IN THE SUPREME COURT OF MISSOURI

No. SC96107

THE DOE RUN RESOURCES CORP.,

Plaintiff-Respondent,

v.

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY AND LEXINGTON INSURANCE COMPANY

AND

ST. PAUL FIRE AND MARINE INS. CO.,

Defendant-Appellant

On Appeal from the Circuit Court of St. Louis County
Cause No. 10SL-CC01716

On Transfer from the Missouri Court of Appeals, Eastern District
Case No. ED103026

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-RESPONDENT

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Date of Filing: May 9, 2017

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INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit 501(c)(3) organization, founded in 1991, whose mission is to be an information resource and effective voice for consumers of all types of insurance, including commercial and residential policyholders, in all 50 states—including the policyholder in this case. UP is funded by donations and grants and does not sell insurance or accept money from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help for victims of wildfires, floods, and other disasters); *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage and the claims process free-of-charge at UP's website.

UP's Executive Director, Amy Bach, is serving in her seventh term as an official consumer representative to the National Association of Insurance Commissioners ("NAIC"). At the NAIC, Bach works with the Missouri Department of Insurance to solve claim and coverage issues affecting Missouri residents. UP provided assistance to victims of the Joplin Tornado and is currently providing assistance to victims of recent storms and flooding.[1] Bach also serves as an Advisor to the American Law Institute's Restatement of the Law of Liability Insurance Project, where the rules of insurance contract interpretation and the duty to defend are front and center.

[1] *See* http://uphelp.org/blog/joplin-tornado-insurance-claim-help.

Advancing the interests of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country is an important part of UP's work. UP has filed *amicus curiae* briefs on behalf of policyholders in more than 400 cases throughout the United States—one of which was cited in the United States Supreme Court's opinion in *Humana v. Forsyth*, 525 U.S. 299 (1999). Additionally, UP's arguments have been cited with approval in numerous state and federal court opinions. UP monitors litigation of concern to insurance consumers and identifies cases that will have statewide or national significance.[2] UP believes that this case will have such significance.

In this regard, UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus*., 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for amicus curiae. As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stern et al., *Supreme Court Practice 570-71* (6th ed. 1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)). UP has a vital interest in seeing that insurance companies do not rely on overbroad and unclear exclusions to shirk their duty to defend—an issue that is likely to impact a large segment of the public, both in Missouri and nationwide.

[2] UP recently appeared in *Labrier v. State Farm Fire & Cas. Co*. (Case No. 16-3185/16-3562, U.S. Court of Appeals, 8th Cir., 2016) (arising under Missouri law).

CONSENT OF THE PARTIES

Amicus curiae United Policyholders adopts and incorporates by reference the jurisdictional statement and statement of facts set forth in Plaintiff-Respondent's brief.

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), *Amicus Curiae* United Policyholders certifies that Defendant-Appellant has not consented to the filing of this brief.

ARGUMENT

Appellant St. Paul seeks to have this Court overturn decades of settled Missouri law on the interpretation of insurance policies, and allow it to deny coverage for what it knew to be the major source of potential liability for its policyholder, Doe Run, by means of a vague and non-specific pollution exclusion. It seeks this result despite the fact that it had available to it, but chose not to include in the policy it sold to Doe Run, an endorsement that would have added language to the pollution exclusion addressing this very ambiguity.

Reversing the underlying decision here would undercut the well-settled principles of Missouri law on insurance policy interpretation, and the clarity and predictability they are designed to promote. It is undisputed that St. Paul was well aware of Doe Run's business operations, its major source of liability, and the Missouri authority requiring insurance companies desiring to exclude coverage for the their policyholders' major sources of liability to do so with specific and clear exclusions. St. Paul nevertheless chose not to include the specific language the insurance industry had drafted to address that identified ambiguity when it offered and sold the policies at issue to Doe Run, its

Missouri-based policyholder. Under Missouri law, insurance companies have the burden to draft express and clear exclusions when they which to limit the coverage they sell their policyholders. Relieving St. Paul of that burden in these circumstances would undercut the purpose of this rule, and create incentives for insurance companies to sell policies containing ambiguous language, and to continue to do so even after that language has been ruled ambiguous.

Pollution exclusions like those at issue here have generated a vast amount of litigation and confusion as courts around the country have struggled to interpret them in the many contexts in which insurance companies assert they apply to bar coverage. Many courts have recognized that they must find "limiting principles" to guide the application of the exclusion, to avoid the absurd results that would ensue if the exclusion were interpreted as broadly as insurance companies argue it should be read. In fact, the insurance industry drafters of the exclusion themselves admitted that they "overdrafted" the exclusion, and acknowledged that courts would have to step in to prevent abuses by insurance companies asserting overbroad interpretations.

Here, this Court already has a well-settled "limiting principle" for the interpretation of insurance policy exclusions: an insurance company that seeks to exclude from coverage what it knows to be its policyholder's major source of liability, must do so with specific and clear language. [3] The lower courts here consistently and

[3] *See Hocker Oil Co. v. Barker - Phillips - Jackson, Inc.*, 997 S.W.2d 510, 518 (Mo. App. 1999); *Aetna Cas. & Sur. Co. v. Haas*, 422 S.W.2d 316, 320-21 (Mo. 1968).

properly applied this principle to the interpretation of the pollution exclusion, to hold that St. Paul could not rely on it to bar coverage from what it knew to be Doe Run's major source of liability. This Court should reject St. Paul's invitation to jettison this well-settled Missouri principle, in service of its attempts to deny coverage to Doe Run based on an ambiguous exclusion.

I. KEY PRINCIPLES UNDER MISSOURI LAW.

Like most jurisdictions, Missouri courts recognize that an insurance policy is a contract that warrants special protections for policyholders and are to be interpreted, if possible, to provide coverage. This rationale is reflected in key principles of insurance policy construction under Missouri law, and which provide an interpretative framework for this coverage dispute.

A. The Duty to Defend Is Broad.

For example, an insurance company's duty to defend, which is broader than its duty to indemnify, is triggered at the mere "potential or possible liability to pay" based on the allegations of the underlying dispute,[4] as well as facts known or which should have

[4] *See, e.g., McCormack Baron Mgmt. Servs., Inc. v. Am. Guar. & Liab. Ins. Co.,* 989 S.W.2d 168, 170-71 (Mo. 1999) ("If the complaint merely alleges facts that give rise to a claim potentially within the policy's coverage, the insurer has a duty to defend.").

been reasonably apparent to the insurance company.[5] As such, an insurance company can evade its duty to defend only if it can prove that there is no possibility of coverage.[6]

While the duty to defend is ascertained by comparing the policy's terms with the allegations in the complaint, the insurance company is obligated to provide a full defense "even though some claims beyond coverage may also be present."[7]

B. Exclusionary Provisions Must Be Express and Clear.

Missouri's courts construe the terms of an insurance contract by applying the meaning which would be attached by an ordinary person of average understanding if purchasing insurance.[8] If ambiguities exist (i.e., if the policy language is susceptible to more than one reasonable interpretation on account of "duplicity, indistinctness, or uncertainty"), courts must resolve them against the insurance company and in favor of coverage.[9] This rule of interpretation applies particularly to exclusionary provisions.[10] Therefore, as the party in a better position to avoid ambiguity and promote certainty in its

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[5] *See, e.g.*, *Zipkin v. Freedman*, 436 S.W.2d 753, 754 (Mo. 1968).

[6] *See Truck Ins. Exch. v. Prairie Framing LLC*, 162 S.W.3d 64, 79 (Mo. Ct. App. 2005).

[7] *Id.* (internal citation omitted).

[8] *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. 2010).

[9] *Id.*

[10] *See Mendenhall v. Prop. & Cas. Ins. Co. of Hartford*, 375 S.W.3d 90, 92 (Mo. 2012) ("[E]xclusionary clauses are strictly construed against the drafter.").

policies, the insurance company has the burden of "clearly and unambiguously expressing its intent to exclude" coverage.[11]

II. THE CIRCUIT COURT APPLIED WELL-ESTABLISHED MISSOURI LAW

A. Missouri Law Long Has Rejected Insurance Company Attempts to Use a Vague and Non-Specific Exclusion to Bar Coverage for a Policyholder's Main Source of Liability.

1. The Underlying Courts Here Properly Relied on the *Hocker Oil* Decision.

The Circuit Court here rejected St. Paul's reliance on the pollution exclusion, relying both on Judge Hemphill's 2011 prior decision in this case construing a version of the pollution exclusion and the Court of Appeals decision in *Hocker Oil Co. v. Barker - Phillips - Jackson, Inc.*, 997 S.W.2d 510 (Mo. App. 1999). The Circuit Court ruled that it "will uphold its predecessor ruling to find the operative language in these policies vague and indistinct under these facts."[12] In following *Hocker Oil*, the Circuit Court quoted that court's reasoning that insurance companies must be explicit when attempting to exclude coverage for the policyholder's main source of potential liability, because: "it would be

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[11] *Stark Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385, 394 (Mo. Ct. App. 2007).

[12] *The Doe Run Resources Corp. v. Am. Guarantee & Liability Ins. Co.*, 2014 WL 10698502, at *2) (Mo. Cir. Ct. July 2, 2014).

an oddity for an insurance company to sell a liability policy to a gas station that would specifically exclude the insured's major source of liability."[13] Judge Hemphill's 2011 decision also explicitly relied on the reasoning of *Hocker Oil*.[14]

Before the transfer to this Court, the Court of Appeals upheld the Circuit Court's decision on the pollution exclusion.[15] The Court of Appeals held that it was required to construe the policy as a whole. Therefore, the court could not ignore that the Estimated Premium Summary in the policy expressly identified the policyholder's operations as "mining, smelting, recycling and fabrication of base metals," and based the premium charged on the amount of ore mined, smelted, recycled, or fabricated.[16] The Court concluded that a person of average understanding purchasing insurance might reasonably believe that such a policy covers the major liability risk of such business and does not exclude "injuries at least in part from exposure to the toxic elements of that process."[17]

The lower court decisions on the pollution exclusion in this litigation thus relied on the long-standing appellate decision in *Hocker Oil*. In *Hocker Oil*, the Missouri Court

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[13] *Id*. (quoting *Hocker Oil*, 997 S.W.2d at 518).

[14] *See The Doe Run Resources Corp. v. Am. Guarantee & Liability Ins. Co.*, 2011 WL 13103983, at *3 (Mo. Cir. Ct. Nov. 7, 2011).

[15] *See The Doe Run Resources Corp. v. Am. Guarantee & Liability Ins. Co.*, 2016 WL 5390200, at *3-*5 (Mo. App. Sept. 27, 2016).

[16] *Id.* at 9-10.

[17] *Id.* at 9.

of Appeals rejected an insurance company's argument that a pollution exclusion barred coverage for an action against the policyholder, the operator of the gas station, arising out of a gasoline spill that migrated into neighboring land.[18] The court held that, under Missouri law, it was required to ascribe "what the layperson who acquired the policy of insurance would ordinarily have understood." It concluded that "[i]n this light, Hocker's suggestion that it, as a layperson, would not have paid a substantial premium for a liability policy that would not afford coverage for damages resulting from gasoline leaks from its storage tanks is not unreasonable."[19]

The *Hocker Oil* court held that an insurance company seeking to exclude coverage for a policyholder's major source of liability had a burden to do so with specific and clear language:

> Gasoline is not identified, with particularity, as being a "pollutant" for purposes of the pollution exclusion in the insurance policy Hocker acquired from Ranger. Hocker could have reasonably concluded that gasoline was not deemed a pollutant for purposes of the exclusion since it was not identified as such. . . . [I]t would be an oddity for an insurance company to sell a liability policy to a gas station

[18] 997 S.W.2d at 512-13, 518.

[19] *Id.* at 518.

that would specifically exclude that insured's major source of liability.[20]

Application of the *Hocker Oil* decision to the facts of this case by the lower courts here was straightforward and correct. St. Paul was well aware of the nature of Doe Run's operations and that its major source of liability arose from its processing of base metals. If it had wished to exclude coverage for that source of liability, St. Paul had a duty to do so with specific and clear language, which it did not do here.

2. *Hocker Oil* Applied Well-Settled Principles of Missouri Law.

St. Paul and the insurance industry *amici* incorrectly argue that the underlying decisions should not have relied on *Hocker Oil*, asserting that decision "does not reflect the current state of Missouri law."[21] To the contrary, the Court of Appeals in *Hocker Oil* in turn applied well-settled principles of Missouri law, long recognized by this Court. *See Aetna Cas. & Sur. Co. v. Haas*, 422 S.W.2d 316 (Mo. 1968).

In *Haas*, this Court established many years ago that if an insurance company is aware of the main liability risk of its policyholder's business, it cannot exclude coverage for that risk by a vague and general exclusion. In *Haas*, the policyholder was an exterminator whose business involved "fogging" houses with insecticide.[22] During these operations, he would transport the fogging machine throughout a house, and the owner

[20] *Id.* at 518 (citing *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Ind. 1996)).

[21] CICLA Br. at 10-12; *see also* St. Paul Br. at 39-40.

[22] 422 S.W.2d at 317.

and residents of the house were required to leave the premises to him for several hours during this process.[23]

An explosion took place during fogging operations at a private residence, and the owner sued the policyholder for the property damage.[24] The policyholder's general liability insurance company denied coverage, citing an exclusion for damage to property in the "care, custody or control of the insured."[25] The insurance company argued that the residence being fogged was under the policyholder's care, custody or control while it was performing the fogging operations.[26]

This Court rejected the application of the "care, custody or control" exclusion for the policyholder's operations.[27] The Court pointed to the fact that the insurance company was well aware of the nature of the policyholder's operations at residences, noting that "a partner in the agency issuing Aetna's policies . . . testified that the manual classification for the premium to be charged was selected knowing the kind of work [the policyholder] was in."[28] Indeed, the policyholder had done exterminating work for that very agent.[29]

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[23] *Id.* at 317-18.

[24] *Id.* at 318.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 319-21.

[28] 422 S.W.2d at 318.

[29] *Id.* at 319.

Given this knowledge of the policyholder's operations, the Court found that even though the exclusion was not patently ambiguous on its face, it contained a "latent ambiguity [which] becomes pronounced when one attempts to discover to just what property the 'care, custody or control' exclusion was meant to apply. The clause is uncertain as to its application, and as applied to the facts and circumstances is susceptible to more than one interpretation."[30] The Court invoked the rule that an insurance company seeking to limit coverage has the burden of making any exclusions express and clear: "Exclusion clauses are strictly construed against the insurer, especially if they are of uncertain import. An insurer may, of course, cut off liability under its policy with a clear language, but it cannot do so with that dulled by ambiguity."[31]

Applying these principles, the Court held that, in light of the insurance company's knowledge of the policyholder's business operations, "it would have been a simple matter for it to have specifically and with clarity excluded residential or other buildings where [the policyholder] was performing its services."[32] Having failed to include such a specific and clear exclusion directed at the policyholder's known operations, the Court did not permit the insurance company to deny coverage under the more general "care, custody or control" exclusion.

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[30] *Id.* at 319.

[31] *Id.* at 321.

[32] *Id.* at 320-21.

In other words, more than thirty years before *Hocker Oil*, this Court endorsed the rule that an insurance company cannot exclude what it knows to be the policyholder's major source of liability by means of a vague and general exclusion. *Haas* has been cited with approval numerous times in the intervening years by this Court and the Missouri appellate courts, and it remains good law today.[33] The application of this rule to the pollution exclusion in *Hocker Oil* in 1999 and the prior *Doe Run* decisions in 2011, 2014, and 2016, thus was consistent with settled Missouri law as espoused by this Court.[34]

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[33] *See, e.g.*, *Maher Bros., Inc. v. Quinn Pork, LLC*, ___ S.W.3d ___, 2017 WL 897648, at *3 (Mo. App. Mar. 7, 2017) (citing *Haas* with approval in March of this year); *see also Burns*, 303 S.W.3d at 509 (Mo. 2010) (citing *Haas* with approval).

[34] The Court of Appeals decisions after *Hocker Oil* applying pollution exclusions are not to the contrary, as they did not involve application of the exclusion to what the insurance company knew to be the policyholder's main source of liability, and in any event could not overrule this Court's decision in *Haas*. *See Cincinnati Ins. Co. v. Germain St. Vincent Orphan Assoc'n, Inc.*, 54 S.W.3d 661 (Mo. App. 2001) (applying pollution exclusion to release of asbestos caused by floor scraper's removal of old vinyl flooring); *Trans World Airlines, Inc. v. Associated Aviation Underwriters*, 58 S.W.3d 609 (Mo. App. 2001) (applying exclusion to deliberate and frequent disposal of waste at aircraft maintenance facility); *Boulevard Investment Co. v. Capitol Indem. Corp.*, 27 S.W.3d 856 (Mo. App. 2000) (applying exclusion to damage from grease clog to a restaurant's

Here, as in *Haas* and *Hocker Oil*, the insurance company was well aware of the nature of the policyholder's business practices and its major source of liability. As in those prior cases, St. Paul should not be permitted to bar coverage for that major source of liability through use of a vague, non-specific exclusion. In *Haas*, the fact that the policyholder could be characterized as having a residence under his "care, custody or control" while applying its pesticide, did not mean that such an exclusion unambiguously applied. Similarly, the insurance companies cannot argue that the vague and general pollution exclusion unambiguously applies to the main exposure of the policyholder here from its known business operations.

In *Haas*, this Court analyzed the issue as one of "latent ambiguity," and so looked to extrinsic evidence.[35] This was due to the fact that the ambiguity was revealed by circumstances external to the contract in the first place—including testimony that the "classification for the premium to be charged was selected knowing the kind of work [the

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plumbing); *Cas. Indem. Exchange v. City of Sparta*, 997 S.W.2d (Mo. App. 1999) (applying exclusion to a city's sewer sludge).

[35] *See* 422 S.W.2d at 319; *see also Prestigiacamo v. Am. Equitable Assur. Co. of N.Y.*, 221 S.W.2d 217, 221-22 (Mo. App. 1949) (parol evidence may be used to resolve a latent ambiguity, which "exists where a writing presents no ambiguity, on its face but, when it is sought to apply the words used to the subject matter, it is found that they do not correctly describe or clearly apply to it").

policyholder] was in."[36] Here, this information is revealed on the face of the policy,[37] and so the rule for patent ambiguity applies—the ambiguity is evident even without resort to any extrinsic evidence. At a minimum, according to *Haas*, there is a latent ambiguity given St. Paul's admitted knowledge of Doe Run's business. Either way, the language is ambiguous under the circumstances of this case and must be construed against St. Paul.[38]

St. Paul's attack on the Court of Appeal's reference to the manner in which St. Paul calculated its premium thus misses the mark.[39] The fact that St. Paul calculated the premium based on the quantity of ore processed demonstrates, from the face of the policy, that St. Paul knew "the kind of work [Doe Run] was in," and its major source of potential liability, supporting the application of the *Hocker Oil*/*Haas* rule. The Court of Appeals thus committed no error in looking to the premium basis set forth on the face of

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[36] *Haas*, 422 S.W.2d at 318.

[37] *See* LR000397 (St. Paul policy's Estimated Premium Summary).

[38] Moreover, as discussed at greater length in the next section, to the extent the record contains evidence of St. Paul's intent, such evidence shows that it had available an endorsement specifically drafted for use for Missouri to address the ambiguity identified by *Hocker Oil*, but chose not to include it in the policies it sold to Doe Run.

[39] *See* St. Paul Br. at 40-42. *Amicus* CICLA, by contrast, repeatedly urges this Court to consider the basis of an insurance company's premium calculations, without acknowledging that such basis supports upholding the decision in favor of coverage here. *See* CICLA Br. at 17-19.

the policy in order to establish that St. Paul was well aware of the work the policyholder was in, and, as in *Hocker Oil* and *Haas*, to use that knowledge as the basis for ruling that St. Paul could not exclude coverage for the major source of liability for that work by means of a non-specific exclusion.[40]

B. The *Hocker Oil*/*Haas* Rule Is Particularly Appropriate Here.

Not long after the *Hocker Oil* decision, and before the policies at issue here were sold, the insurance industry group Insurance Services Office ("ISO") drafted and obtained approval for an endorsement entitled "Missouri Changes Pollution Exclusion" that addressed the ambiguity identified in *Hocker Oil*. The endorsement, when used, adds the following language to the pollution exclusion: "This Pollution Exclusion applies even if such irritant or contaminant has a function in your business, operations, premises, site or location."[41]

In its description of the endorsement, ISO specifically stated that the revision was being made "in response to" the *Hocker Oil* decision, describing how the Missouri court

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[40] *See also Maher Brothers*, ___ S.W.3d ___, 2017 WL 897648, at *4 (looking to the insurance company's knowledge of the policyholder's business in declining to apply an "indistinct and uncertain" exclusion that could be understood in multiple ways when viewed by a layperson "in the context of a farm or ranch, which this policy was clearly intended to insure.").

[41] LR001024 (2000 version of endorsement); *see also* LR001026 (2003 version of endorsement).

"[i]n its ruling it found it odd that an insurance company would sell to a gas station a liability policy that would exclude the major exposure to loss."[42]

Despite the decision in *Hocker Oil* identifying the ambiguity in the pollution exclusion,[43] and availability of approved alternative language addressing that ambiguity and setting out the result St. Paul seeks here, St. Paul did not include the "Missouri change—Pollution Exclusion" endorsement in the policy it sold its Missouri-based policyholder, Doe Run.

In *Burns v. Smith*, this Court looked to alternative language that the insurance company could have used in its exclusion to reach the result it claims it intended, but did not:

> Had Farmers intended to sell a policy containing an exclusion that applied to all trades, occupations or businesses without regard to where they were conducted, it could have used the policy language construed in *Dieckman v. Moran*, which

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[42] LR000942.

[43] Under Missouri law, of course, "contracting parties are presumed to contract in reference to the existing law." *Union Pac. R. Co. v. Kansas City Transit Co.*, 401 S.W.2d 528, 534 (Mo. Ct. App. 1966); *see also Zirul v. Zirul*, 671 S.W.2d 320, 324 (Mo. Ct. App. 1984) ("Under both Missouri and Kansas law, contracting parties are presumed to know the law and have it in mind when they enter into an agreement.").

> stated it excluded business pursuits, and its definitions section stated "'Business' includes trade, profession or occupation."[44]

Referencing that alternative exclusionary language available in the insurance industry, this Court held that "[i]f that was what Farmers intended, then it should have written the policy so."[45] Similarly, having failed here to include the clearer alternative language approved and available to the insurance industry to accomplish the result it claimed it intended, St. Paul should not be permitted to have its policy rewritten to include that language.

III. CONSIDERATIONS OF CLARITY AND PREDICTABILITY SUPPORT REJECTION OF ST. PAUL'S RELIANCE ON A VAGUE AND NON-SPECIFIC EXCLUSION

Amicus CICLA argues that "[p]ublic policy considerations" support its reading of the pollution exclusion, incorrectly asserting that the result St. Paul seeks here would advance the considerations of certainty of contractual relations and predictability in insurance underwriting.[46] To the contrary, the result St. Paul and CICLA seek here would thwart these considerations and undermine the incentives this Court's well-settled

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[44] *Burns*, 303 S.W.3d at 513 (quoting *Dieckman v. Moran*, 414 S.W.2d 320, 321 (Mo. Banc 1967)).

[45] *Burns*, 303 S.W.3d at 513.

[46] CICLA Br. at 17.

principles provide to encourage certainty and predictability in the drafting and sale of insurance policies.

A. Upholding the Underlying Decision Promotes Clarity and Predictability in Insurance Contracts.

This Court has recognized that it is a "principle long followed by this Court" to construe ambiguous language in insurance policies in favor of coverage:

> [A]n insurance policy, being a contract designated to furnish protection will, if reasonably possible, be construed so as to accomplish that object and not to defeat it. Hence, if the terms are susceptible of two possible interpretations and there is room for construction, provisions limiting, cutting down, or avoiding liability on the coverage made in the policy are construed most strongly against the insurer.[47]

This Court has held that one of the key rationales for this rule is that "as the drafter, the insurer is in the better position to remove ambiguity from the contract."[48] The rule thus promotes clarity and predictability by placing the incentive to clarify language and remove ambiguity on the party in the best position to do so:

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[47] *Burns*, 303 S.W.3d at 512 (internal quotations omitted).

[48] *Id.* at 512; *see also Spaete v. Auto. Club Inter-Ins. Exch.*, 736 S.W.2d 480, 483 (Mo. App. 1987) ("The rationale behind the rule is that the insurer as drafter of the policy language has the opportunity to clearly word exclusions and limits of its liability.").

> When one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He also is more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert.[49]

The present case presents a prime example of the dangers the rule was designed to avoid. Well before these policies went into effect, the *Hocker Oil* court identified ambiguity in the pollution exclusion. The insurance industry drafted, and obtained approval for, an endorsement specifically designed to address that ambiguity. St. Paul then chose to sell to Doe Run a policy with a pollution exclusion *without* the endorsement designed to clarify the identified ambiguity. Allowing St. Paul's policy to be read as if it contained that language would create incentives to sell policies with unclear language, and even to continue using language specifically determined to be ambiguous and for which a simple and approved clarification already exists. The insurance company could reap the benefits of selling a policy with unclear language that a purchaser may read as providing broader coverage than the insurance company plans to assert it owes. Such a result would undercut the certainty and predictability that Missouri's rules of insurance policy interpretation are meant to foster.

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[49] *Restatement (Second) of Contracts* § 206 cmt. a.

St. Paul's argument is premised on its incorrect assertion that the Circuit Court failed to interpret the pollution exclusion "as written" when it applied the holding of *Hocker Oil* to this case. [50] To the contrary, this Court has held, in a case in which it relied on *Haas* and the rule that "Missouri also *strictly* construes exclusionary clauses against the drafter, who also bears the burden of showing the exclusion applies," that in doing so "[t]his Court applies the policy as written."[51]

B. This Court Should Reject St. Paul's Attempt to Avoid Its Obligation to Draft Clear Exclusions.

As described above, it is well-settled that it is an insurance company's burden to draft any exclusion so that it is express and clear. *Amicus* CICLA, however, argues that this Court instead should permit insurance companies to deny coverage based on non-specific exclusions, on the grounds that to do so would be "less expensive and more practical" than revising the pollution exclusion to reflect the factual situation of its policyholder, and that a specific exclusion might be "incomprehensible."[52] What this argument overlooks is that the insurance industry *already* drafted the clearer exclusion language on this issue, but St. Paul chose not to use it. And the unused language was a single sentence, which would have been neither burdensome nor incomprehensible:

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[50] *See* St. Paul Br. at 36.

[51] *Burns*, 303 S.W.3d at 510, 513 (citing *Haas*, 422 S.W.2d at 321) (emphasis original).

[52] CICLA Br. at 13.

"This Pollution Exclusion applies even if such irritant or contaminant has a function in your business, operations, premises, site or location."[53]

In other words, requiring the insurance company to include language resolving the ambiguity identified in *Hocker* would not place an impossible burden on insurance companies. Rather, with language already drafted addressing that ambiguity, it would have been no burden at all for St. Paul to have included the Missouri-specific endorsement in the policies it sold to Doe Run, if that had been its intent.

Moreover, assertions about the purported burden and expense of addressing different "factual situations" are particularly unavailing in the present case. St. Paul's version of the pollution exclusion is much longer than many versions of the exclusion, taking up three pages of dual column printing.[54] The extra length stems from extra language, in addition to its exclusionary provisions, containing ten separate descriptions of hypothetical factual scenarios explaining when the exclusion would apply. And yet, despite going to this burden and expense of expressly setting out numerous hypothetical scenarios and explanations, St. Paul chose not to add the single sentence that already had been drafted and approved for use in addressing the ambiguity identified by the Missouri court in *Hocker Oil*. Nor do any of the hypothetical examples St. Paul did include explain that the exclusion applies to the major source of potential liability arising from

[53] LR001024 (2000 version of endorsement); *see also* LR001026 (2003 version of endorsement).

[54] *See* LR 000473-75.

the policyholder's business. CICLA's assertions about drafting expense thus are red herrings—St. Paul had the burden of making its exclusion clear, it spent pages setting out hypotheticals and explanations about the exclusion, but did not add the single pre-approved sentence that could have clarified the exclusion's application here, if that was truly its intent.

C. CICLA's Assertions About St. Paul's Subjective Intent Are Unsupported and Contrary to the Record Evidence.

CICLA suggests that upholding the Circuit Court's ruling would "expose insurers to massive *unintended* liabilities."[55] CICLA provides absolutely no support from the record or elsewhere, of St. Paul's subjective intent with respect to this pollution exclusion. To the extent any such evidence exists, it demonstrates the contrary: St. Paul had available to it, but declined to add to the policy it sold, a straightforward endorsement for use with Missouri policyholders, if it had wanted the pollution exclusion to bar coverage for harm by the policyholder's main source of potential liability. Having failed to do so, St. Paul should not have its policy read as if it included that language, regardless of what is now claimed to be its subjective intent.

Similarly, this Court should reject CICLA's repeated suggestions that St. Paul "has not collected premiums" that reflect the reading of the exclusion by the Circuit

[55] CICLA Br. at 18 (emphasis added).

Court.[56] Again, these are simply unsupported assertions about St. Paul's purported subjective intent in selling the policy.[57] To the extent this Court does look to such evidence of intent, St. Paul's decision not to include the Missouri-specific endorsement is the only evidence in the record, and it supports an inference contrary to CICLA's argument.

IV. THIS COURT SHOULD NOT FOLLOW EIGHTH CIRCUIT PREDICTIONS THAT ARE CONTRARY TO MISSOURI LAW

Appellant argues against application of *Hocker Oil* by the lower courts here, relying on several opinions handed down by the Eighth Circuit Court of Appeals.[58] Notwithstanding the fact that *Hocker Oil* remains good law in Missouri, the Appellant argues that these Eighth Circuit opinions show that *Hocker Oil* has been tacitly overruled. Of course, this Court is not bound by the Eighth Circuit on this state law issue, and it

[56] *See* CICLA Br. at 17-18 (making repeated, unsupported assertions about "premiums" and the alleged scope of coverage that Doe Run "paid for").

[57] Indeed, St. Paul itself goes to great pains to argue just the opposite of CICLA on this point—that the Court should *not* look to the basis of its premiums in construing the scope of coverage. St. Paul Br. at 40-42. In any event, the calculation of premiums based on the quantity of ore processed demonstrates on the face of the policy that St. Paul was well aware of the nature of Doe Run's operations and its major source of potential liability.

[58] St. Paul Br. at 34-36.

need not follow the Eighth Circuit's predictions of Missouri law, particularly when they fail to apply well-settled principles of Missouri law.[59]

In the area of insurance coverage law, this Court has not hesitated to reject Eighth Circuit predictions of state law that are inconsistent with settled Missouri principles. For example, in *Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 842 F.2d 977 (8th Cir. 1988) ("*NEPACCO*"), a Missouri-based policyholder sought coverage for the cleanup costs charged by the federal government in response to the improper disposal of hazardous wastes at the policyholder's facilities. The dispositive issue before the court was whether the term "damages" in the policy included equitable monetary relief, thereby covering the cleanup costs sought by the federal government in several lawsuits against the policyholder. The Eighth Circuit held that within the insurance field the term was unambiguous and only referred to legal damages.[60] As such, the court held that the recovery of cleanup costs sought by the

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[59] *See Kunzie v. Jack-In-The-Box, Inc.*, 330 S.W.3d 476, 482 (Mo. Ct. App. 2010) ("At the outset, we acknowledge that decisions of the federal courts merit our respect but do not bind us, especially when our determination rests upon an interpretation of state contract law.") (citing *State v. Storey*, 901 S.W.2d 866, 900 (Mo. 1995)); *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 243 (Mo. Ct. App. 2006) ("However, with all due respect to the Eighth Circuit, the Missouri Supreme Court does not blindly follow the predictions of the federal courts.") (internal citation omitted).

[60] *NEPACCO*, 842 F.2d at 985.

federal government against the policyholder were not "damages" under the policy, precluding coverage.

Several years later, in *Farmland Industries, Inc. v. Republic Insurance Co.*, 941 S.W.2d 505 (Mo. 1997), this Court explicitly rejected the Eighth Circuit's reasoning in *NEPACCO*. *Farmland* presented an essentially identical fact pattern: the policyholder sought coverage for cleanup costs and other remediation activities stemming from environmental contamination at its sites. Again, as in *NEPACCO*, the primary issue was whether these environmental response costs constitute "damages" under the policyholder's policy. This Court rejected this argument, stating that "[t]he *NEPACCO* court misconstrue[d] and circumvente[d] Missouri law."[61] Applying the rules of construction applied by Missouri's courts in which terms are given their ordinary, as opposed to a technical, meaning, this Court rejected the Eighth Circuit's approach, holding that the policy's reference to "damages" did not distinguish between equitable and legal relief.

In addition, the Eighth Circuit itself has recognized that subsequent Missouri appellate authority has called into question *NEPACCO*'s prediction on another issue: that Missouri would apply an "exposure" theory to determine which liability policies are triggered to respond to liability for long-term injury.[62] Also in the context of liability

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[61] *Id.* at 510.

[62] *See Nationwide Ins. Co. v. Central Missouri Elec. Coop. Inc.*, 278 F.3d 742, 747 (8th Cir. 2001).

insurance coverage for long-term injury liability, Missouri appellate authority has not followed the Eighth Circuit's prediction that Missouri would prorate coverage by an insurance company's time on the risk,[63] but has enforced the language requiring any triggered policy to cover "all sums" arising from the continuing injury.[64]

As in *NEPACCO*, the Eighth Circuit decisions cited by the Appellant here also misconstrue Missouri law. In particular, the Appellant touts *Doe Run I* and *Doe Run II* as evidence that *Hocker Oil* is no longer good law in Missouri, even though the Missouri Supreme Court has never overruled *Hocker Oil* nor explicitly restricted its holding. Moreover, the Eighth Circuit decisions fail to acknowledge that the *Hocker Oil* decision simply applied this same rule this Court already had endorsed in *Haas*, that an insurance company must use clear and specific language, rather than a vague and non-specific exclusion, if it intends to exclude an policyholder's major source of liability. Accordingly, this Court should ignore the Eighth Circuit's misapplication of Missouri law regarding the interpretation of the pollution exclusion and reaffirm the Missouri principles articulated in *Haas* and *Hocker Oil*.

Furthermore, given the Eighth Circuit's inconsistent jurisprudence regarding the interpretation of the pollution exclusions, this Court should approach its decisions cited by the Appellant with caution. For example, in *Sargent Construction Co., Inc. v. State*

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[63] *See id.*, 278 F.3d at 747-48.

[64] *See Doe Run Res. Corp. v. Certain Underwriters at Lloyd's, London*, 400 S.W.3d 463, 474-75 (Mo. App. 2013).

Automobile Insurance Co., 23 F.3d 1324, 1327 (8th Cir. 1994), a policyholder contractor sought coverage for property damage caused by an acidic chemical solution used as part of a flooring job. The insurance company denied coverage, asserting that the chemical solution fell within the definition of a "pollutant" under the policy's pollution exclusion.[65] Siding with the policyholder, the Eighth Circuit held that the policy's definition of "pollutant" was ambiguous, since a substance, such as the chemical solution used by the contractor, "could be described as an 'irritant or contaminant' because it *in fact* . . . contaminated the environment, causing property damage [or it] could also be deemed an 'irritant or contaminant' because it has the *capability* of . . . contaminating the environment, regardless of whether the accident giving rise to the specific claim involved such harm."[66]

In *United Fire & Casualty Co. v. Titan Contractors Service, Inc.*, 751 F.3d 880, 886 (Eight Cir. 2014), the Eighth Circuit again set out this distinction involving a material that has the potential to contaminate, but in fact "caused harm in a manner other than by irritating." It described that as one of the "interpretive principles" courts addressing the pollution exclusion had to use to "avoid 'absurd results'" and mitigate the "concern that an unbounded pollution exclusion could swallow up the inclusionary provisions of the policy."[67]

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[65] *Id.* at 1326.

[66] *Id.* at 1327.

[67] 751 F.3d at 885-86.

Despite these repeated acknowledgements of the need to avoid overbroad application of the exclusion, the Eighth Circuit's most recent decision on the pollution disregards its own warnings about the potential for absurd results in applying the exclusion. *See Hiland Partners GP Holdings, LLC v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 847 F.3d 594, 599 (8th Cir. 2017) (applying North Dakota law). In *Hiland*, the Eighth Circuit held that the pollution exclusion applied to a claim against a natural gas operator arising from injuries to a third-party employee when the policyholder's hydrocarbon condensate tanks overflowed and exploded. The Eighth Circuit held that the exclusion applied on the grounds that condensate has "the *ability* to soil, stain, corrupt, or infect the environment," even though the claimant was injured by the explosive properties of the hydrocarbon, rather than its toxicity or its effect on the environment.[68]

Thus, following the guidance of the Eighth Circuit on this exclusion easily could lead to absurd results. Many substances that can explode or ignite have some "ability" to soil, stain, or corrupt the environment, so the Eight Circuit's approach would convert the "pollution" exclusion into an exclusion for injuries caused by explosions or fire. Similarly, many injuries caused by collisions or impacts with a claimant involve substances that have the "ability" to contaminate the environment; under *Hiland* each of these may be excluded as well. Insurance companies, for example, may argue that a claimant's injuries from accidental discharge of lead shot arose out of the release of a

[68] *Hiland*, 847 F.3d at 599-600 (emphasis added).

pollutant. In an auto accident case, the insurance company could argue that many of the components of the car that hit the plaintiff (the paint, the metal frame, the various fluids) all have the "ability" to contaminate the environment, and so all coverage is barred, even though the particular injury did not arise out of the nature of those materials as an irritant.

This Court thus should reject St. Paul's request that it follow the Eight Circuit's guidance on the application of the exclusion, when that guidance disregards established Missouri law and leads to absurd results. Instead, this Court should apply the well-established Missouri principles reflected in *Hocker Oil*, *Haas*, and the lower courts here.

V. COURTS ACROSS THE COUNTRY HAVE STRUGGLED TO REIN IN THE "OVERDRAFTED" POLLUTION EXCLUSION, REQUIRING COURTS TO DEVELOP LIMITING PRINCIPLES.

The Eighth Circuit's inconsistency in applying the pollution exclusion is merely a reflection of the difficulty that courts nationwide have encountered in attempting to apply the pollution exclusion. Missouri, for example, is not alone in addressing the incongruity created when an insurance company argues that it can use a general pollution exclusion to deny coverage for what it knows to be the policyholder's main source of potential liability. *Hocker Oil* relied on the decision of the Indiana Supreme Court in *American States Insurance Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996), which held under similar facts that a pollution exclusion did not bar coverage for the cleanup of gasoline that had leaked from a gas station. The court rejected the insurance company's argument that the pollution exclusion applied, beginning its analysis by "noting one oddity in American States' position. That an insurance company would sell a 'garage policy' to a gas station

when that policy specifically excluded the major source of potential liability is, to say the least, strange."[69] The court then held that, while gasoline is sometimes referred to "in common parlance" as a "pollutant," the exclusion was nevertheless ambiguous when applied to a gas station:

> If a garage policy is intended to exclude coverage for damage caused by the leakage of gasoline, the language of the contract must be explicit. This follows the more general rule of construing exclusions strictly against the insurer and in favor of coverage.[70]

The Indiana courts have applied the holding in *Kiger* to reject insurance company efforts to bar coverage for such liabilities as that of a carpet installer sued for injuries arising out of carpet glue fumes,[71] and that of a manufacturer and finisher of metal parts for cleanup of contaminants at its site.[72]

The Washington Supreme Court was motivated by similar concerns when it recently held that a pollution exclusion did not preclude the duty to defend for a policyholder sued for the negligent installation of a hot water heater that led to the release

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[69] *Id.* at 948.

[70] *Id.* at 949.

[71] *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002).

[72] *The Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 935 (Ind. App. 1999).

of toxic levels of carbon monoxide in a home.[73] The *Xia* court analyzed the issue under the doctrine of "efficient proximate cause," holding that a non-specific pollution exclusion cannot bar coverage for a loss arising from the covered peril of negligence:

> Like any other covered peril under a general liability policy, an act of negligence may be the efficient proximate cause of a particular loss. Having received valuable premiums for protection against harm caused by negligence, an insurer may not avoid liability merely because an excluded peril resulted from the initial covered peril.[74]

Although it invoked a different legal doctrine to drive its analysis, the *Xia* court pointed to the same concerns as the courts in *Hocker Oil* and *Haas* about an insurance company seeking to bar coverage by a non-specific exclusion for the major risks of its policyholder's business:

> If ProBuilders sought to avoid liability for damages resulting from particular acts of negligence, it certainly could have written specific exclusions to that effect – for instance, an exclusion for acts of negligence relating to installation of home fixtures generally or hot water heaters specifically. . . .

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[73] *See Xia v. ProBuilders Specialty Ins. Co.*, ___ P.3d ___, 2017 WL 1532219 (Wash. Apr. 27, 2017).

[74] *Id.* at *5.

> Such an exclusion may have been foreseeable given that this policy was for the construction of a new home, but no such exclusion is found in this insurance policy. [The policyholder] paid valuable premiums for an insurance policy providing broad coverage for all forms of negligence *except those acts specifically excluded*, and it was a covered act of negligence that was the efficient proximate cause of Xia's loss.[75]

Other courts addressing the exclusion have had to resolve additional ambiguities in its language and application. While not all of these issues arise in the present case, the struggle so many jurisdictions have had in construing and applying the exclusion demonstrates that this exclusion is far from the clear and explicit provision that St. Paul claims. Rather, courts around the country have recognized the need to interpret the provision in light of various limiting principles.

For example, courts have struggled over whether the same substance can act as a "pollutant" in some contexts but not in others.[76] Courts also have struggled to define

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[75] *Id.* at *8 (emphasis in original; internal citation omitted).

[76] *Compare United Fire & Cas. Co. v. Titan Contractors Svs., Inc.*, 751 F.3d 880, 886 (8th Cir. 2014) (noting that substances may fall within the pollution exclusion in some contexts but not in others, such as if a person slips and falls on the contents of a bottle of

what substances constitute a "pollutant," with different courts coming to different conclusions as to whether such substances as carbon monoxide, asbestos, and lead paint constitute "pollutants" for purposes of the exclusion.[77]

Drano), *with Noble Energy, Inc. v. Bituminous Cas. Co.*, 529 F.3d 642, 647 (5th Cir. 2008) (refusing to distinguish between polluting and non-polluting circumstances).

[77] *Compare Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90, 92 (Ga. 2008) (concluding that carbon monoxide is a pollutant under pollution exclusion), *with American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 82 (Ill. 1997) ("The accidental release of carbon monoxide in this case . . . does not constitute the type of environmental pollution contemplated by the [pollution exclusion]."); *Compare Edwards & Caldwell LLC v. Gulf Ins. Co.*, 2005 WL 2090636 (D.N.J. 2005) (release of asbestos held to fall within definition of pollutant), *with Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 660 N.E.2d 746 (Ohio Com. Pleas Ct. 1993) ("This court, therefore, finds that asbestos cannot be categorized as an 'irritant,' 'contaminant,' or 'pollutant,' as a matter of law, within the meaning of the exclusion."); *Compare Peace v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429, 448 (Wis. 1999) ("[W]e conclude that lead present in paint in a residential property is a pollutant."), *with Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 623 (Md. 1995) (concluding that "a reasonably prudent layperson may interpret the terms 'pollution' and 'contamination,' . . . as *not* encompassing lead paint[.]") (emphasis in original).

The underlying culprit for these inconsistent interpretations is the insurance industry itself, which knowingly selected over-inclusive language when it introduced the so-called "absolute pollution exclusion" in the mid-1980s:

> At the time of the release of the Absolute Pollution Exclusion, insurance companies also submitted a companion pollution liability insurance policy which they intended to provide to restore the insurance coverage excluded by the exclusion. The position of the insurance industry as well as the expectation of insurance regulators regarding the exclusion and the new policy was that the exclusion would not be read more broadly than the policy which restores the deleted coverage. Regulators, however, were not ignorant of the possibility of over-broad application of the exclusion. In fact, former Louisiana Insurance Commissioner, James H. Brown, went so far as to note that the terms of the exclusion were written so broadly that it was susceptible to abuse by insurance companies arguing that it applies in situations far removed from government environmental enforcement actions.[78]

[78] *In re Idleaire Technologies Corp.,* 2009 WL 413117, *5 (Bankr. D. Del. 2009) (internal quotation marks and citations omitted); *see also Stempel and Knutsen on*

Indeed, when seeking approval of the pollution exclusion from the Texas Insurance Board, and pressed on the breadth of the language used, an insurance company representative admitted that "[w]e have overdrafted the exclusion. We'll tell you, we'll tell anybody else, we overdrafted it."[79] Another industry representative appeared to endorse the role of courts in reining in overzealous application of the exclusion: during an exchange about whether the exclusion would apply to a hypothetical claim involving the spill of a cleaning fluid within a store, a member of the Board opined "the Courts wouldn't read the policy that way," to which the insurance industry representative responded, "Nobody would read it that way."[80]

Despite these promises of restraint on the part of the insurance industry when it introduced the pollution exclusion, the exclusion's overdrafting has created a host of issues for courts across the country. Courts, therefore, have recognized the need to

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Insurance Coverage § 14.11[c] ("The language of the absolute pollution exclusion is obviously broad and has the potential, if read literally, to bar coverage for any bodily injury claim that involves chemicals or other irritants.") ("*Stempel*").

[79] *Stempel* § 14.11[c] (quoting Texas State Board of Insurance, Transcript of Proceedings: Hearing to Consider, Discuss, and Act of Commercial General Liability Policy Forms Filed by the Insurance Services Office, Inc., Board Docket No. 1472 (Oct. 30, 1985), Vol. 1 at 6-10).

[80] *Id.*

impose limiting principles on the pollution exclusion to prevent its overzealous application and absurd results.[81]

And under Missouri law, an applicable limiting principle already is well established, and in fact long predates the drafting of the pollution exclusion in St. Paul's standard-form liability policies. As far back as this Court's 1968 decision in *Haas*, Missouri's courts have recognized that insurance companies must use clear and specific language if they wish to exclude coverage for their policyholders' major source of potential liability. *Hocker Oil* affirmed this principle specifically with respect to the pollution exclusion, and the lower courts here have followed that line of authority. Indeed, the insurance industry was well aware of this authority and drafted a specific endorsement for use when insurance companies wished to resolve this ambiguity, but St. Paul chose not to include that endorsement in the policy it sold to Doe Run. This Court should decline St. Paul's invitation to jettison the Court's well-established rules for the application of insurance exclusions and reject St. Paul's efforts to rewrite its policies to include language it easily could have added to the policy it offered, had that been its intent.

[81] *See, e.g., Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992) ("Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results.").

CONCLUSION

For the reasons stated herein, *amicus curiae* United Policyholders urges that this Court affirm the decision of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Brief of *Amicus Curiae* United Policyholders includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06.

Relying on the word count of Microsoft Word Program, the undersigned certifies that the total number of words contained in the Brief of *Amicus Curiae* United Policyholders is 9,797 exclusive of the cover, signature block, and certificates of service and compliance.

/s/ Timothy W. Burns

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2017, I electronically filed the foregoing document with the Clerk of Court using the Missouri Courts e-Filing system, which will send a notice of electronic filing to the counsel of record in this case.

/s/ Timothy W. Burns