendix Tab 2). The Referee found that there "is no specific allegation" of a sudden and accidental discharge, Order at 9, and the Holsons do not point to any such allegation now. In these circumstances, the Holsons' have not satisfied their burden of demonstrating "a reasonable interpretation of the complaint that brings the claim within the

sudden and accidental discharge exception." Schilberg, 819 A.2d at 788. The Holsons essentially ask the Court to infer the existence of a sudden and accidental discharge from the absence of an allegation foreclosing such a discharge. See Motion at 8 ("Perhaps most important, KVL did not limit its opportunity to recover to underlying events that did not fit the sudden and accidental definition . . . ."). As the Referee held (Order at 9-10), this is just the type of speculation that the Schilberg and Stamford courts found insufficient to require a defense in the face of a pollution exclusion. Accordingly, Home had no obligation to defend the KVL action.

The Holsons attempt to distinguish Schilberg on its allegedly "extraordinary" facts. Motion at 6. However, Schilberg is important not because of its facts but because the court looked to the allegations of the underlying complaint to see whether the insured had "satisfied its burden of proving the applicability of the sudden and accidental discharge exception." 819 A.2d at 785. The complaint there alleged that the policyholder had arranged for "treatment and disposal" of hazardous substances at the site. Id. at 785 n.7. The court concluded that "without more information detailing what the treatment of the insulated wire in the present case entails," the policyholder had not satisfied its burden. Id. So here, the allegations of "disposal or leakage" do not reasonably show a sudden and accidental discharge without more information, so the Holsons have not satisfied their burden of showing the case was within the exception.[8]

In sum, under Connecticut law, the insured has the burden of identifying allegations that affirmatively raise the possibility that the discharge was sudden and accidental. The Referee

---

[8] The Referee also held that Exclusion 2 does not require a defense where the pollution exclusion applies. Order at 10. The Holsons do not challenge this ruling in their motion.

correctly applied Schilberg, and the motion to recommit should be denied.[9]

CONCLUSION

For the reasons set forth above, the Holsons' motion to recommit should be denied.

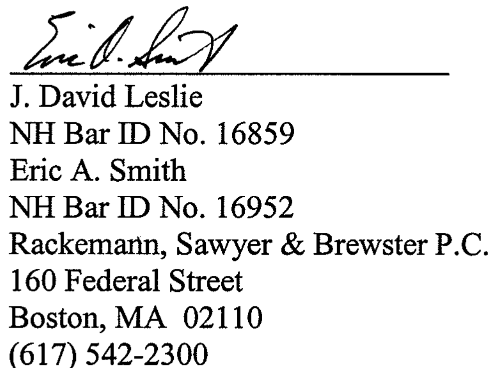
Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER OF INSURANCE OF THE STATE OF NEW HAMPSHIRE, SOLELY AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,

By his attorneys,

MICHAEL A. DELANEY
ATTORNEY GENERAL

J. Christopher Marshall
NH Bar ID No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650



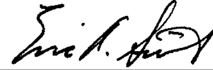
J. David Leslie
NH Bar ID No. 16859
Eric A. Smith
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110
(617) 542-2300

December 3, 2009

[9] As noted at page 5 n.5 above, the Home policies are excess policies such that even if the pollution exclusion did not apply Home could only be responsible for the costs of defense after the underlying primary policies have been exhausted by payment of claims. The Referee did not reach those issues, see Order at 10, and the Holsons have not briefed them in the motion to recommit. If the Court were to conclude that the Referee erred in applying the pollution exclusion, the matter should be recommitted so that the exhaustion issues may be determined.

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Objection to Claimant Sheldon Holson and Melvin Holson's Motion to Recommit was mailed, by first class mail, postage prepaid, on December 3, 2009 to the persons on the attached service list. The voluminous Appendix was mailed only to counsel for Holsons.



Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

In the Matter of the Liquidation of
US International Reinsurance Company
Docket No. 03-E-0112

SERVICE LIST

Lisa Snow Wade, Esq.
Orr & Reno
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550

Gary S. Lee, Esq.
James J. DeCristofaro, Esq.
Kathleen E. Schaaf, Esq.
Morrison & Foerster
1290 Avenue of the Americas
New York, New York 10104-0050

Pieter Van Tol, Esq.
Lovells
590 Madison Avenue
New York, New York 10022

Gail M. Goering, Esq.
Adam Goodman, Esq.
Eric Haab, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue, Suite 1900
Chicago, Illinois 60611

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachos
& Haley, PLLP
57 North Main Street
P.O. Box 1318
Concord, New Hampshire 03302-1318

George T. Campbell, III, Esq.
Robert A. Stein, Esq.
Robert A. Stein & Associates, PLLC
One Barberry Lane
P.O. Box 2159
Concord, New Hampshire 03302-2159

David M. Spector, Esq.
Dennis G. LaGory, Esq.
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

Michael Cohen, Esq.
Cohen & Buckley, LLP
1301 York Road
Baltimore, Maryland 21093

David H. Simmons, Esq.
Mary Ann Etzler, Esq.
de Beaubien, Knight, Simmons,
Mantzaris & Neal, LLP
332 North Magnolia Avenue
P.O. Box 87
Orlando, Florida 32801

Martin P. Honigberg, Esq.
Sulloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302-1256

Richard Mancino, Esq.
Willkie Farr & Gallagher, LLP
787 Seventh Avenue
New York, New York 10019

Joseph G. Davis, Esq.
Willkie Farr & Gallagher, LLP
1875 K Street, N.W.
Washington, DC 20006

Albert P. Bedecarre, Esq.
Quinn Emanuel Urguhart Oliver & Hedges, LLP
50 California Street, 22nd Floor
San Francisco, California 94111

Jeffrey W. Moss, Esq.
Morgan Lewis & Bockius, LLP
225 Franklin Street
16th Floor
Boston, Massachusetts 02110

Gerald J. Petros, Esq.
Hinckley, Allen & Snyder LLP
50 Kennedy Plaza, Suite 1500
Providence, Rhode Island 02903

Christopher H.M. Carter, Esq.
Hinckley, Allen & Snyder LLP
11 South Main Street, Suite 400
Concord, New Hampshire 03301

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION
DISPUTED CLAIMS DOCKET

In Re Liquidator Number:	**2008-HICIL-39**
Proof of Claim Number:	**INSU700645-01; INSU275296** **INSU700638; INSU700640** **INSU700641; INSU700624** **INSU700655; INSU700657** **INSU700658; INSU700659** **INSU700660; INSU700662**
Claimant Name:	**Sheldon Holson and Melvin Holson**
Claimant Number:	
Policy or Contract Number:	
Insured or Reinsured Name:	**Holson Company**
Date of Loss:	

ORDER ON THE MERITS

Sheldon Holson and Melvin Holson, Hereinafter "the Holsons," seek an Order that they are entitled to reimbursement from Home for defending claims against them and Holson Company brought by KVL, a full reimbursement of the amount paid by the Holsons to KVL, and attorneys fees incurred in the prosecution of this action. Home denies that it had a duty to defend or indemnify the Holsons or the Holson Company for the claims by KVL.

RELEVANT FACTS

Melvin and Sheldon Holson managed a business, the Holson Company. The Holson Company assembled and sold photo albums. In 1968, the company moved to a new facility in Wilton, Connecticut ("the site"). In 1986, the Holsons sold the Holson Company to an acquisition corporation that eventually sold the company to Intercraft Company. As part of the transaction, the Holsons received back the site. In 1989 the Holsons sold the site to K.V.L. Corporation (hereinafter "KVL"). Before the purchase, KVL hired an environmental consultant to inspect the site. KVL went through with the purchase. Sometime after the purchase, KVL decided to sell the site. In 1990, an inspection by a potential buyer noted some solvent contamination in an underground sump and in a concrete vault on the southern end of the site. Further investigation found groundwater contamination in the area.

In 1991, KVL sued the Holsons and the Holson Company. The Holsons and the Holson Company requested defense and indemnification from their primary insurers, The Travelers Indemnity Company ("Travelers") and Fireman's Fund Insurance Company ("Fireman's Fund"). The Holsons and Holson Company also notified Home on February 22, 1991, and asked Home to defend them.

Home had issued seven manuscript excess liability policies to the Holson Company which were in effect from 1973 to 1981 and provided varying limits of liability ranging from $3 million to $5 million excess of

scheduled primary policies. Home also issued insurance policies to Melvin Holson for the period November 10, 1972 to November 10, 1979 and to Sheldon Holson for the period November 10, 1973 to November 10, 1979.

Travelers and Fireman's Fund declined defense of the KVL action and the case was tried in federal court in Connecticut in 1995. The Holson Company brought a declaratory judgment action against Travelers and Fireman's Fund seeking defense and indemnification for the KVL action. In 1999, while the KVL action was still pending, Holson Company entered into confidential settlements with Fireman's Fund and Travelers. The May 1999 Travelers settlement included an agreement that the two cgl policies issued by Travelers for the 1979-1980 and 1980-1981 policy periods were "deemed to be exhausted." The settlement agreement with Fireman's Fund in August 1999 "bought back" the Fireman's Fund policies. These settlements did not end the KVL action. The settlement amounts were not used to pay KVL but rather used to defray the defense costs in the KVL action.

On August 3, 2000, a decision was issued in the KVL action against the Holsons on certain claims. One finding was that the Holsons made "fraudulent misrepresentations as alleged by KVL." In April 2001, the Court entered a partial judgment holding the Holsons liable for an amount in excess of $2 million. In September 2002, the Holsons reached a settlement with KVL that resolved the action for a payment of $612,500.

The Holsons' proof of claim seeks the settlement funds paid, $25,000 in future monitoring and remediation expenses, and $1,109,260.72 in defense expenses, less the proceeds of the settlements with Travelers and Fireman's Fund. The Holsons also seek "compensatory damages."

The Liquidator issued a notice of determination denying the claim on July 28, 2008 and the Holsons filed their objection on September 5, 2008.

The Home Insurance Policies

A schedule of the Home policies can be found in Liquidator's Exhibit 1. The first policies for the periods 1973 to 1976 provide they are excess of a Federal Insurance Company cgl policy with $50,000 property damage limit. The 1976-1980 Home policies provide they are excess of Fireman's Fund cgl policies with a $100,000 limit. The 1980-1981 Home policy schedules provide the policy is excess of a Travelers CGL policy with a $100,000 limit.

The Home policies are manuscript policies. The Insuring Agreement of the Home policy effective August 12, 1977 through August 12, 1981 states:

> With respect to any occurrence not covered by the underlying policies listed on Endorsement 1 hereof or any underlying insurance collectible by the insured, but which is covered by the terms and conditions of this policy...the Company shall:
>
> (a) Defend any suit against the insured alleging injury or destruction and seeking damages on account thereof, even if such suit is

groundless, false or fraudulent and the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient provide, however, that the settlement of any claim or suit within the retained limit shall be with the consent of the insured;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without obligation to apply for or furnish any such bonds;

(c) pay all expenses incurred by the Company, all cost taxed against the insured in any such suit, all interest occurring after entry of judgment until the Company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon;

(d) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request.

The amount so incurred, except settlement or satisfaction of claims and suits, are payable by the Company in addition to the applicable limit of liability of this policy...

Coverage afforded under this Insuring Agreement shall not apply to defense, investigations, settlement of legal expenses covered by underling insurances.

Endorsement 2 of the Home policies in effect after August 12, 1977 states:

With respect to any occurrence not covered by the underlying policies listed on Endorsement 1 hereof or any underlying insurance collectible by the insured, but which is covered by the terms and conditions of this policy...the Company shall:

(a) defend any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent and the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient provided, however, that the settlement of any claim or suit within the retained limit shall be with the consent of the insured;....

Those policies contain a Limit of Liability provision that states that Home:

Home shall only be liable for the ultimate net loss the excess of either (a) the limits of the underlying insurances as set out in the attached

schedule in respect of each occurrence covered by said underlying insurances; or (b) [$10,000][1] ultimate net loss in respect of each occurrence not covered by underlying insurances, (hereinafter called the 'underlying limits').

The Loss Payable clause provides:

> Liability under this policy with respect to any occurrence shall not attach unless and until the Insured, or the Insureds underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence. The Insured shall make a definitive claim for any loss for which the Company may be liable under the policy within twelve (12) months after the Insured shall have paid an amount of ultimate net loss in excess of the amount borne by the Insured or after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and The Company. If any subsequent payment shall be made by the Insured on account of the same occurrence, additional claims shall be made similarly from time to time. Such losses shall be due and payable within thirty (30) days after they are respectively claimed and proven in conformity with this policy.

The Home policies also contain a pollution exclusion. By endorsement that exclusion is for coverage for pollution claims unless they arise from a "sudden and accidental" release. The endorsement also provides that pollution coverage under the policies is no broader than that provided by the scheduled underlying policies by stating:

> It is agreed that the 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 gases, waster materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.
>
> It is further understood and agreed that in no event shall coverage provided by this policy for Contamination or Pollution be broader than that provided by the Underlying Insurances set forth in the Schedule of Underlying Insurances.

The Home policies define "Ultimate Net Loss" as:

[1] The $10,000 amount is specified in an policy endorsement.

> [T]he total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses, investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which re paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying insurer's permanent employees.
>
> * * *
>
> The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

Condition H of the policies provides:

> The Company shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured by The Company shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of and claim, suit, or proceeding relative to an occurrence where the claim or suit involves or appears reasonably likely to involved The Company, in which event the Insured and The Company shall cooperate in all things in the defense of such claim, suit or proceeding.

The policies also require that the Insured maintain the underlying policies in full effect, except for payment of claims. Condition Q provides:

> It is a condition of this policy that the policy or policies referred to in the attached "schedule of Underlying Insurances" shall be maintained in full effect during the currency of this policy except for any reduction of the aggregate limit or limits contained therein solely by payment of claims un respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Insured to comply with the foregoing shall not invalidate this policy but in the event of such failure, the Company shall only be liable to the same extent as they would have been had the Insured complied with the said condition.

LEGAL ANALYSIS[2]

The Holsons assert that Home had a duty to defend them in the suit brought by KVL. The Holsons assert the duty to defend is based on the language of Endorsement 2 and the fact that the underlying insurers, Travelers and Fireman's Fund, denied a duty to defend under their policies. In addition, the Holsons argue that the settlements with Travelers and Fireman's Fund also triggered a duty to defend on the part of the Home. The Holsons also assert that they have met their burden to demonstrate that the sudden and accidental exception to the pollution exclusion does not apply because there are allegations in the KVL Complaint that demonstrate the possibility that the pollution was caused by a sudden and accidental event.

Home argues that it had no duty to defend the Holsons or Holson Company because the claims against them by KVL were excluded by the pollution exclusion because the Holsons did not demonstrate that the claims by KVL arose as the result of pollution that was sudden and accidental. Home further asserts that because the pollution exclusion applies, Endorsement 2 is inapplicable in this case. Home also argues that it has no duty to defend pollution claims because the Home policies were excess above the scheduled underlying insurance and Endorsement 2 does not apply because the pollution exclusion endorsement provides that coverage for pollution claims will be no broader than that provided by the underlying policies. Home contends because those policies have not been exhausted by payment as required to trigger the Home coverage, since refusal by the underlying insurers to defend and settlements with those underlying insurers for partial defense costs do not satisfy the exhaustion requirement. Finally Home asserts the policies do not include a duty to indemnify the Holsons because of the pollution exclusion and the allocation of the settlement amount across the many years of primary coverage.

Under Connecticut law, and that of other jurisdictions, the duty to defend is broader than the duty to indemnify. According to the Supreme Court of Connecticut, if an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured. *Community Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co.*, 757 A.2d 1974 (Conn.2000). Whether the duty to defend exists is based on the facts as alleged in the four corners of the complaint, not those ultimately established at trial. *Stamford Wallpaper Company v. TIG Insurance*, 138 F.3d 75 (2nd Cir. 1998). If one claim of the underlying action is covered by the policy, there is a duty to defend. *Id.*

I. The Holsons Have Not Demonstrated that the Sudden and Accidental Exception to the Pollution Exclusion Applies.

The duty to defend extends to claims that fall within the coverage afforded by the terms of the policy. Home alleges that the sudden and accidental pollution exclusion eliminates all coverage for the claims by KVL under the Home policy, including the duty to defend. The pollution exclusion excludes from coverage suits arising from the discharge, dispersal, release or escape of pollutants into or upon land, the atmosphere, or any watercourse or body of water. However, the exclusion excepts from its

[2] The parties agree that the law of Connecticut applies to the interpretation of the insurance policies in this case. The Referee agrees and therefore analyzes the obligations of Home based on Connecticut law.

elimination of coverage any such discharge, dispersal, release or escape that is sudden and accidental. The terms "sudden" and "accidental" have been defined by the Connecticut Supreme Court in the context of the pollution exclusion. In *Buell Industries, Inc. v. Greater New York Mutual Ins. Company, et al*, 259 Conn. 527, 791 A.2d 489 (2002), the Supreme Court of Connecticut held that the meaning of "sudden" is a temporal one and "requires the release in question occur in a rapid or otherwise abrupt manner."

Generally, when determining whether there is a duty to defend, the burden is on the insurance company to demonstrate that the claim does not fall within the grant of coverage. However, in the case of the sudden and accidental pollution exclusion, the insureds are seeking coverage under an exception to the exclusion. Therefore, it is the Holsons who have the burden to demonstrate that the claims fall within the coverage afforded by the policy. *Buell* 259 Conn. at 551; 791 A.2d at 504. In other words, the Holsons have the burden to demonstrate that the facts in the underlying KVL complaint at least allege a sudden and accidental event that led to the damages claims by KVL at the Site. If the claims against the insured allege any facts that even possibly fall within the coverage terms, there is a duty to defend. *Community Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co.*, 254 Conn. 387, 399, 757 A. 2d 1074, 1081 (2000).

The Holsons assert that they have met their burden. They point to the allegations in the KVL Complaint of "severe environmental contamination on the site, concentrated in but not limited to the areas surrounding several large underground concrete vaults which are adjacent and connected to the building on the Site through a network of underground piping." The Complaint alleges that the contamination resulted from disposal practices at the facility which introduced contaminants into the sump and vaults 1 and 2 and which in turn resulted in contamination of soils and groundwater. According to the Complaint, the contamination was the result of negligence or other actions on the part of the Holson Company and the Holsons individually. The Holsons acknowledge the Complaint does not specify how the contamination itself occurred, at what point it occurred, or with what frequency it occurred. They also agree the allegations do not specify whether the contaminating event or events occurred over time or as a sudden event. Thus, the Holsons argue that the allegations do no foreclose an accident or a sudden release of contaminants. Therefore, given the broadest reading of the exclusion, the Holsons argue that the allegations do no eliminate the possibility that the exclusion may not apply to the particular facts developed in the KVL action. The Holsons assert that a reasonable interpretation of the substance of the allegations in the KVL Complaint is that there was a possibility that the discharge was sudden and accidental.

Home asserts the Holsons have not satisfied their burden to demonstrate that the allegations of the KVL complaint fall within the exception to the pollution exclusion. Home asserts that there are no allegations of pollution due to occurrences that were both sudden and accidental. [3]

---

[3] Home also asserts it has not duty to indemnify the Holsons because of the Court's finding that the Holson's made fraudulent misrepresentations to procure the sale to KVL. Connecticut law does not allow insurers to "look back" to the ultimate findings by the Court. Rather, it requires that the

The Supreme Court of Connecticut has discussed the burden of proof related to the sudden and accidental exception to the pollution exclusion in *Buell.* Buell discovered contamination on two sites at which it had undertaken manufacturing. At each site, there was contamination. Buell sought insurance coverage for claims against arising from the pollution from its insurers. The Supreme Court first found that the term "sudden" is not ambiguous and is defined as having a temporal quality and requiring a quick or abrupt release. *Buell* 259 Conn. at 541; 791 A.2d at 498-99. The Court then undertook an extensive analysis of the issue of burden of proof that the sudden and accidental exception to the pollution exclusion applies to allow for coverage. First, the Supreme Court stated "[i]n the context of these comprehensive general liability policies, the burden properly rests with the insured to prove that the "sudden and accidental" exception is applicable." *Buell* 259 Conn. at 551; 791 A.2d at 504. Next the Court reviewed the Complaint and determined that the pleading did not include allegations of sudden and accidental releases of pollutants.

The Supreme Court then reviewed the evidence presented in the underlying case and found that the insured had not met its burden. The insured asserted that the contamination at one site could have been the result of an abrupt release of TCE caused by a malfunction in the degreasing machine. The insured alleged this type of malfunction "would result in a large release of TCE to the lagoon equivalent to punching a hole in the degreaser and allowing 500 gallons of TCE to pour out." However, the Court found no evidence submitted by the insured to suggest that an event like this had occurred. The insured did not present evidence that an abrupt release had occurred but instead cited evidence to show that normal operating procedures would not result in the release of TCE to the lagoon. The Supreme Court found this was not enough to meet the burden of proof that the release of pollutants fell within the exception to the exclusion. *Buell* 259 Conn. at 553; 791 A.2d at 505. The same reasoning applied to the insured's claims as to the second site.

The Supreme Court of Connecticut did another analysis of the duty to defend under the sudden and accidental exception to the pollution exclusion in *Schilberg Integrated Metals Corporation v. Continental casualty Company, et al.,* 263 Conn. 245, 819 A.2d 773 (2003). In that case, Schilberg sued its insurers after they denied a defense in an administrative action brought by the Pennsylvania Department of Environmental Resources ("the Department"). Schilberg had arranged for treatment and disposal of waste from its scrap metal processing in a landfill in Pennsylvania. In 1988, the Department took remedial action related to significant contamination at the landfill site. The Department filed an action against several parties including Schilberg seeking remediation costs.

---

determination of the insurer's duties is based on the four corners of the Complaint. *Stamford Wallpaper Company v. TIG Insurance,* 138 F.3d 75 (2nd Cir. 1998). Therefore, the Referee does not consider this argument.

Schilberg requested defense from its insurers, who declined. The policies issued to Schilberg prior to 1985 included pollution exclusions with the sudden and accidental exception. The language of those exclusions is identical to that at issue in this case.

The Supreme Court of Connecticut first confirmed that the insured had the duty to show the exception from the exclusion applied to provide coverage. *Schilberg* 263 Conn. at 256; 819 A.2d at 782. According to the Court, if an allegation of a complaint falls even possibly within the coverage then the insurance company must defend the insured. *Schilberg* 263 Conn. at 256-57; 819 A.2d at 783. The relevant inquiry is "not whether the substance of [the complaint] rules out the possibility of a sudden and accidental discharge...but rather whether the [insured] has demonstrated that a reasonable interpretation of the substance of the department's allegations potentially would bring the claims within the purview of the sudden and accidental discharge exceptions in the policies." *Schilberg* 263 Conn. at 259; 819 A.2d at 784. To determine whether the underlying complaint can be read as even potentially bringing the claim within the sudden and accidental exception to the exclusion, a court "should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable by tortured and unreasonable. *Id.*, citations omitted.

The Supreme Court then reviewed Schilberg's arguments that the exception to the pollution exclusion applied. Schilberg argued that the allegation that it "began arranging for treatment of hazardous waste" left open the possibility of a sudden and accidental discharge. The Supreme Court disagreed. Schilberg also presented a hypothetical scenario involving the possibility of sudden and accidental discharges based on the economic incentives to remove all processing by-products from the site. The Supreme Court refused to "speculate as to an occurrence that finds no reasonable basis in the...allegations [in the underlying complaint." *Schilberg,* 263 Conn. at 262; 819 A.2d at 786.

In this case, the Holsons point out that the KVL complaint alleges the contamination resulted from disposal practices at the facility which introduced contaminants into the sump and vaults 1 and 2 and which in turn resulted in contamination of soils and groundwater. The Holsons argue that the specific allegations in the Complaint do not foreclose accidental or sudden release of contaminants and that they are entitled to the broadest reading of the exclusion. Although the Holsons acknowledge the Complaint does not specify how the contamination itself occurred, at what point it occurred, or with what frequency it occurred they assert that a reasonable interpretation of the substance of the allegations in the KVL Complaint is that there was a possibility that the discharge was sudden and accidental.

The Supreme Court of Connecticut has made clear the burden on an insured seeking to demonstrate a duty to defend based on the sudden and accidental exception to the pollution exclusion in *Buell* and *Schilberg*. Although the facts reviewed by the Supreme Court in *Schilberg* differ from those in this case, the test set forth by the Court is clear. Based on the Supreme Court's reasoning in these cases, the Holsons assertions are not enough to demonstrate that the sudden and accidental exception to the pollution exclusion applied based on the allegations in the KVL complaint. There is no specific allegation of such a dispersal, release or escape of pollutants. To find one would require the kind of speculation

the Supreme Court specifically refused to undertake. The claims do not fall within the sudden and accidental exception to the pollution exclusion.

II. Endorsement 2 Does Not Expand Home's Duty to Defend the Holsons

The Holsons also argue that they are entitled to defense from Home based on the language of Endorsement 2 for policies with periods beginning after August 12, 1977. They assert that Endorsement 2 applies because the occurrences alleged by KVL were not covered by the underlying policies but are covered by the terms of the Home policies. The Holsons argue that the claims were not covered by the underlying insurers because the claim was over $25 million and therefore well in excess of the limit per occurrence of the Travelers and Fireman's Fund policies. In addition, the Holsons argue that because Travelers and Fireman's Fund refused to defend, the Home's duty to do so was triggered.

Home asserts that the duty to defend language in the "Defense Settlement" provision of Endorsement 2 is inapplicable because the pollution exclusion eliminates coverage for the claims by KVL. The pollution exclusion specifically states that "in no event shall coverage provided by this policy for Contamination or Pollution be broader than that provided by the Underlying Insurances set forth in the Schedule of Underlying Insurances." Home asserts that this language means Home provides no independent coverage for pollutions claims, but only follows the coverage provided by the primary policy. Therefore, the Defense Settlement provision for claims not covered by underlying insurance but covered by the Home policy does not extend to pollution claims.

The Referee has found that the pollution exclusion eliminates a duty to defend Holsons for the claims by KVL. Therefore, the claims by the Holsons are not claims that are covered by the terms and conditions of the Home policy. For this reason, Endorsement 2 does not apply.

The Referee need not reach the issue of whether there is a duty to defend because the claims in the KVL action exceeded the limits of the primary insurance, or because the underlying policies were exhausted based on the settlement agreements. The finding that there was no duty to defend based on the pollution exclusion makes those arguments moot. In fact, during oral argument the Holsons acknowledged that if there is no coverage for the claims by KVL because they are not sudden and accidental, then Endorsement 2 does not provide a duty to defend by Home.

CONCLUSION

For the reasons set forth above, the Referee finds that Home did not have a duty to defend the Holsons for the claims brought by KVL. The Referee sustains the Liquidator's determination denying the Holsons' claims.

So ordered.

11/5/09
Dated

Melinda S. Gehris, Referee

SCHILBERG INTEGRATED METALS CORPORATION v. CONTINENTAL CASUALTY COMPANY ET AL.

(SC 16729)

SUPREME COURT OF CONNECTICUT

263 Conn. 245; 819 A.2d 773; 2003 Conn. LEXIS 142; 33 ELR 20178

October 22, 2002, Argued
April 22, 2003, Officially Released

PRIOR HISTORY: [***1] Action to recover damages for breach of general liability insurance contracts issued by the defendants as a result of the defendants' refusal to defend the plaintiff in an administrative action brought against the plaintiff alleging environmental contamination at a certain site, and for other relief, brought to the Superior Court in the judicial district of New Britain, Complex Litigation Docket, where the court, Aurigemma, J., denied the plaintiff's motion for summary judgment, granted the defendants' motion for summary judgment and rendered judgment thereon in favor of the defendants, from which the plaintiff appealed.
Schilberg Integrated Metals v. Cont'l Cas. Co., 2001 Conn. Super. LEXIS 1082 (Conn. Super. Ct., Apr. 17, 2001)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant insured appealed from the denial of its motion for summary judgment, from the grant of summary judgment for appellee insurers, and from the entry of judgment for the insurers by the Superior Court in the Judicial District of New Britain, (Connecticut). The appeal was transferred to the state's highest court pursuant to Conn. Gen. Stat. § 51-199(c) and Conn. Gen. Prac. Book, R. App. Ct. § 65-2.

OVERVIEW: The insured contended that the insurers were required to defend it in an administrative action for environmental violations. The state's highest court held that the insured failed to meet its burden of proving the applicability of the sudden and accidental discharge exception to the pollution exclusion clauses. The insured failed to allege a reasonable possibility that its liability was based on the sudden or accidental discharge of hazardous substances. The absolute pollution exclusion clauses in the policies not containing the sudden and accidental discharge exceptions were clear and unambiguous. There was no evidence that the insured did not get what it bargained for when it contracted with the insurers. The clear and unambiguous language of the absolute pollution exclusion clauses excluded coverage for any liability that the insured might incur in connection with its discharge of pollutants at the site. The insured failed to timely specially plead its allegation that the policies had not been properly approved by the state authorities. Any error in the denial of the insured's motion to compel discovery of documents relating to the drafting of the policies was harmless.

OUTCOME: The judgment was affirmed.

CORE TERMS: pollution, sudden and accidental, exclusion clause, coverage, insured's, summary judgment, pollutant, site, special defense, insurance policies, quotation marks omitted, duty to defend, insurer, present case, reply, hazardous substances, applicability, disposal, business activity, failure to file, administrative action, recycling, property damage, burden of proving, unambiguous, wire, policies issued, reasonable possibility, insurance commissioner, issue of material facts

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1]Summary judgment shall be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The scope of appellate review depends upon the proper characterization of the rulings made by the trial court. When the trial court draws conclusions of law,

appellate review is plenary and the appellate court must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record.

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN2]In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. The party seeking summary judgment has the burden of showing the absence of any genuine issue of material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact.

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN3]Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact, a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court in support of a motion for summary judgment.

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview
[HN4]When a policy contains an exception within an exception, the insurer need not negative the internal exception; rather, the insured must show that the exception from the exemption from liability applies.

Insurance Law > General Liability Insurance > Exclusions > Pollution
Insurance Law > General Liability Insurance > Obligations > Defense
Insurance Law > Property Insurance > Exclusions > Pollution > Sudden & Accidental Exception
[HN5]When a complaint in an action states a cause of action against the insured which appears to bring the claimed injury within the policy coverage, it is the contractual duty of the insurer to defend the insured in that action. If the complaint, however, alleges a liability which the policy does not cover, the insurer is not required to defend.

Evidence > Procedural Considerations > Burdens of Proof > Allocation
Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend
Insurance Law > General Liability Insurance > Obligations > Defense
[HN6]As the insured has the burden of proving the applicability of the sudden and accidental discharge exception in the context of the duty to indemnify, the appellate court can discern no reason as to why the insured should not shoulder that burden in the context of the duty to defend. The policy reasons underlying the allocation of the burden of proof that were announced in Buell apply with equal force in the context of the duty to defend.

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend
Insurance Law > General Liability Insurance > Coverage > General Overview
Insurance Law > General Liability Insurance > Obligations > Defense
[HN7]An insurer's duty to defend is broader than its duty to indemnify. The distinction between the duty to defend and the duty to indemnify can be attributed to the fact that, if an allegation of a complaint falls even possibly within the coverage, then the insurance company must defend the insured. In contrast to the duty to defend, the duty to indemnify depends upon the facts established at trial and the theory under which judgment is actually rendered in the case.

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend
Insurance Law > General Liability Insurance > Obligations > Defense
[HN8]It is well settled that an insurer's duty to defend is determined by reference to the allegations contained in the underlying complaint. If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured.

Insurance Law > Claims & Contracts > Policy Interpretation > Exclusions
Insurance Law > Property Insurance > Exclusions > Pollution > Burdens of Proof
Insurance Law > Property Insurance > Exclusions > Pollution > Sudden & Accidental Exception
[HN9]Once an insurer has satisfied its burden of establishing that the underlying complaint alleges damages attributable to the discharge or release of a pollutant into the environment, thereby satisfying the basic requirement for application of the pollution coverage exclusion provision, the burden shifts to the insured to demonstrate a reasonable interpretation of the underlying complaint potentially bringing the claims within the sudden and accidental discharge exception to exclusion of pollution coverage, or to show that extrinsic evidence exists that the discharge was in fact sudden and accidental.

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend
Insurance Law > Property Insurance > Exclusions > Pollution > Burdens of Proof
Insurance Law > Property Insurance > Exclusions > Pollution > Sudden & Accidental Exception
[HN10]An insured does not satisfy its burden of proving the applicability of the sudden and accidental discharge exception by the assertion of conclusory statements, or reliance on mere speculation or conjecture as to the true nature of the facts. In determining whether the underlying complaint can be read as even potentially bringing the claim within the sudden and accidental discharge exception to the exclusion of pollution coverage, a court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable but tortured and unreasonable.

Environmental Law > Hazardous Wastes & Toxic Substances > Transportation
Environmental Law > Hazardous Wastes & Toxic Substances > Treatment, Storage & Disposal
[HN11]See Pa. Stat. Ann. tit. 35, § 6020.103 (1993).

Insurance Law > General Liability Insurance > Exclusions > Pollution
[HN12]An insured may not rely on mere speculation to establish the applicability of the sudden and accidental discharge exception.

Insurance Law > General Liability Insurance > Exclusions > Pollution
Insurance Law > Property Insurance > Exclusions > Pollution > General Overview
[HN13]In order for the sudden and accidental discharge exception to apply, the allegations within the four corners of the complaint must raise the possibility that the event which caused the pollution-related property damage was sudden and accidental.

Insurance Law > General Liability Insurance > Exclusions > Pollution
Insurance Law > Property Insurance > Exclusions > Pollution > General Overview
[HN14]The plaintiff cannot prevail on its claim that the sudden and accidental discharge exception requires an insurer to defend it in an administrative proceeding merely by relying on the fact that the allegations in the underlying complaint do not eliminate all reasonable possibility of a sudden and accidental discharge of pollutants. Rather, the plaintiff must demonstrate a reasonable interpretation of the complaint that brings the claim within the sudden and accidental discharge exception.

Insurance Law > General Liability Insurance > Exclusions > Pollution
Insurance Law > Property Insurance > Exclusions > Pollution > General Overview
[HN15]For a discharge of pollutants to be a covered event under an insurance policy, it must be both sudden and accidental. If one or the other of these conditions is absent, then the discharge is not a covered incident.

Insurance Law > Claims & Contracts > Policy Interpretation > Exclusions
Insurance Law > Claims & Contracts > Policy Interpretation > Ordinary & Usual Meanings
[HN16]The terms of an insurance policy are to be construed according to the general rules of contract construction. The determinative question is the intent of the parties, that is, what coverage the insured expected to receive and what the insurer was to provide, as disclosed by the provisions of the policy. If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. However, when the words of an insurance contract are, without violence, susceptible of two equally responsible interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. This rule of construction favorable to the insured extends to exclusion clauses.

Insurance Law > Claims & Contracts > Policy Interpretation > Plain Language
[HN17]Connecticut jurisprudence makes clear that although ambiguities are to be construed against the insurer, when the language is plain, no such construction is to be applied. Indeed, courts cannot indulge in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties.

Insurance Law > Industry Regulation > Policy Forms > General Overview
[HN18]See Conn. Gen. Stat. § 38a-676.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Insurance Law > General Liability Insurance > Exclusions > Pollution
Insurance Law > Property Insurance > Exclusions > Pollution > General Overview
[HN19]See Conn. Gen. Prac. Book, R. Super. Ct. § 10-57.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN20]The appellate court previously has afforded trial courts discretion to overlook violations of the rules of practice and to review claims brought in violation of those rules as long as the opposing party has not raised a timely objection to the procedural deficiency. A defendant's failure to file special defense in violation of rules of practice does not preclude consideration of that defense when plaintiffs fail to object. It necessarily follows, therefore, that, when a party properly objects to a violation of the rules of practice, the trial court may disregard the improperly raised claim if doing so is not an abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN21]When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. Furthermore, the appellate court has stated in other contexts in which an abuse of discretion standard has been employed that it will rarely overturn the decision of the trial court.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Governments > Legislation > Statutes of Limitations > Pleading & Proof
Insurance Law > General Liability Insurance > Exclusions > Pollution
[HN22]Conn. Gen. Prac. Book, R. Super. Ct. § 10-57 requires a plaintiff specially to plead its claim concerning the defendants' failure to file the pollution exclusion clauses in a reply to the defendants' special defenses.

Civil Procedure > Pleading & Practice > Pleadings > Time Limitations > General Overview
[HN23]Pursuant to Conn. Gen. Prac. Book, R. Super. Ct. § 10-8, a party has 15 days to file a reply to special defenses.

Civil Procedure > Pleading & Practice > Pleadings > Time Limitations > General Overview
[HN24]See Conn. Gen. Prac. Book, R. Super. Ct. § 10-8.

Insurance Law > Claims & Contracts > Policy Interpretation > General Overview
Insurance Law > General Liability Insurance > Exclusions > Pollution
Insurance Law > Property Insurance > Exclusions > Pollution > Sudden & Accidental Exception
[HN25]Once the appellate court determines that the language of an insurance policy is subject to only one reasonable interpretation, it declines to look at drafting history. Because the appellate court will not create ambiguity where none exists, reference to extrinsic documentation such as drafting history is inappropriate.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview
Evidence > Documentary Evidence > Parol Evidence
Insurance Law > Claims & Contracts > Policy Interpretation > Parol Evidence > General Overview
[HN26]The appellate court's decision not to refer to extrinsic documentation such as drafting history when the language in a contract is clear and unambiguous is dictated by the parol evidence rule. The parol evidence rule is not a rule of evidence, but a substantive rule of contract law. The rule is premised upon the idea that when the parties have deliberately put their engagements into

writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversations, or circumstances, or usages in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme.

Contracts Law > Contract Interpretation > Parol Evidence > General Overview
Evidence > Documentary Evidence > Parol Evidence
Evidence > Relevance > Parol Evidence
[HN27]The parol evidence rule does not of itself, therefore, forbid the presentation of parol evidence, that is, evidence outside the four corners of the contract concerning matters governed by an integrated contract, but forbids only the use of such evidence to vary or contradict the terms of such a contract. Parol evidence offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant.

Contracts Law > Defenses > Ambiguity & Mistake > General Overview
Contracts Law > Defenses > Fraud & Misrepresentation > General Overview
Contracts Law > Remedies > Equitable Relief > General Overview
[HN28]By implication, parole evidence may still be admissible if relevant: (1) to explain an ambiguity appearing in the instrument; (2) to prove a collateral oral agreement which does not vary the terms of the writing; (3) to add a missing term in a writing which indicates on its face that it does not set forth the complete agreement; or (4) to show mistake or fraud. These recognized exceptions are, of course, only examples of situations in which the evidence: (1) does not vary or contradict the contract's terms; (2) may be considered because the contract has been shown not to be integrated; or (3) tends to show that the contract should be defeated or altered on the equitable ground that relief can be had against any deed or contract in writing founded in mistake or fraud.

COUNSEL: Brian P. Daniels, with whom was John R. Bashaw, for the appellant (plaintiff).

Joel M. Fain, with whom, on the brief, was Erich H. Gaston, for the appellees (defendants).

Daniel P. Scapellati, John B. Farley, Laura A. Foggan, pro hac vice, and John C. Yang, pro hac vice, filed a brief for the Insurance Environmental Litigation Association as amicus curiae.

JUDGES: Sullivan, C. J., and Borden, Katz, Palmer and [***2] Zarella, Js. In this opinion the other justices concurred.

OPINION BY: ZARELLA

OPINION

[**777] [*247] ZARELLA, J. This appeal arises from a dispute over whether various insurance policies issued by the defendant insurers required them to defend the plaintiff insured in an administrative action brought by the Pennsylvania department of environmental resources (department). The plaintiff, Schilberg Integrated Metals Corporation, brought this action against the defendants, Continental Casualty Company, Transportation Insurance Company and Valley Forge Insurance Company (defendants), seeking, inter [**778] alia, damages for breach of contract after the defendants had declined to provide the plaintiff with a defense in an administrative action brought by the department against the plaintiff. Both the plaintiff and the defendants filed separate motions for summary judgment. The trial court denied the plaintiff's motion, granted the defendants' motion and rendered judgment in favor of the defendants, from which the plaintiff appealed. We affirm the judgment of the trial court.

The record discloses the following undisputed facts and procedural [***3] history. The plaintiff is a Connecticut corporation that specializes in scrap copper processing and recovery of metal from insulated wire. In December, 1981, the plaintiff, in conjunction with Phillip Cardinale, arranged for the treatment and disposal of waste containing hazardous substances at a site located in the state of Pennsylvania (site) at which Cardinale had maintained an unauthorized scrap, wire and metal reclamation and waste disposal facility. The arrangement between the plaintiff and Cardinale involved the removal of insulated wire from the plaintiff's Connecticut [*248] facility, the processing of the wire at Cardinale's facility in Pennsylvania, and the return of residual copper derived from the processed wire to the plaintiff. The processing of the insulation from the wires resulted in the release of hazardous substances at the site.

In 1988, an inspection of the site revealed significant contamination to the on-site soil. [1] In light of the inspection results, the department took various remedial actions pursuant to its authority under the Pennsylvania Hazardous Sites Cleanup Act (act), Pa. Stat. Ann. tit. 35, § 6020.101 et seq. The department filed an administrative

[***4] action against several parties, including the plaintiff, seeking reimbursement for the remediation costs it had incurred in connection with its cleanup efforts. The plaintiff, in turn, requested that the defendants, pursuant to the various insurance policies that they had issued to the plaintiff, provide a defense to the department's action. The defendants declined the plaintiff's request.

1 The site investigation also revealed the presence of hazardous waste in several residential wells situated around the contaminated site.

The provisions of the insurance policies on which the plaintiff bases its claim can be summarized as follows. From 1981 to 1985, the defendants issued to the plaintiff policies containing three types of insurance coverage: comprehensive general liability coverage; umbrella coverage; and excess coverage. Pursuant to those policies, the defendants agreed to provide coverage for any losses sustained as the result of bodily injury or property damage. Furthermore, each of the policies required [***5] each defendant to defend the plaintiff in any action seeking damages for bodily injury or property damage, regardless of the merits of the claim. Coverage under the policies was limited, however, by a pollution exclusion clause, which excluded from coverage any claims arising from the discharge of pollutants. The pollution [*249] exclusion clause itself was limited by an exception for "sudden and accidental" occurrences. Under this exception, coverage under the policy is not excluded if the discharge of pollutants is "sudden and accidental . . . ." [2]

2 The pollution exclusion clause that includes the exception for sudden and accidental occurrences provides in relevant part: "[Coverage under the policy is excluded for] *Bodily Injury* or *Property Damage* arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials 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 . . . ."

[***6] [**779] Insurance policies issued to the plaintiff by the defendants after 1985 did not include an exception for sudden and accidental occurrences. Rather, the policies issued after 1985 contained an absolute pollution exclusion clause that excluded from coverage any bodily injury or property damage arising out of the discharge of pollutants, regardless of the manner of discharge. [3]

3 The policies containing the absolute pollution exclusion clause excluded coverage for: "'Bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

"(a) At or from premises you own, rent or occupy;

"(b) At or from any site or location used by or for you or others for the handling, storage, disposal, processing or treatment of waste;

"(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

"(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

"(i) if the pollutants are brought on or to the site or location in connection with such operations; or

"(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

"(2) Any loss, costs, or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

[***7] [*250] In response to the defendants' refusal to defend the plaintiff, the plaintiff filed this action against the defendants alleging, inter alia, breach of contract. The defendants filed an answer in which they denied all legal claims and asserted, by way of a special

defense, that "there is no coverage for the plaintiff's claims by reason of the pollution exclusions contained in any applicable policy of insurance."

Both the plaintiff and the defendants filed separate motions for summary judgment. In their respective motions, the parties asserted that they were entitled to judgment as a matter of law on the basis of the nature of the allegations asserted by the department in its administrative action against the plaintiff and the substance of the provisions contained in the insurance policies. Specifically, the defendants claimed that the pollution exclusion clauses in the policies did not obligate the defendants to provide a defense for the plaintiff in the department's administrative action. The plaintiff claimed, to the contrary, that the nature of the allegations underlying the department's action against the plaintiff did not eliminate the possibility of coverage and, [***8] therefore, that the defendants were obligated to provide a defense. In its motion, the plaintiff also sought summary judgment as to the defendants' special defenses. [4] The trial court granted the defendants' motion for summary judgment and rendered judgment thereon, concluding that, as a matter of law, the allegations underlying the department's administrative action against the plaintiff fell within the purview of the pollution exclusion [**780] clauses contained in the insurance policies [*251] issued by the defendants and that, consequently, the defendants had no duty to defend the plaintiff. The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

4 The defendants asserted a total of eleven special defenses. In addition to the special defense based on the existence of the pollution exclusion clauses in the policies, the defendants also alleged, inter alia, that the plaintiff's claims were barred by the doctrine of collateral estoppel and the known loss doctrine, and that the policies at issue were rendered void by virtue of the plaintiff's allegedly wilful concealment or misrepresentation. None of these additional special defenses is at issue in this appeal.

[***9] The sole issue in this appeal is whether the defendants were required to defend the plaintiff in the department's administrative action pursuant to the terms of the various insurance policies issued by the defendants to the plaintiff. The plaintiff advances several arguments in support of its contention that the trial court improperly granted the defendants' motion for summary judgment. The plaintiff argues, first, that the trial court improperly concluded that the defendants' duty to defend was not triggered under the policies containing the sudden and accidental discharge exception to the pollution exclusion clauses. Second, the plaintiff argues that the trial court improperly concluded that the absolute pollution exclusion clauses precluded coverage when the discharge of pollutants resulted from the plaintiff's central business activity. Third, the plaintiff argues that, owing to the defendants' failure to file the pollution exclusion clauses with the appropriate regulatory body, the trial court improperly granted summary judgment in favor of the defendants on the basis of the substance of those clauses. Finally, the plaintiff argues that the trial court improperly denied its motion [***10] to compel discovery of certain documents pertaining to the drafting of the policies at issue in order to establish that the policy language was susceptible to more than one interpretation. We address, and reject, each of these arguments seriatim.

"Before addressing the [plaintiff's] arguments, we set forth the applicable standard of review of a trial court's ruling on motions for summary judgment. [HN1]Summary judgment shall be rendered forthwith if the pleadings, [*252] affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Citations omitted; internal quotation marks omitted.) *Dept. of Social Services v. Saunders*, 247 Conn. 686, 696-97, 724 A.2d 1093 (1999). In the present case, "the trial court was presented with [***11] cross motions for summary judgment based on undisputed facts. Therefore, our review is plenary and we must determine whether the court's conclusions are legally and logically correct and are supported by the record." (Internal quotation marks omitted.) Id., at 697.

[HN2]"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Buell Industries, Inc. v. Greater New York Mutual Ins. Co.*, 259 Conn. 527, 550, 791 A.2d 489 (2002).

"We emphasize . . . that [HN3]although the party seeking summary judgment [**781] has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine [***12]

issue of material fact together with the evidence disclosing the existence of such an issue. . . . It is not enough, however, [*253] for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]." (Internal quotation marks omitted.) Id.

I

The plaintiff's first claim concerns the sudden and accidental discharge exception to the pollution exclusion clauses. Specifically, the plaintiff claims that, in ruling on the parties' motions for summary judgment, the trial court improperly concluded that: (1) the plaintiff, rather than the defendants, had the burden of proof with respect to whether the discharge of pollutants was "sudden and accidental" within the meaning of the policy terms; and (2) the allegations underlying the department's administrative action did not trigger the defendants' duty to defend in light of the sudden and accidental discharge exception in the pollution exclusion clauses.

A

The plaintiff argues that, under Connecticut law, [***13] "the insurer . . . bears the burden of establishing that the underlying allegations eliminate every reasonable possibility that the [discharge of pollutants was] 'sudden and accidental' . . . ." [5] We disagree and conclude that this [*254] issue is controlled by our recent decision in *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 259 Conn. 527 (*Buell*).

5 In support of its contention, the plaintiff suggests that every court that has considered this issue under Connecticut law has held accordingly, citing several decisions, including *Edo Corp.* v. *Newark Ins. Co.*, 898 F. Supp. 952, 961-62 (D. Conn. 1995), *Edo Corp.* v. *Newark Ins. Co.*, 878 F. Supp. 366, 371 (D. Conn. 1995), *Remington Arms Co.* v. *Liberty Mutual Ins. Co.*, 810 F. Supp. 1406, 1413 & n.2 (D. Del. 1992) (interpreting Connecticut law), *REO, Inc.* v. *Travelers Cos.*, Superior Court, judicial district of New Haven, Docket No. CV95-0372522S (May 20, 1998), and *Cole* v. *East Hartford Estates Ltd. Partnership,* Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CV95-0547179S (May 15, 1996). We note that our decision in *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 259 Conn. 527, was unavailable to the parties when they prepared their briefs for presentation to this court.

[***14] In *Buell*, the insured, Buell Industries, Inc. (Buell), was a metal parts manufacturer that sought indemnification under certain insurance policies for the cost of remediating environmental contamination at two of its manufacturing facilities. Id., at 530, 532. As in the present case, the insurance policies at issue in *Buell* each contained a pollution exclusion clause that "excluded from coverage any claims that [were] the result of the discharge of pollutants." Id., at 534. The policies also each contained a sudden and accidental discharge exception that "reinstated coverage when the release of pollutants [was] sudden and accidental." (Internal quotation marks omitted.) Id. The insurers denied coverage under the insurance policies, prompting Buell to file an action seeking reimbursement for the costs that it had incurred as a result of its remediation efforts. Id., at 532. The [**782] insurers moved for summary judgment, claiming, inter alia, that Buell was not entitled to coverage under the policies based on the provisions of the pollution exclusion clauses contained therein. Id., at 535. The trial court agreed [***15] and concluded "that there existed no genuine issue of material fact that any of the discharges were, as required by the insurance policies, 'sudden.'" Id. On appeal, Buell challenged the trial court's conclusion that the sudden and accidental discharge exception was not implicated under the facts of the case. Id., at 535-36.

In *Buell*, we addressed an ancillary issue raised by both parties concerning who should bear the burden of proof regarding the applicability of the sudden and accidental discharge exception. Id., at 550-51. Buell contended that the insurers, as summary judgment movants, [*255] had the burden of proving the absence of a sudden and accidental discharge. Id., at 550. We disagreed, concluding that [HN4]"when a policy contains an exception within an exception, the insurer need not negative the internal exception; rather, the [insured] must show that the exception from the exemption from liability applies." (Internal quotation marks omitted.) Id., at 551. Therefore, within the context of the particular insurance policies at issue in *Buell*, "the burden properly rested with the insured to prove that the [***16] sudden and accidental [discharge] exception [was] applicable." (Internal quotation marks omitted.) Id. We based our conclusion on the policy consideration that "shifting the burden to establish the exception conforms with an insured's general duty to establish coverage where it would otherwise not exist, provides the insured with an incentive to strive for early detection that it is releasing pollutants into the environment and appropriately places the burden of proof on the party having the better and earlier access to the actual facts and circumstances surrounding the discharge . . . ." (Internal quotation marks omitted.) Id., quoting *Northville Industries Corp.* v. *National Union*

Fire Ins. Co. of Pittsburgh, Pa., 89 N.Y.2d 621, 634, 679 N.E.2d 1044, 657 N.Y.S.2d 564 (1997).

Although our decision in *Buell* resolved this burden proving issue within the context of the duty to indemnify, our resolution of the same issue within the context of the duty to defend--the context we are presented with in the present case--compels the same analysis. Within either context, our analysis focuses on whether the insured's alleged discharge of pollutants falls within [***17] the sudden and accidental discharge exception to the pollution exclusion clause. We previously have explained that [HN5]when "a complaint in an action . . . states a cause of action against the insured which appears to bring the claimed injury within the policy [*256] coverage, it is the contractual duty of the insurer to defend the insured in that action . . . ." Keithan v. Massachusetts Bonding & Ins. Co., 159 Conn. 128, 138, 267 A.2d 660 (1970); accord Stamford Wallpaper Co. v. TIG Ins., 138 F.3d 75, 79 (2d Cir. 1998). "If the complaint [however] alleges a liability which the policy does not cover, the insurer is not required to defend." (Internal quotation marks omitted.) Springdale Donuts, Inc. v. Aetna Casualty & Surety Co. of Illinois, 247 Conn. 801, 807, 724 A.2d 1117 (1999). Accordingly, the duty to defend necessarily depends on whether the claim falls within the policy coverage. For purposes of the present case, the issue of whether the allegations underlying the department's administrative action fall within the policy coverage depends on whether the plaintiff's alleged discharge of pollutants was sudden [***18] and accidental. Therefore, [HN6]if the [**783] insured has the burden of proving the applicability of the sudden and accidental discharge exception in the context of the duty to indemnify; Buell Industries, Inc. v. Greater New York Mutual Ins. Co., supra, 259 Conn. at 551; we can discern no reason, nor does the plaintiff offer one, as to why the insured should not shoulder that burden in the context of the duty to defend. The policy reasons underlying the allocation of the burden of proof that we announced in *Buell* apply with equal force in the context of the duty to defend. We therefore conclude that the burden of proving the applicability of the sudden and accidental discharge exception in the present case properly rested with the plaintiff.

In reaching this conclusion, we emphasize that [HN7]an insurer's duty to defend is broader than its duty to indemnify. E.g., Springdale Donuts, Inc. v. Aetna Casualty & Surety Co. of Illinois, supra, 247 Conn. at 807. The distinction between these two duties can be attributed to the fact that, "if an allegation of [a] complaint falls *even possibly* within the coverage, then the insurance [*257] [***19] company must defend the insured." (Emphasis added; internal quotation marks omitted.) Community Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co., 254 Conn. 387, 399, 757 A.2d 1074 (2000). "In contrast to the duty to defend, the duty to indemnify . . . depends upon the facts established at trial and the theory under which judgment is actually [rendered] in the case." (Internal quotation marks omitted.) Board of Education v. St. Paul Fire & Marine Ins. Co., 261 Conn. 37, 48-49, 801 A.2d 752 (2002). Thus, our conclusion that the burden of proving the applicability of the sudden and accidental discharge exception within the context of the duty to defend rests with the insured is not inconsistent with the general principles governing the expansive scope of the duty to defend.

B

The plaintiff also claims that the trial court improperly concluded that the allegations underlying the department's administrative action did not trigger the defendants' duty to defend pursuant to the sudden and accidental discharge exception. The plaintiff contends that the department's allegation that the plaintiff "began arranging for [***20] *treatment* and disposal of [hazardous] waste"; [6] (emphasis added); did not eliminate "all reasonable possibility" of a sudden and accidental discharge of pollutants. The plaintiff makes two arguments in support of this contention. First, the plaintiff argues that "nothing in [the act's] definition of the term 'treatment' even implies . . . any inevitable release of contaminants . . . over a prolonged period of time or otherwise." According to the plaintiff, therefore, any discharge resulting from the "treatment" of insulated wire must have been sudden and accidental. To this end, [*258] the plaintiff claims that, in light of the "total absence of legal or factual allegations which would have defined the nature of the alleged events upon which [the department] based its 'arranged for treatment' claims against [the plaintiff], the reasonable possibility existed that the underlying action involved, at least in part, a 'sudden and accidental' [discharge] . . . ."

6 The plaintiff specifically refers to the allegation in the department's complaint that, "in December of 1981, [the plaintiff] began arranging for treatment and disposal of waste containing hazardous substances at the site . . . ."

[***21] Second, the plaintiff offers a hypothetical scenario detailing the various economic incentives of the parties involved in the recycling activities and how these incentives [**784] support the proposition that any discharge of pollutants resulting from the plaintiff's recycling activities was sudden and accidental. The plaintiff contends that, on the basis of the foregoing arguments, the defendants were required to defend the plaintiff pursuant to the provisions of the insurance policies, and, consequently, the trial court improperly granted the de-

fendants' motion for summary judgment. We conclude that the plaintiff has failed to meet its burden of proving the applicability of the sudden and accidental discharge exception to the pollution exclusion clauses and, therefore, that the trial court properly concluded that the pollution exclusion clauses excluded coverage under the circumstances of the present case.

"We note at the outset that [HN8]it is well settled that an insurer's duty to defend . . . is determined by reference to the allegations contained in the [underlying] complaint." (Internal quotation marks omitted.) _Springdale Donuts, Inc._ v. _Aetna Casualty & Surety Co. of Illinois_, supra, 247 Conn. at 807 [***22] . "If an allegation of the complaint falls even possibly within the coverage, then the insurance company must defend the insured." (Internal quotation marks omitted.) _Community Action for Greater Middlesex County, Inc._ v. _American Alliance Ins. Co._, supra, 254 Conn. at 399; accord _Stamford Wallpaper Co._ v. _TIG Ins._, supra, 138 F.3d at 79. The issue we must resolve first, therefore, is whether any of the [*259] allegations contained in the department's administrative complaint fall "even possibly within the scope of the policy, as drawn by the pollution exclusion and the sudden and accidental [discharge] exception to that exclusion." (Internal quotation marks omitted.) _Stamford Wallpaper Co. v. TIG Ins._, supra, 138 F.3d at 79.

We previously have stated that, [HN9]"once an insurer has satisfied its burden of establishing that the underlying complaint alleges damages attributable to the discharge or release of a pollutant into the environment, thereby satisfying the basic requirement for application of the pollution coverage exclusion provision, the burden shifts to the insured to demonstrate a reasonable interpretation of [***23] the underlying complaint potentially bringing the claims within the sudden and accidental discharge exception to exclusion of pollution coverage, or to show that extrinsic evidence exists that the discharge was in fact sudden and accidental." (Internal quotation marks omitted.) _Buell Industries, Inc._ v. _Greater New York Mutual Ins. Co._, supra, 259 Conn. at 552. The relevant inquiry, therefore, is not whether the substance of the department's allegations rules out the possibility of a sudden and accidental discharge, as the plaintiff suggests, but, rather, whether the plaintiff has demonstrated that a reasonable interpretation of the substance of the department's allegations potentially would bring the claims within the purview of the sudden and accidental discharge exception in the policies. Id. [HN10]An insured does not satisfy its burden of proving the applicability of the sudden and accidental discharge exception, however, by the assertion of conclusory statements; id., at 557-58; or reliance "on mere speculation or conjecture as to the true nature of the facts . . . ." (Internal quotation marks omitted.) Id., at 558. "In determining whether [***24] the underlying complaint can be read as even potentially bringing the claim within the sudden and accidental [discharge] exception to the [*260] exclusion of pollution coverage, a court should not attempt to impose the duty to defend on an insurer through a strained, implausible reading of the complaint that is linguistically conceivable but tortured [**785] and unreasonable . . . ." (Citation omitted; internal quotation marks omitted.) _Northville Industries Corp._ v. _National Union Fire Ins. Co. of Pittsburgh, Pa._, supra, 89 N.Y.2d at 634-35.

On the basis of the foregoing principles, we first must determine whether the defendants met their burden of establishing the applicability of the pollution exclusion clauses in the insurance policies. The department alleged in its complaint [7] that it was entitled to recover the costs it incurred in responding to the discharge of contaminants and hazardous substances into the soil and water at the site. The department further alleged [*261] that the plaintiff was responsible for much of the waste that contributed to the contamination at issue. Thus, any liability that the plaintiff may incur as a result [***25] of the department's allegations must have derived from the plaintiff's discharge of hazardous substances into the land or water comprising the site. After reviewing the relevant insurance policies; see footnote 3 of this opinion; we conclude that any such discharge, as alleged in the department's complaint, that resulted in the contamination of the site, falls squarely within the purview of the pollution exclusion clauses in the policies. Thus, we now turn to the applicability of the sudden and accidental discharge exception.

7 The department's complaint provides in relevant part:

> "1. This complaint requests that the department be reimbursed for the costs it incurred in performing an interim response action at the . . . site . . . . The department took action, pursuant to [§§] 501 (a) and 505 (b) of the [act] to respond to a release of contaminants and/or hazardous substances which the department deemed necessary to protect public health, and safety and the environment.
>
> * * *
>
> "11. [The plaintiff] is a Connecticut corporation . . . . [The plaintiff] was a generator of much of the waste unlawfully processed and disposed at the site.

> * * *
>
> "21. In December of 1981, [the plaintiff] began arranging for treatment and disposal of waste containing hazardous substances at the site with Phillip Cardinale.
>
> "22. [The plaintiff's] business dealings consisting of arranging for treatment and disposal of waste containing hazardous substances continued with Anthony Cardinale after 1984 and continued until 1986.
>
> * * *
>
> "44. As a result of the site investigations and soil and water samplings conducted over the years, it was found that the site was contaminated with ash containing high levels of lead; [polychlorinated biphenal has] been detected in soil, water and creek sediments; polycyclic aromatic hydrocarbons . . . have been found in on-site soil samples; dioxin has been found in soil at the site; and tetrachloroethylene . . . has been found in five residential wells which are situated around the site."

[***26] We conclude that the plaintiff has failed to satisfy its burden of proving the applicability of the sudden and accidental discharge exception. First, we are not persuaded by the plaintiff's argument that the department's allegation that the plaintiff "began arranging for treatment . . . of [hazardous] waste" leaves open the possibility of a sudden and accidental discharge of pollutants. The plaintiff's argument depends on the theory that the "treatment" portion of its recycling activities did not include any disposal of waste. Neither the act's definition of "treatment" [8] nor any [**786] facts pleaded or set forth in the affidavits support this contention, however. Moreover, the department's underlying allegations shed no light on what the plaintiff contemplated with respect to the treatment of the insulated wire. Accordingly, without more information detailing what the treatment [*262] of the insulated wire in the present case entails, we cannot conclude that the plaintiff has satisfied its burden of proving the applicability of the sudden and accidental discharge exception.

8 [HN11]The act defines the term "treatment" as follows: "A method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of a hazardous substance so as to neutralize the hazardous substance or to render the hazardous substance nonhazardous, safer for transport, suitable for recovery, suitable for storage or reduced in volume. The term includes activity or processing designed to change the physical form or chemical composition of a hazardous substance so as to render it neutral or nonhazardous." Pa. Stat. Ann. tit. 35, § 6020.103 (West 1993).

[***27] Second, the plaintiff attempts to satisfy its burden of proving the applicability of the sudden and accidental discharge exception by presenting the following hypothetical scenario: On the basis of the economic incentives of the various parties to remove all of the processing by-products from the site, including those alleged by the department to have contributed to the contamination of the site, there exists a possibility that the discharge of these by-products was sudden and accidental. Specifically, the plaintiff contends that, because the profits earned by the various parties involved in the recycling process at issue in the present case were dependent on the amount of copper that could be reclaimed, there was an affirmative incentive to prevent the loss of copper to the environment. The plaintiff further contends that, in light of the fact that some of the contamination alleged by the department was the result of the discharge of copper, [9] it is reasonable to conclude that such discharge was sudden and accidental. This scenario, according to the plaintiff, viewed in conjunction with the department's allegations, raises at least an issue of material fact as to whether any of [***28] the discharge was sudden and accidental.

9 The department alleged in its complaint that, "on November 29, 1988, [the site inspector] supplied the [federal] Environmental Protection Agency with a site inspection report of the . . . site. That . . . report contained a toxicological evaluation which stated . . . [that] 'on-site soil and sediment samples revealed significant levels of several inorganic contaminants, including . . . copper (up to 542,000 mg/kg) . . . ."

In proposing such a hypothetical, however, the plaintiff requires us to speculate as to an occurrence that finds no reasonable basis in the department's allegations. [*263] [HN12] An insured may not rely on mere speculation to establish the applicability of the sudden and accidental discharge exception, and, thus, we cannot conclude that the plaintiff has satisfied its burden in this

regard. Accordingly, we agree with the reasoning employed by the United States Court of Appeals for the Second Circuit in *Stamford Wallpaper Co. v. TIG Ins.*, supra, 138 F.3d 75. [***29]

In *Stamford Wallpaper Co.*, the Second Circuit reviewed an insurance policy containing a pollution exclusion clause and a sudden and accidental discharge exception in determining whether, under the particular facts, the insurer's duty to defend had been triggered. Id., at 78. The insured, Stamford Wallpaper Company, Inc. (Stamford Wallpaper), sought coverage under an insurance policy issued by its insurer, TIG Insurance (TIG), following "a third-party complaint seeking contribution from Stamford [Wallpaper] . . . in a cost-recovery action for the clean-up of a landfill . . . and . . . [after being] informed . . . that it [was] a potentially responsible party . . . in connection with the disposal of hazardous waste at two other disposal sites . . . ." Id., at 77. Similar to the facts of the present case, Stamford Wallpaper's potential liability stemmed from an agreement that it had entered into with various recycling [**787] companies for the removal and recycling of certain waste materials, certain by-products of which eventually were sold back to Stamford Wallpaper and other businesses. [10] Id., at 77-78.

10 "Each of the [recycling companies] retained by Stamford [Wallpaper was] alleged to be a source of hazardous waste at one or more of [the contaminated] sites . . . ." *Stamford Wallpaper Co. v. TIG Ins.*, supra, 138 F.3d at 78.

[***30] After TIG declined to provide Stamford Wallpaper with a defense on the basis of a pollution exclusion clause, Stamford Wallpaper brought an action against TIG in the United States District Court for breach of [*264] contract. Id., at 78. Stamford Wallpaper subsequently filed a motion for partial summary judgment, which the court denied. Id. The court concluded that: "all of the allegations made against Stamford [Wallpaper] . . . fell within the scope of the policy's pollution exclusion; that none of the allegations brought the claims within the sudden and accidental [discharge] exception; that therefore none of the . . . claims [was] . . . covered by the policy; and that absent coverage, TIG had no duty to defend Stamford [Wallpaper] against those allegations." (Internal quotation marks omitted.) Id. On appeal, the Second Circuit Court of Appeals affirmed the District Court's judgment, concluding that, [HN13]"in order for the sudden and accidental [discharge] exception to apply, the allegations within the four corners of the complaint must raise the possibility that the event which caused the pollution-related property damage was sudden and accidental." (Internal [***31] quotation marks omitted.) Id., at 80. In reaching this conclusion, the court rejected Stamford Wallpaper's argument that the sudden and accidental discharge exception saves coverage when claims that are brought against the insured "do not rule out the possibility that the contamination was caused by a sudden and accidental event." (Internal quotation marks omitted.) Id., at 81. The court reasoned that, "no doubt, one can conjure up a sudden and accidental event that is not absolutely incompatible with the set of allegations in any complaint." Id. Thus, the court limited the scope of its analysis to a review of the complaint itself and refused to "hypothesize or imagine episodes or events that cannot be found among the allegations, and cannot reasonably be deduced from them." Id. According to the court, "the pollution exclusion [clause] would lose all force if it could be defeated by the mere imagining of any sudden accident that is not actually foreclosed by the allegations of the underlying complaint." Id. Therefore, after looking within the four [*265] corners of the third party's complaint, [11] the court held that the sudden and accidental discharge [***32] exception was inapplicable in that case because the allegations contained in the complaint did not "state or support the inference that the cause of the property damage was sudden and accidental." Id.

11 In *Stamford Wallpaper*, "the underlying liability claims [arose from] . . . a third-party complaint seeking contribution from [the insured] under the Comprehensive Environmental Response, Compensation and Liability Act [42 U.S.C. § 9601 et seq.] . . . in a cost-recovery action for the clean-up of a landfill . . . and two letters from the [federal] Environmental Protection Agency . . . informing [the insured] that it is a potentially responsible party . . . in connection with the disposal of hazardous waste at two other disposal sites . . . ." *Stamford Wallpaper Co. v. TIG Ins.*, supra, 138 F.3d at 77. Thus, when the court in *Stamford Wallpaper* referred to the "complaint," it actually was referring to the complaint and the letters from the Environmental Protection Agency.

[***33] The plaintiff essentially urges that we accept an argument similar to the one that the court rejected in *Stamford Wallpaper* [**788] *Co*. The plaintiff contends that "no factual allegations appear anywhere in [the department's] . . . complaint eliminating all reasonable possibility of at least some coverage," and, therefore, "at a minimum, the reasonable possibility that at least one release which allegedly occurred during [the plaintiff's] recycling activities was sudden and accidental." (Internal quotation marks omitted.) As we explained previously, however, [HN14]the plaintiff cannot prevail on its claim merely by relying on the fact that the allegations in the underlying complaint do not eliminate all reasonable possibility of a sudden and accidental discharge of pollutants. Rather, the plaintiff must demon-

strate a reasonable interpretation of the complaint that brings the claim within the sudden and accidental discharge exception. Buell Industries, Inc. v. Greater New York Mutual Ins. Co., supra, 259 Conn. at 552. In our view, the plaintiff's economic incentive hypothetical, which finds no reasonable basis in the department's allegations, [*266] [***34] does not provide such a reasonable interpretation. Were we to hold otherwise, an insurer's duty to defend could arise in a virtually endless number of situations, constrained only by the imagination of the insured, regardless of what is, in fact, alleged in the underlying complaint. See Stamford Wallpaper Co. v. TIG Ins., supra, 138 F.3d at 81.

The plaintiff simply has failed to demonstrate a reasonable possibility that its discharge of pollutants was sudden and accidental. The department alleged that the plaintiff's discharge of pollutants occurred over a span of five years and was the result of the plaintiff's ongoing business relationship with Cardinale. See footnote 7 of this opinion. We agree with the court in *Stamford Wallpaper Co.* that "there is nothing accidental about such an arrangement, which is characteristic of an ordinary course of business." Stamford Wallpaper Co. v. TIG Ins., supra, 138 F.3d at 80. Moreover, the plaintiff's economic incentive hypothetical does not convince us that there is a reasonable possibility that the plaintiff's discharge of pollutants was accidental. We previously have stated that, [***35] "[HN15]for a discharge to be a covered event under the policy, it must be *both* sudden and accidental. If one or the other of these conditions is absent, then the discharge is not a covered incident." (Emphasis in original.) Buell Industries, Inc. v. Greater New York Mutual Ins. Co., supra, 259 Conn. at 539. The department's allegations do not support the plaintiff's contention that any of the plaintiff's discharge of pollutants was accidental, and the plaintiff has failed to provide a reasonable interpretation of the department's allegations to convince us otherwise. Consequently, we conclude that the trial court properly determined that a genuine issue of material fact did not exist as to whether the plaintiff's discharge of pollutants was sudden and accidental.

[*267] II

The plaintiff next claims that the trial court improperly concluded that the absolute pollution exclusion clauses, which can be found in the policies not containing the sudden and accidental discharge exceptions, are clear and unambiguous as applied to the facts of this case and, accordingly, precluded coverage under the circumstances of the case. The plaintiff contends that the language [***36] of the pollution exclusion clauses reasonably cannot be read to exclude coverage for all pollution liability incurred, including that which resulted from the plaintiff's central business activity or what the plaintiff refers to as its "central recycling activities." Such a result, the plaintiff argues, would render the insurance policies issued by the defendants [**789] meaningless. The plaintiff contends, therefore, that, within the context of its central recycling activities, the absolute pollution exclusion clauses are ambiguous and, accordingly, must be construed in favor of the insured. We disagree.

[HN16]"The terms of an insurance policy are to be construed according to the general rules of contract construction. . . . The determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . However, when the words of an insurance contract are, without violence, [***37] susceptible of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. . . . This rule of construction favorable to the insured extends to exclusion clauses." (Citations omitted; internal quotation marks omitted.) Heyman Associates No. 1 v. Ins. Co. of Pennsylvania, 231 Conn. 756, 769-70, [*268] 653 A.2d 122 (1995) (*Heyman Associates*). [HN17]"Our jurisprudence makes clear, however, that although ambiguities are to be construed against the insurer, when the language is plain, no such construction is to be applied. . . . Indeed, courts cannot indulge in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties." (Citations omitted; internal quotation marks omitted.) Id., at 770-71.

The plaintiff relies on a footnote in our decision in *Heyman Associates,* in support of its contention that the otherwise clear and unambiguous absolute pollution exclusion clause is rendered ambiguous within the context of an insured's central business activity. In *Heyman Associates*, we reviewed an absolute [***38] pollution exclusion clause that contained language identical in all material respects to the language used in the absolute pollution exclusion clauses contained in the policies that the defendants had issued to the plaintiff. Compare id., at 761-62 n.5 with footnote 3 of this opinion. We held that the policy language at issue in *Heyman Associates* was clear and unambiguous. See Heyman Associates No. 1 v. Ins. Co. of Pennsylvania, supra, 231 Conn. at 771-74. In footnote 20 of *Heyman Associates*, we distinguished a case relied on by the insured in which the North Carolina Court of Appeals held that an absolute pollution exclusion clause virtually identical to the clause at issue in *Heyman Associates* was ambiguous "as applied to claims arising from property damage caused by [a certain pollutant and that] occurred in the course of the

insured's 'regular business activities' . . . ." (Citation omitted.) Id., at 776 n.20, citing *West American Ins. Co.* v. *Tufco Flooring East, Inc.*, 104 N.C. App. 312, 320-21, 409 S.E.2d 692 (1991), discretionary review improvidently allowed, 332 N.C. 479, 420 S.E.2d 826 (1992) [***39] . We distinguished the North Carolina case on the ground that, in *Heyman Associates*, the insured's [*269] storage of fuel oil, which resulted in an oil spill for which the insured sought coverage, did not constitute part of its central business activities. *Heyman Associates No. 1* v. *Ins. Co. of Pennsylvania*, supra, 231 Conn. at 776 n.20. Thus, contrary to the plaintiff's claim, we did not announce in *Heyman Associates* a different approach to the interpretation of clear and unambiguous pollution exclusion clauses in cases in which the pollution occurs in the course of the insured's central business activity.

[**790] Although we do not agree with the plaintiff that *Heyman Associates* supports its "central business activity" argument, the North Carolina Court of Appeals' decision in *West American Ins. Co.* v. *Tufco Flooring East, Inc.*, supra, 104 N.C. App. 312 (*West American*), on which the plaintiff also relies, does recognize the significance of an insured's central business activity. The facts of *West American*, however, are distinguishable from the facts of the present case. In *West American*, the insurance policy [***40] at issue contained a pollution exclusion clause that excluded coverage for property damage or personal injury arising from the discharge of pollutants. Id., at 315. Coverage under the policy, however, could be reinstated through what the court referred to as "'completed operations' coverage . . . ." Id., at 317. In accordance with the insurance policy, "the scope of the completed operations coverage included all property damage occurring away from premises the insured owned or rented and arising out of the insured's work, so long as the work [was] completed before the property damage had occurred." (Internal quotation marks omitted.) Id. The court held that the completed operations coverage overrode the pollution exclusion clause and, therefore, that the insured properly could seek coverage under the policy. Id., at 317, 319.

The court based its holding, in part, on the theory that any ambiguity in the provisions of an insurance contract must be resolved in favor of the insured. Id., at 320. [*270] The court concluded that the interrelationship between the pollution exclusion clause and the completed operations coverage [***41] created an ambiguity as to whether coverage was excluded. Id., at 320-21. Therefore, "[a] reasonable person in the position of [the insured] would have understood [the claims at issue] to be covered." Id. Accordingly, the court declined to allow "an insurance company to accept premiums for a commercial liability policy and then . . . hide behind ambiguities in the policy and deny coverage for good faith claims that arise during the course of the insured's normal business activity." Id.

Although the correlation between the insured's central business activity and the damage resulting from the insured's discharge of pollutants formed part of the factual backdrop in *West American*, the factor crucial to the holding in that case was the ambiguity created by the existence of conflicting clauses within the policy. In the absence of conflicting clauses, such as in the present case, the "central business activity" argument is unavailing. In the present case, the substance of the department's allegations clearly place the facts of the case within the purview of the pollution exclusion clauses, and there is no conflicting language in the policy to create a tension similar [***42] to that which the court observed in *West American*. Consequently, we are unwilling to follow the North Carolina Court of Appeals' holding in *West American* under the facts of the present case.

Although the absolute pollution exclusion clauses limit the available coverage under the insurance policy, there is no evidence that the plaintiff did not get what it bargained for when it contracted with the defendants. Furthermore, the plaintiff has offered no evidence, other than conclusory statements, to suggest that the insurance policies issued by the defendants are rendered meaningless by virtue of the denial of coverage [*271] for the discharge of pollutants. Therefore, we conclude that, "contrary to arguments posed by [the plaintiff], our construction of the absolute pollution exclusion [clauses in the present case] does not nullify the essential coverage [**791] provided by the policies; rather, the policies . . . provide coverage for a wide variety of accidents and mishaps . . . that may occur during [the plaintiff's routine business activities]." *Technical Coating Applicators, Inc.* v. *United States Fidelity & Guaranty Co.*, 157 F.3d 843, 846 (11th Cir. 1998) [***43] . Accordingly, the trial court properly concluded that the clear and unambiguous language of the absolute pollution exclusion clauses in the policies excludes coverage for any liability that the plaintiff might incur in connection with its discharge of pollutants at the site.

III

The plaintiff next claims that the trial court improperly denied its motion for summary judgment or, at a minimum, improperly granted the defendants' motion for summary judgment with respect to the defendants' fourth special defense inasmuch as the pollution exclusion clauses contained in the policies never were filed with the appropriate regulatory authority. We disagree.

We begin our analysis by reviewing the procedural history relevant to this claim. On January 19, 2000, the trial court issued a scheduling order requiring all dispositive motions to be filed by September 8, 2000, and all

responses to dispositive motions to be filed by October 6, 2000. Thereafter, the defendants filed their amended answer and special defenses on September 14, 2000, in which they asserted, inter alia, the pollution exclusion as a special defense. On October 18, 2000, the court amended the scheduling order by extending [***44] until November 15, 2000, the deadline for filing summary judgment motions. Both the plaintiff and the defendants subsequently filed motions for summary judgment. In [*272] connection with its motion for summary judgment, the plaintiff asserted for the first time that the pollution exclusion clauses were unenforceable owing to the defendants' failure to file them with the insurance commissioner pursuant to General Statutes § 38a-676. [12] In response, on December 6, 2000, the defendants filed a memorandum of law in support of their objection to the plaintiff's motion for summary judgment, claiming that the plaintiff was required to plead the failure to file issue specially in a reply as a matter in avoidance of the affirmative allegations in the defendants' special defense. Thus, the defendants argued that it was improper for the plaintiff to raise the defendants' failure to file in its motion for summary judgment. Notwithstanding the defendants' objection, the plaintiff proceeded to oral argument on the parties' summary judgment motions on December 18, 2000, without having filed a reply to the defendants' special defenses. It was not until December 21, 2000, after oral argument, [***45] that the plaintiff filed a reply, asserting by way of avoidance that the pollution exclusion clauses in any applicable policy were unenforceable inasmuch as the defendants had failed to file them with the insurance [**792] commissioner in accordance with § 38a-676.

12 General Statutes § 38a-676 provides in relevant part: "(c) [HN18]The form of any insurance policy or contract the rates for which are subject to the provisions of sections 38a-663 to 38a-696, inclusive, other than fidelity, surety or guaranty bonds, and the form of any endorsement modifying such insurance policy or contract, shall be filed with the Insurance Commissioner prior to its issuance. The commissioner shall adopt regulations in accordance with the provisions of chapter 54 establishing a procedure for review of such policy or contract. If at any time the commissioner finds that any such policy, contract or endorsement is not in accordance with such provisions or any other provision of law, the commissioner shall issue an order disapproving the issuance of such form and stating his reasons for disapproval. The provisions of section 38a-19 shall apply to any such order issued by the commissioner."

[***46] The trial court declined to consider the plaintiff's claim regarding the unenforceability of the pollution [*273] exclusion clauses. The trial court concluded that "it [was] procedurally improper for [the plaintiff] to challenge [the defendants'] regulatory compliance in its motion for summary judgment" in light of the fact that the defendants had pleaded the pollution exclusion as a special defense. Pursuant to Practice Book § 10-57, a [HN19]"matter in avoidance of affirmative allegations in an answer or counterclaim shall be specially pleaded in the reply." According to the trial court, the plaintiff's claim that the defendants had failed to file the pollution exclusion clauses with the insurance commissioner having been a matter in avoidance of a special defense, the plaintiff was required to plead the failure to file issue in a reply to the defendants' special defenses. [13] Therefore, because the plaintiff raised its claim in a motion for summary judgment rather than a reply to the defendants' special defenses, the claim was not properly before the court. We conclude that the trial court did not abuse its discretion in declining to consider the plaintiff's claim.

13 The trial court also indicated that, even if it had overlooked the procedural deficiencies in this instance, the plaintiff still would not have been able to prevail as it had not met its burden of proof with respect to its claim that the pollution exclusion clauses were unenforceable by virtue of the defendants' failure to file them with the insurance commissioner.

[***47] As an initial matter, we set forth the appropriate standard of review. [HN20]We previously have afforded trial courts discretion to overlook violations of the rules of practice and to review claims brought in violation of those rules as long as the opposing party has not raised a timely objection to the procedural deficiency. See, e.g., *Pepe* v. *New Britain*, 203 Conn. 281, 285-86, 524 A.2d 629 (1987) (defendant's failure to file special defense in violation of rules of practice did not preclude consideration of that defense when plaintiffs failed to object). It necessarily follows, therefore, that, when a party properly objects to a violation of the rules of [*274] practice, the trial court may disregard the improperly raised claim if doing so is not an abuse of discretion. Accordingly, in the present case, we review the trial court's decision under an abuse of discretion standard. [14]

14 The plaintiff claims that because it raised its claim in a motion for summary judgment, our review is plenary. In making this claim, however, the plaintiff mischaracterizes the issue. Although we do agree that our review of a trial court's decision on a motion for summary judgment is ple-

nary; e.g., *H.O.R.S.E. of Connecticut, Inc.* v. *Washington*, 258 Conn. 553, 560, 783 A.2d 993 (2001); the narrower issue in this instance is whether the trial court was required to consider the plaintiff's claim concerning the defendants' failure to file within the context of the court's ruling on the parties' motions for summary judgment. Thus, the issue is not whether there existed a genuine issue of material fact as to whether the pollution exclusion clauses were rendered unenforceable by virtue of the defendants' failure to file them with the insurance commissioner, but, rather, whether the trial court was required to consider the plaintiff's claim in light of the plaintiff's failure to plead that claim timely in a reply to the defendants' special defenses.

[***48] [HN21]When reviewing claims under an abuse of discretion standard, "the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . ." (Internal quotation marks omitted.) *Roberto* v. *Honeywell, Inc.*, 33 Conn. App. 619, 624, 637 A.2d 405, cert. denied, 229 Conn. 909, 642 A.2d 1205 (1994). Furthermore, we have stated [**793] in other contexts in which an abuse of discretion standard has been employed that "this court will rarely overturn the decision of the trial court." *Bauer* v. *Waste Management of Connecticut, Inc.*, 239 Conn. 515, 521, 686 A.2d 481 (1996).

We turn, therefore, to the trial court's decision to determine whether there has been an abuse of discretion. The trial court correctly observed that Practice Book § 10-57 [HN22]required the plaintiff specially to plead its claim concerning the defendants' failure to file the pollution exclusion clauses in a reply to the defendants' special defenses. See, e.g., *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 150, 163, 464 A.2d 18 (1983) (plaintiffs' claim [***49] of fraudulent concealment not properly [*275] before court owing to plaintiffs' failure specially to plead claim in avoidance of defendants' special defense based on statute of limitations). Consequently, in raising its claim in a motion for summary judgment rather than a reply to the defendants' special defenses, the plaintiff failed to comply with the rules of practice. Furthermore, although the plaintiff ultimately filed a reply to the defendants' special defenses, it did so over three months after the defendants had filed their special defenses. [HN23]Pursuant to Practice Book § 10-8, [15] a party has fifteen days to file a reply to special defenses. Thus, even if we were to overlook the fact that the plaintiff filed its motion for summary judgment prior to filing the appropriate reply, the plaintiff nonetheless failed to comply with the rules of practice in filing its reply to the defendants' special defenses over three months after the defendants had filed their special defenses. As we previously noted, the plaintiff was made aware of the pleading discrepancy when the defendants distinctly raised the procedural issue in their December 6, 2000 memorandum of law in opposition of [***50] the plaintiff's motion for summary judgment. Consequently, the plaintiff could have filed a motion for an extension of time to file a reply or could have requested permission from the trial court at oral argument to file a late reply. The plaintiff failed to do so, however. Rather, the plaintiff simply filed the reply, after oral argument on the parties' motions for summary judgment, without any explanation for its procedural transgressions.

15 Practice Book § 10-8 provides in relevant part: [HN24]"Commencing on the return day of the writ, summons and complaint in civil actions, pleadings, including motions and requests addressed to the pleadings, shall first advance within thirty days from the return day, and any subsequent pleadings, motions and requests shall advance at least one step within each successive period of fifteen days from the preceding pleading . . . ."

Thus, we conclude that the trial court did not abuse its discretion in declining to consider the plaintiff's claim, raised for the first time in connection [***51] with its [*276] motion for summary judgment, that the pollution exclusion clauses were rendered unenforceable by virtue of the defendants' failure to file them with the insurance commissioner.

IV

Finally, the plaintiff claims that the trial court improperly denied its motion to compel discovery of certain documents relating to the drafting of the insurance policies and, consequently, that the trial court's decision with respect to the parties' motions for summary judgment must be reversed. The plaintiff sought discovery of these documents for the purpose of establishing that certain language in the policies was susceptible to two or more reasonable interpretations. Our resolution of this claim is controlled by our determination in part II of this opinion, in which we concluded that the policy language [**794] is clear and unambiguous as applied to the present facts, and by our holding in *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 259 Conn. 527. Accordingly, we conclude that the trial court's denial of the plaintiff's motion to compel discovery does not require reversal of its decision on the parties' motions for summary judgment.

[***52] In *Buell*, we defined the term "sudden" as it was used in the sudden and accidental discharge exceptions to the pollution exclusion clauses contained in vari-

ous insurance policies. Id., at 541. In so doing, we concluded that, within the context of the particular policies at issue, "only a temporally abrupt release of pollutants would be covered as an exception to the general pollution exclusion." Id., at 540. [HN25]Once we determined that the language of the policies was subject to only one reasonable interpretation, we rejected the claim that the term "sudden" was ambiguous on its face and, accordingly, declined to look to drafting history. Id., at 544-45. We reasoned that, "because we will not create ambiguity [*277] where none exists, reference to extrinsic documentation such as drafting history is inappropriate." Id., at 546.

[HN26]Our decision not to refer to extrinsic documentation such as drafting history when the language in a contract is clear and unambiguous is dictated by the parol evidence rule. "As we have so often noted, the parol evidence rule is not a rule of evidence, but a substantive rule of contract law... [***53] . The rule is premised upon the idea that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversations, or circumstances, or usages . . . in order to learn what was intended, or to contradict what is written, would be dangerous and unjust in the extreme.

[HN27]"The parol evidence rule does not of itself, therefore, forbid the presentation of parol evidence, that is, evidence outside the four corners of the contract concerning matters governed by an integrated contract, but forbids only the use of such evidence to vary or contradict the terms of such a contract. Parol evidence offered solely to vary or contradict the written terms of an integrated contract is, therefore, legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant. [***54] [HN28] By implication, such evidence may still be admissible if relevant (1) to explain an ambiguity appearing in the instrument; (2) to prove a collateral oral agreement which does not vary the terms of the writing; (3) to add a missing term in a writing which indicates on its face that it does not set forth the complete agreement; or (4) to show mistake or fraud. . . . These recognized exceptions are, of course, only examples of situations [*278] [in which] the evidence (1) does not vary or contradict the contract's terms, or (2) may be considered because the contract has been shown not to be integrated; or (3) tends to show that the contract should be defeated or altered on the equitable ground that relief can be had against any deed or contract in writing founded in mistake or fraud." (Citations omitted; internal quotation marks omitted.) *Heyman Associates No. 1* v. *Ins. Co. of Pennsylvania*, supra, 231 Conn. at 779-81.

[**795] On the basis of our determination in part II of this opinion that the absolute pollution exclusion clauses are clear and unambiguous as applied to the facts of the present case, "the parol evidence rule bars the introduction of any [***55] extrinsic evidence to vary or contradict the plain meaning of the [language contained in the] exclusions." Id., at 781. Because the plaintiff sought discovery in support of its contention that the policy language was susceptible to more than one reasonable interpretation, and makes no allegations concerning mistake or fraud, "we find no occasion to refer to [the] drafting history." *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 259 Conn. at 545. Consequently, even if we were to assume that the trial court erred in denying the plaintiff's motion to compel discovery, such error would have been harmless. Accordingly, we reject the plaintiff's challenge to the trial court's denial of its motion to compel discovery. [16]

16 We note that the plaintiff raises two additional claims on appeal. First, the plaintiff claims that the trial court improperly granted the defendants' motion for summary judgment with respect to the defendants' second special defense. Second, the plaintiff claims that the trial court improperly denied its motion to strike the defendants' first, fifth, sixth and eleventh special defenses. We need not address these claims, however, inasmuch as our holding with respect to the pollution exclusion clauses, which the defendants relied on in asserting their fourth special defense, is dispositive of the duty to defend issue.

[***56] The judgment is affirmed.

In this opinion the other justices concurred.