

No. 95-4397

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COURT OF APPEALS  
STATE OF NEW YORK

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A-ONE OIL, INC.,  
Plaintiff-Appellant,

v.

THE MASSACHUSETTS BAY INSURANCE COMPANY and the  
HANOVER INSURANCE COMPANY,  
Defendants-Respondents.

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BRIEF OF AMICI CURIAE  
CENTER FOR CHILDREN AND FAMILIES  
and  
UNITED POLICYHOLDERS

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insulation is not excluded under such exclusions, an interpretation similar to that advocated by Amici Curiae herein.

Amici Curiae maintain that the polluter's exclusion contained in policies like that sold by Massachusetts Bay was intended to apply to intentional waste disposal practices that resulted in intentional environmental pollution. The exclusion never was intended to apply to products, such as asbestos insulation that was perfectly legal when used. Under the interpretation adopted by Massachusetts Bay, virtually any substance, element, or object that causes harm could be considered a "toxic chemical," "waste material," "irritant," "contaminant" or "pollutant" thus rendering illusory the insurance coverage that countless policyholders like Amici Curiae purchased.

Massachusetts Bay's position, if sustained by this Court, would strip policyholders of the protection they purchased for liability arising out of the use decades ago, of products that, at the time, were believed to be perfectly safe.

#### STATEMENT OF THE CASE

Policyholder, A-One seeks insurance coverage for bodily injuries and property damage sustained by A-One for a single incident which occurred when its subcontractor removed asbestos insulation from an old furnace in the Wolff residence, a private home, and installed a new furnace. The Massachusetts Bay Insurance Company and the Hanover Insurance Company (collectively "Massachusetts Bay") denied coverage under the so-called

"absolute" pollution exclusion. The court below held that Massachusetts Bay was not obligated to defend or indemnify A-One. This Court should reverse.

#### ISSUES PRESENTED

Amici Curiae adopt the issues presented by Appellant.

#### STATEMENT OF FACTS

Amici Curiae adopt the statement of facts of the Appellant.

#### PRELIMINARY STATEMENT

Massachusetts Bay denied coverage under the pollution exclusion for bodily injuries and property damage sustained by private homeowners, the Wolff's, who contracted with A-One to replace their furnace. Amici Curiae contend that this exclusion does not relieve Massachusetts Bay of its duty to defend and indemnify A-One.

Bodily injuries and property damage caused by the replacement of an old heater in a private residence does not fall within the tenor of substances enumerated in the exclusion<sup>2</sup> in the policy that Massachusetts Bay sold to A-One. Because the

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2. The language of this exclusion is substantially similar to the pollution exclusion contained in the standard-form Commercial General Liability policy. From 1986 onwards, liability insurance companies modified the terms contained in the standard-form Comprehensive General Liability ("CGL") insurance policy. When this revised standard-form policy was drafted, insurance companies signalled the modification with a name change, and identified the new policy form as the Commercial General Liability standard-form policy. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, remanded sub nom., In Re Insurance Antitrust Litigation, 5 F.3d 1556 (9th Cir. 1993).