

## **Serial Polluting Is Not 'Sudden and Accidental'**

### **Insurance Law Update**

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### **Supreme Court of South Dakota**

In *Demaray v. De Smet Farm Mut. Ins. Co.*, \_\_\_ N.W.2d \_\_\_, 2011 WL 2937284 (S.D. July 20, 2011), the Supreme Court of South Dakota held that an underlying suit did not fall within an exception to a pollution exclusion because the alleged pollutant discharge was not "sudden and accidental."

Floyd Demaray and James Hagemann were sued by Alvine Family Limited Partnership for discharging pollutants into lakes and streams on Alvine's property. Demaray and Hagemann tendered their defense to their insurer, De Smet Farm Mutual Insurance Company, which declined the tenders based on an exclusion for property damage arising out of "the discharge, dispersal, release, or the escape of pollutants into or upon land, water or air." Demaray and Hagemann filed suit against De Smet, contending that the underlying action fell within an exception that stated that the exclusion did not apply to property damage arising out of the "sudden and accidental" discharge of pollutants. The trial court agreed with Demaray and Hagemann and ruled that De Smet breached its duty to defend.

The Supreme Court of South Dakota reversed, holding that the underlying complaint did not allege the "sudden and accidental" discharge of pollutants. The court observed that other jurisdictions have espoused two views regarding the meaning of "sudden and accidental." The first view is that "sudden and accidental" is ambiguous because "sudden" is a synonym for "accidental," as both mean "unintended or unexpected." These courts construe "sudden and accidental" to mean "unintended or unexpected." The second view is that "sudden and accidental" is not ambiguous merely because "sudden" has multiple meanings or is synonymous with "accidental." Under this view, "sudden" was intended to be defined differently than "accidental" because "sudden" would otherwise become superfluous and repetitious in the phrase "sudden and accidental." These courts interpret "sudden" to mean abrupt or immediate, and thus interpret "sudden and accidental" to include a temporal component.

The South Dakota high court adopted the second view, concluding that "sudden and accidental" includes a temporal component, and means abrupt or immediate and unexpected or unintended. Therefore, the court concluded that the underlying complaint did not allege a claim for the "sudden and accidental" discharge of pollutants because the allegations of "intermittent," "past and continuing," and "repeated" discharges did not constitute allegations of an immediate or abrupt discharge.

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