1966. It found the design defect claims not pre-empted but barred on other grounds. The jury rejected the fraudulent misrepresentation claims and conspiracy claims but found defendant Liggett had, before 1966, breached its duty to warn and express warranties. The jury found Rose 80 percent at fault and that she voluntarily encountered a known danger. No damages were awarded to her estate but the jury awarded $400,000 to her husband for losses caused by breach of express warranty.

The Supreme Court considered the issue of the pre-emptive effect of the federal statutes. The Supreme Court found that the 1965 law provided that no statement relating to smoking and health (other than a required conspicuous package label warning of health hazards) shall be required on packages or in the advertising of cigarettes packaged with the required federal warning thus, state agencies could not require additional warnings. However, the 1965 Act was found by the Court not to bar any state law damage claims. The Court then examined the 1969 amendments. Justice Stevens, in his opinion, joined by Justices Ranquist, White, and O'Connor found that certain of the petitioners failure to warn and fraudulent representation claims were barred by the 1969 act but that other such claims or the claims based on express warranty or conspiracy were not pre-empted. The Court found the claim that the respondents were negligent in the manner they tested and that they failed to provide adequate warnings would require showing that post 1969 advertising should have included additional or more clearly stated warnings and thus were pre-empted.

The holding of the Supreme Court was summarized by Justice Stevens as follows: "The 1965 Act did not pre-empt state law damage actions; the 1969 Act pre-empted petitioners claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents advertising or promotions; the 1969 Act does not pre-empt petitioners claims based on express warranty, intentional fraud and misrepresentation, or conspiracy."

An opinion by Justice Blackman joined by Kennedy and Souter found that the 1969 act did not pre-empt any state law claims. An opinion by Justice Scalia joined by Justice Thomas concluded that the 1969 act barred all the post 1969 failure to warn claims and certain fraudulent misrepresentation claims were pre-empted.

Thus, warnings mandated by federal law do not bar damages. The case may be significant to other industries subject to federally-required warnings such as the chemical industry.

Pollution Exclusion Term "Sudden and Accidental" Found Ambiguous

Dimmitt Chevrolet Inc. v. Southeastern Fidelity Insurance Corporation, case no. 78, 293 filed September 3, 1992. (1992 WL 212008[Fla.], West Publishing Co.)

The Florida Supreme Court answered in the negative the following certified question from the United States Court of Appeals for the Eleventh Circuit.

WHETHER, AS A MATTER OF LAW, THE POLLUTION EXCLUSION CLAUSE CONTAINED IN THE COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY PRECLUDES COVERAGE TO ITS INSURED FOR LIABILITY FOR THE ENVIRONMENTAL CONTAMINATION THAT OCCURRED IN THIS CASE.

The case involved an automobile dealer which sold used crank case oil to an oil recycler. The Environmental Protection Agency (EPA) determined that the recycler's operation had resulted in extensive soil and ground water pollution. The EPA notified the automobile dealer that a release of hazardous substances had occurred and that the dealer was potentially liable pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) which imposes responsibility for the cost of investigating and cleaning up pollution on anyone who generates, transports, or disposes of hazardous substances.

The Florida Supreme Court wrote that the comprehensive general liability policy is a standard policy providing the primary form of commercial insurance coverage obtained by businesses. The Supreme Court found that the policies had been revised in 1966, in the early 1970s, and again in the mid 1980s. The pollution exclusion clause involved in this case was the standard clause contained in the comprehensive general liability policies with the 1970s revision. The policy provided coverage "for all sums which the insured shall become legally obligated to pay as damages because of: A) Bodily Injury, or B) Property Damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the Insured seeking Damages on account of such, Bodily Injury or property damage, even if any of the allegations of the suit are groundless."

An "occurrence" is defined by the policy as "an accident including continuous or repeated exposure to conditions, which result in Bodily Injury or Property Damage neither expected nor intended from the standpoint of the insured." The policy excluded coverage 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...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."

The Federal district court found that the insurer did not owe a duty to defend the insured and granted summary judgement reasoning that the pollution exclusion was not ambiguous and that the word "sudden" should be given a temporal meaning. The district court found that the pollution in this case occurred over a period of years and therefore could not be considered sudden.

The case was appealed to the Federal Court of Appeals which then certified the question to the Florida Supreme Court. The Florida Supreme Court found that the meaning of the term "sudden and accidental" has been the subject of much litigation. The court wrote that fifty cases have found the term to be ambiguous and fifty cases have found the term to be clear and unambiguous. The Michigan and Massachusetts Supreme Courts were cited as representative of those courts which had embraced the view that the word "sudden" has a temporal meaning and found "sudden and accidental" to be unambiguous.

On the other hand Wisconsin, Colorado, and Georgia courts have found the term "sudden and accidental" susceptible to more than one meaning.

The Florida Supreme Court determined the term "sudden and accidental" was ambiguous because the term is subject to more than one interpretation.

The Florida Supreme Court reviewed the drafting history of the clause and statements made to regulators when approval of the language was sought. The Court found that the West Virginia Insurance Commissioner held a hearing to determine the meaning of the term "sudden and accidental." The Court wrote "the Commissioner's concern was that the clause will reduce coverage but not reduce rates." The West Virginia hearing officer made the following findings:

> The insurance companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions... are merely clarifications of existing coverages as defined and limited in the definitions of the term "occurrence" contained in the respective policies to which said exclusions would be attached.

The Florida Supreme Court wrote that the Supreme Court of Georgia found the insurance rating board made similar representations to the Georgia Insurance Commissioner indicating that the pollution exclusion clause was intended to shut out only intentional polluters. The State of Florida in its amicus brief asserted that a representation similar to those made to West Virginia's Insurance Commissioner was made in Florida at the time the industry sought approval of the clause in Florida.

The Court wrote, "had insurers submitted the clause as one limiting coverage, Florida and other states would likely not have approved the clause without a simultaneous rate reduction." Thus, the Florida Supreme Court found that the drafting of history of the pollution exclusion clause led to "the inescapable conclusion that the insurance industry was attempting to exclude from coverage those polluters who committed their acts intentionally."

The Court also rejected the argument of insurers "that if 'sudden and accidental' could mean 'unexpected and unintended' the pollution exclusion would serve no purpose because it would simply duplicate the definition of occurrence." The Court wrote that the distinction between the two policy provisions was explained in *Claussen v. Aetna Casualty and Surety Company*, 380 S.E. 2nd 686 (Georgia, 1989) where the Georgia Supreme Court wrote "the pollution exclusion clause focuses on, whether the 'discharge, dispersal, or release' of the pollutants is unexpected and unintended; the definition of "occurrence" focuses on whether the property damage is unexpected and unintended."

In summary the Court considered the differing dictionary definitions, the divergence of judicial opinions and the drafting history in finding the term "sudden and accidental" susceptible to more than one meaning and ambiguous as a matter of law. Thus, the exclusion does not preclude coverage for the insured's liability for clean-up costs where contamination was unexpected and unintentional on the part of the insured even though it occurred over an extended period of time.

Discriminatory Premium Tax Found Constitutional

Gallagher v. Motors Insurance Corporation, case no. 79, 061, filed July 23, 1992. (1992 WL 171313 [Fla.], West Publishing Company.) The Florida Supreme Court found the Florida premium tax scheme, as it existed prior to July 1, 1988 constitutional. Although the Florida premium tax law was changed effective July 1, 1988 the case is significant because it runs counter to decisions in other states which found similar taxing schemes unconstitutional.

Under the Florida taxing scheme, foreign insurers were liable for the premium tax at a rate of two percent. The rate was reduced to one percent if the insurer maintained a regional home office. Domestic insurers were exempt from premium tax. The statutory taxing scheme was challenged by foreign corporations writing insurance in Florida. They argued that the taxing scheme violated constitutional guaranties of equal protection and due process.

The trial court found that the premium tax was unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution and the due process clause of the Florida Constitution. The trial court found that the premium tax lacked a legitimate state purpose and relied on *Metropolitan Life Insurance v. Ward 470 U.S. 869* (1985) which found a premium tax scheme similar to the one at issue in Florida to be volitive of the equal protection clause.

Similar taxing schemes were held unconstitutional in a number of states, see *Principal Mutual Life Insurance Company v. Division of Insurance*, 780 P 2nd 1023 Alaska, 1989; *Penn Mutual Life Insurance Company v. Department of Licensing and Regulation*, 412 NW 2nd 668 Mich. app. 1987; *State v. American Bankers Insurance Company*, 374 NW 2nd 609 (S.D. 1985); *Metropolitan Life Insurance Company v. Commissioner of the Department of Insurance*, 373 NW 2nd 399 (N.D. 1985).

The Florida Supreme Court distinguished the Florida taxing scheme from the other cases because the trial court had found that the purpose advanced by the state of acquiring a greater degree of regulatory control over insurance companies was a legitimate state purpose and, secondly, the trial court finding that the legislature could have believed that the differential tax treatment would have the effect of causing a company to change its state of domicile and therefore increase the state's ability to regulate such compa-