SUPREME COURT

OF THE

STATE OF CONNECTICUT

SC 16464

BUELL INDUSTRIES, INC.

Plaintiff-Appellant

v.

GREATER NEW YORK MUTUAL INSURANCE COMPANY, ET AL

Defendants-Appellees

BRIEF OF *AMICUS CURIAE*, TEXTRON INC., AVCO CORPORATION, WASTE MANAGEMENT, INC. AND UNITED POLICYHOLDERS

For Joint *Amicus Curiae*, Textron Inc., Avco Corporation, Waste Management, Inc., and United Policyholders

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I. ACTIONS TAKEN PURSUANT TO ENVIRONMENTAL CLEAN-UP LEGISLATION CONSTITUTES LIABILITY IMPOSED BY LAW.

Policyholders face strict, retroactive, and joint and several liability for the costs to remediate environmental property damage at sites throughout the country under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and state equivalents. Under CERCLA, any owner or operator of a facility who discharges hazardous substances into the environment is liable for any resulting property damage. See 42 U.S.C.A. § 9601 et seq. Under many states' law, payments for environmental remediation or "clean-up" costs constitute "damages" compensible under liability insurance policies.[1]

Once property damage occurs, and once liability is "imposed by law" in the form of clean-up costs, liability insurance coverage is triggered. The form in which that liability is imposed

[1] See e.g., Aetna Casualty & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1513 (9th Cir. 1991); Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co., 944 F.2d 940 (D.C. Cir. 1991); New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1185 (3d Cir. 1991), *cert. denied*, 507 U.S. 1030 (1993); Snydergeneral Corp. v. Century Indem. Co., 113 F.3d 536 (5th Cir. 1997); United States v. Pepper's Steel & Alloys, Inc., 823 F.Supp. 1574 (S.D. Fla. 1993), *aff'd in part, rev'd in part*, 87 F.3d 1329 (11th Cir. 1996); MAPCO Alaska Petroleum, Inc. v. Central Nat'l Ins. Co. of Omaha, 795 F.Supp. 941 (D. Alaska 1991); Briggs & Stratton Corp. v. Royal Globe Ins. Co., 64 F. Supp. 2d 1340, 1344-45 (M.D. Ga. 1999); National Indem. Co. v. United States Pollution Control, Inc., 717 F.Supp. 765 (W.D. Okla. 1989); Avondale Indus. Inc. v. Travelers Indem. Co., 697 F.Supp. 1314 (S.D.N.Y. 1988), *aff'd*, 887 F.2d 1200 (2d Cir. 1989), *modified and reh'g denied*, 894 F.2d 498 (2d Cir.), *cert. denied*, 496 U.S. 906 (1990); Village of Morrisville Water & Light Dept. v. United States Fidelity & Guar. Co., 775 F. Supp. 718 (D. Vt. 1991); Boeing Co. v. Aetna Casualty & Sur. Co., No. C86-352D (W.D. Wash. Oct. 1988), *certified question answered*, 113 Wash. 2d 869, 784 P.2d 507 (1990) (en banc); AIU Ins. Co. v. Superior Court, 51 Cal. 3d 807, 799 P.2d 1253, 274 Cal. Rptr. 820 (1990); Compass Ins. Co. v. City of Littleton, Colo., 984 P.2d 606 (Colo. 1999); Atlantic Wood Indus., Inc. v. Lumbermen's Underwriting Alliance, 196 Ga. App. 503, 396 S.E.2d 541 (1990); *cert. denied*, 498 U.S. 1085 (1991); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90, 607 N.E.2d 1204 (1992); Bausch & Lomb, Inc. v. Utica Mut. Ins. Co., 330 Md. 758, 625 A.2d 1021 (1993); Hazen Paper Co. v. United States Fidelity & Guar. Co., 407 Mass. 689, 555 N.E.2d 576 (1990); Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175 (Minn. 1990); Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1996) (rejecting 8th Circuit's reading of Missouri law in NEPACCO, 842 F.2d 975 (8th Cir. 1987) (*en banc*), *cert. denied*, 488 U.S. 821 (1988); Coakley v. Maine Bonding & Casualty Co., 136 N.H. 402, 618 A.2d 777 (1992); C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., 326 N.C. 133, 388 S.E.2d 557 (1990).

upon the policyholder is irrelevant. Comprehensive General Liability (CGL) insurance policies do not contain any requirement that a dollar judgment resulting from a third party lawsuit is necessary before the indemnity obligation is triggered. All that is necessary is that liability be imposed by law. Environmental regulations are law.

II. PUBLIC POLICY FAVORS RECOGNIZING INSURANCE COVERAGE FOR ENVIRONMENTAL CLEAN-UPS.

The purpose of insurance is to insure. Public policy dictates that the environmental contamination be dealt with swiftly and efficiently. Requiring policyholders to be sued and become dollar judgment debtors before their response to environmental liabilities can be covered by liability insurance would (1) delay and aggravate necessary environmental clean-ups, (2) foster an adversarial relationship between environmental regulators and those engaged in environmental clean-ups, and (3) clog the courts and strain public resources with additional unnecessary lawsuits and added environmental enforcement personnel.

A. State Attorneys General And Other Public Entities Unanimously Support Insurance Coverage For Clean-up Costs.

In numerous cases throughout the country, the United States Department of Justice, the Environmental Protection Agency and their counterparts in state government, as well as state, county and city officials, have argued forcefully that CERCLA type clean-up costs are "damages because of property damage." These entities, charged with protecting and promoting the public interest, have unanimously stated that a ruling in favor of policyholders is correct as a matter of insurance policy interpretation and is in the public interest.[2] The United States Attorney General, as well as the Attorneys General of the States of California, Indiana, Iowa, Delaware, Pennsylvania,

[2] Recently, environmental state agencies in Washington and Rhode Island as well as in other jurisdictions have filed briefs in their respective State Supreme Courts supporting the policyholder position on the "damages" issue. See e.g., Weyerhaeuser Co. v. Aetna Cas. Sur. Co., 123 Wn. 2d 891 (1994) ("Weyerhaeuser"); Textron Inc. v. Aetna Cas. & Sur. Co., 754 A.2d 742 (R.I. 2000) ("Textron").

and Missouri, along with other public entities, have filed *amicus* briefs specifically supporting the policyholders' position urged here, that clean-up costs are covered damages. More than twenty-eight such briefs have been filed throughout the country.[3]

B. Public Policy Favors The Swift And Efficient Mitigation Of Environmental Damage.

Public policy favors the swift and efficient mitigation of environmental damage. This very significant public policy concern was articulated by the court in Intel Corp. v. The Hartford Accident & Indemnity Co., 692 F. Supp. 1171 (N.D.Cal. 1988), aff'd in part, rev'd in part, 952 F.2d 1551, 1193 (9th Cir. 1991):

> The EPA and Congress have recognized that even with increased appropriations, industry cooperation is essential to begin to combat the nation's hazardous waste problem. Prospects for PRP cooperation would be undermined if insurer's contributions are made contingent on a government clean-up first, followed by a judgment against the insured, and then a claim against the insurer.[4]

Denying liability insurance coverage to policyholders because they expend monies to meet the liabilities imposed by governmental clean-up orders is contrary to public policy and is not supported by the insurance policy language, the case law, the positions taken by insurance companies in other insurance coverage cases, or the insurance industry's own regulatory and drafting history.[5]

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[3] Eugene R. Anderson et al., Environmental Insurance Coverage In New Jersey: A Tale Of Two Stories, 24 Rutgers L.J. 83, 110 n.130 (1992).

[4] Insurance companies typically argue that construing "damages" to include cleanup costs would eliminate the incentives for the prevention of pollution. To the contrary, insurance is sold to cover unintended damage. Most of the courts that have considered the public policy implications of the "damages" issue have rejected this argument. See, e.g., U.S. Fidelity and Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988) ("Thomas Solvent") at 1159-60 n.4, rejecting the argument that public policy best is served by forcing policyholders, through restrictive interpretations of insurance policies, to "internalize" pollution clean-up costs.

[5] See Reply Brief of Plaintiff-Appellant, Buell Industries, Inc. for a review of the insurance industry's drafting history concerning the "damages" language in the standard form CGL insurance

III. THE INCONSISTENT POSITIONS THAT THE INSURANCE INDUSTRY HAS TAKEN WITH RESPECT TO THE "CLEAN-UP COSTS AS DAMAGES" ISSUE DEMONSTRATE IT SHOULD NOT BE A BAR TO COVERAGE.

The insurance industry has asserted inconsistent positions in the past on the issue of covered damages under insurance policies containing similar, if not virtually identical, language to those at issue here.

A. Insurance Companies Successfully Have Argued Clean-Up Costs Are "Damages" To Courts Throughout The Country.

Insurance companies, including, in some instances, some of the Defendants-Appellees in this appeal, have themselves argued successfully to courts that government-mandated clean-up costs are covered "damages."[6]

B. The Insurance Industry Has Argued to Congress That Clean-up Costs Are Damages.

In addition to the representations to courts, the insurance industry told the United States Congress that clean-up costs are damages. For example, the American Insurance Association ("AIA"), the insurance industry's principal lobbying organization, submitted a proposal to Congress which treated clean-up costs and damages synonymously.[7] In addition, Leslie Cheek, III, vice president of Crum & Forster Insurance Companies, told the United States Senate in 1980 that, if

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policy. The Restatement (Second) of Contracts § 205(e) (1981) states that asserting an interpretation of a contract contrary to one's own understanding violates a party's duty of good faith and fair dealing.

[6] See, e.g., Upjohn v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. 1989), app. gr. motion gr., 435 Mich. 862 (1990) ("Upjohn"); Compass Ins. Co. v. Cravens, Dargen & Co., 748 P.2d 724 (Wyo. 1988) ("Compass"); Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988); Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987) ("Centennial"). For an extensive analysis of cases in which the insurance industry has represented to courts across the country that clean-up cost are "damages", see Stanzler & Yuen, "Coverage for Environmental Clean-Up Costs: History of the Word 'Damages' in the Standard Form Comprehensive General Liability Policy," Columbia Business Law Review, Vol. 1990 No. 3: 449.

[7] See, e.g., Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977 (8th Cir.) (en banc), cert. denied, 488 U.S. 821 (1988).

Congress enacted § 1480 (the bill that later became CERCLA), insurance companies would face the large and unpredictable burden of payment of "remedial action" costs as mandated by the Senate's version of the bill:

> Determination as to whether such costs are reasonable or necessary is entirely out of the hands either of the discharger or his insurer, but his liability for them is virtually absolute.

96 Cong. Rec. S. 12918 (daily ed. Sept. 18, 1980).

IV. CLEAN-UP COSTS ARE COVERED "DAMAGES" WITHOUT A DOLLAR JUDGMENT AND EVEN WITHOUT A SUIT.

Insurance company arguments that a third party lawsuit and a dollar judgment is required before clean-up costs would be indemnified under CGL policies were rejected by the Washington Supreme Court in Weyerhaeuser, 874 P.2d 142 (Wash. 1994). The State Supreme Court there found that "costs incurred when an insured engages voluntarily in cleanup activities in advance of litigation are covered under comprehensive general liability policies":

> The insurance contracts provide coverage when the [policyholder] becomes obligated to pay by reason of the liability "imposed by law". The policy language does not specify whether this liability must be imposed by formal legal action (or threat of such) or by a statute which imposes liability. In the case where there has been property damage and where a policyholder is liable pursuant to an environmental statute, a reasonable reading of the policy language is that coverage is available, if it is not otherwise excluded.
>
> There is nothing in the insurance policy language which requires a "claim" or an overt threat of legal action and, therefore, the insurers' argument that a claim is a prerequisite to coverage seems to us to be an effort to add to the language of the policies. Id. at 151, 154.

V. COMMERCIAL GENERAL LIABILITY INSURANCE COVERS LIABILITIES ARISING FROM GRADUAL ENVIRONMENTAL DAMAGE THAT IS UNEXPECTED AND UNINTENDED.

A. The Qualified "Polluter's Exclusion" Is Ambiguous.

Thomas L. Ashcraft, Secretary, Policyholders Service Division, INA, (an insurance company organization and a member of the IELA which has filed an *amicus* brief in support of the

defendant insurance companies here) perhaps said it best: "[j]ust what is or is not sudden and accidental has puzzled insurance men since the advent of liability insurance." Ashcraft, "Ecology, Environment, Insurance and the Law," 21 Fed'n of Ins. Couns. Q. 37 (1970-1971).

The term "sudden" is capable of more than one reasonable interpretation, including "unexpected" as well as "abrupt" or "instantaneous". It is these multiple interpretations of "sudden and accidental" that have "puzzled insurance men" for decades -- and now -- require reversal of the prior decision of the Trial Court.

The insurance industry argues that "sudden" must be read exclusively as "temporally abrupt" to avoid redundancy with the term "unexpected" in the exception to the "polluter's exclusion". This insurance industry argument has been rejected soundly. As the United States Court of Appeals for the Third Circuit stated:

> We believe that the word "sudden," even if defined to mean "unexpected," is not completely synonymous with the word "accidental." Simply put, sudden means unexpected, and accidental means unintended. To the extent that the meanings of these words overlap, we do not think that this precluded the district court from defining sudden as unexpected. Insurance policies routinely use words that, while not strictly redundant, are somewhat synonymous. For example, the exception to the pollution exclusion clause also uses the words "discharge, dispersal, release or escape" – terms that convey the same basic idea, with only slightly different permutations. We think that the words "sudden" and "accidental," when read together, serve the same purpose as "discharge, dispersal, release or escape": they each connote the same general concept – namely, fortuity – with a small variation. Neither do we think that annexing the word "sudden" to the word "accidental" with the conjunctive "and" necessarily injects a temporal element, such as brevity or abruptness, into the exception to the pollution exclusion clause.

New Castle County v. Hartford Acc. & Indem. Co., 933 F.2d 1162, 1194-95 (3d Cir. 1991), rev'd on other grounds, 970 F.2d 1267 (3d Cir. 1992), cert. denied, 507 U.S. 1030 (1993) ("New Castle County") (citations omitted) (emphasis added).

The drafting and regulatory history more fully reviewed in Morton Int'l, Inc. v. General Accident Ins. Co. of Am., 629 A.2d 831 (N.J. 1993) ("Morton") and Textron, 754 A.3d 742 (R.I. 2000), proves the insurance industry's own understanding of the qualified polluter's exclusion at the time it was drafted and during the state approval process supports coverage.

B. The Wide Spread Conflict Expressed in Numerous Judicial Opinions Confirms That The Qualified "Pollution Exclusion" Is Ambiguous.

Joint *Amicus Curiae* urge this Court to adopt the proposition that a wide split in numerous judicial opinions of the type that exists with respect to the qualified "polluter's exclusion" is "proof positive" of the insurance policy term's ambiguity.[8]

Numerous courts around the country agree with the Joint *Amicus Curiae*. For example, the South Carolina Supreme Court, in a case construing the qualified "polluter's exclusion" in favor of policyholders, observed "[t]hat different courts have construed the language of an insurance policy differently is some indication of ambiguity." Greenville County v. Insurance Reserve Fund, 443 S.E.2d 552, 553 (S.C. 1994) ("Greenville County") ("In view of the holding by numerous jurisdictions, along with the definitions found in both Webster's and Black's, we find the term is ambiguous and susceptible of more than one reasonable interpretation. Construing the ambiguity, as we must, in favor of the insured, we hold that 'sudden' is to be interpreted as 'unexpected.'"). Similarly, the United States Court of Appeals for the Third Circuit in New Castle County, interpreting the qualified polluter's exclusion, stated:

> We also are impressed by the profound judicial disagreement over the meaning of the phrase "sudden and accidental". That so many learned jurists throughout the nation differ on the construction of the phrase is, in our view, additional proof that the phrase admits to two reasonable constructions.

New Castle County, 933 F.2d at 1198.[9]

[8] Zanfagna v. Providence Washington Ins. Co., 415 A.2d 1049, 1051 (R.I. 1980).

The profound judicial disagreement has continued unabated since the Third Circuit's observation in New Castle County. In St. Paul Fire & Marine Ins. Co. v. Warwick Dyeing Corp., 26 F.3d 1195 (1st Cir. 1994) ("Warwick Dyeing"), the United States Court of Appeals for the First Circuit found "[s]tate and federal courts ... fairly evenly divided" on the qualified "polluter's exclusion" and, noting a brief which listed 74 cases holding for one side, stated "we do not doubt for a minute that there are another 74 cases" holding for the other. Warwick Dyeing, supra, 26 F.3d at 1200, 1201, n.2. The First Circuit was correct in surmising that there is substantial authority finding the "sudden and accidental" exception to the qualified polluter's exclusion ambiguous or otherwise construing it in favor of policyholders.[10]

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[9] Other courts which agree include, for example, the Oregon Supreme Court, which held that the qualified "polluter's exclusion" was ambiguous and observed: "'The very fact that a number of courts have reached conflicting conclusions as to the interpretation of a certain provision is frequently considered evidence of ambiguity.'" St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 923 P.2d 1200, 1218 (Or. 1996) (quoting J.A. Appleman & J. Appleman, 13 Ins. Law & Practice, § 7404 (1976)). In Just v. Land Reclamation, 456 N.W.2d 570, 577-78 (Wis. 1990) ("Just") the Wisconsin Supreme Court found "that substantial conflicting authority exists with respect to the 'correct' interpretation of the exclusionary terms merely serves to strengthen the conclusion that the terms are susceptible to more than one meaning, and thus ambiguous"). See also U.S. Fidelity and Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139, 1155-56 (W.D. Mich. 1988) ("comprehensive debate" over the meaning of the qualified "polluter's exclusion" confirms its inherent ambiguity); Pepper's Steel & Alloys, Inc. v. United States Fid. & Guar. Co., 668 F. Supp. 1541, 1549 (S.D. Fla. 1987); see also Annot., Insurance — Ambiguity — Split Court Opinions, 4 A.L.R. 4th 1253, 1255 (1981) (same principle).

[10] See, e.g., St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 923 P.2d 1200 (Ore. Sup. Ct. 1996)(quoting J.A. Appleman & J., Appleman, 13 Ins. Law & Practice, §7404 (1976)); American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. Sup. Ct. 1996); Seymour Mfg. Co., Inc. v. Commercial Union Ins. Co., 665 N.E.2d 891 (Ind. Sup. Ct. 1996); Alabama Plating Co. v. United States Fidelity and Guar. Co., 690 So. 2d 331 (Ala. 1996) ("Alabama Plating"); Greenville County, 443 S.E.2d at 553; Queen City Farms v. Aetna Cas. & Sur. Co., 882 P.2d 703 (Wash. 1994) ("Queen City Farms"); Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co., 881 P.2d 201 (Wash. 1994); Harleysville Mut. Ins. Co. v. Sussex County, 831 F. Supp. 1111 (D. Del. 1993), aff'd, 46 F.3d 1116 (3d Cir. 1994); Morton, 629 A.2d 831 (N.J. 1993); Joy Technologies, Inc. v. Liberty Mut. Ins. Co., 421 S.E.2d 493 (W. Va. 1992) ("Joy Technologies"); New Castle County, 933 F.2d at 1198; Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1406 (D. Del. 1992) (applying Connecticut law); Broderick Inv. Co. v. Hartford Accident & Indem. Co., 954 F.2d 601, 608 (10th Cir. 1992); Just, 456 N.W.2d 570; Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686 (Ga.

In the most recent decision regarding the polluter's exclusion, the Supreme Court of Rhode Island summed up the present status of the case law:

> As one court has colorfully described it, "The cases swim [in] the reporters like fish in a lake. The Defendants would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too." *Pepper's Steel &Alloys, Inc. v. United States Fidelity and Guaranty Co.*, 668 F.Supp. 1541, 1549-50 (S.D.Fla.1987).
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> * * *
>
> [A] multitude of cases exists on both sides. Persuasive majority of other jurisdictions hold that the word "sudden" in this type of clause is ambiguous; that is, it is susceptible to more than one reasonable interpretation.

Textron, 754 A.2d 742, 748-749 (R.I. 2000).

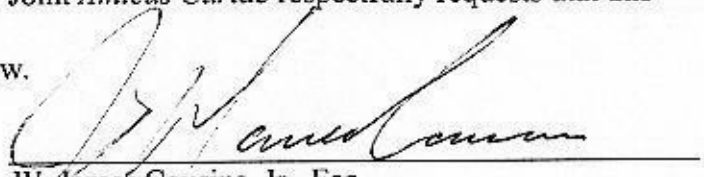
1989) ("Claussen"); Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1204-06 (2d Cir. 1989), cert denied, 496 U.S. 906 (1990); Benedictine Sisters of St. Mary's Hosp. v. St. Paul Fire & Marine Ins. Co., 815 F.2d 1209, 1210-12 (8th Cir. 1987); MAPCO Alaska Petroleum, Inc. v. Central Nat'l Ins. Co., 795 F. Supp. 941, 946 (D. Alaska 1991); United States v. Conservation Chem. Co., 653 F. Supp. 152, 160 (W.D. Mo. 1986) ; National Grange Mut. Ins. Co. v. Continental Cas. Ins. Co., 650 F. Supp. 1404, 1409-12 (S.D.N.Y. 1986); City of Northglenn v. Chevron U.S.A., Inc., 634 F. Supp. 217-23 (D. Colo. 1986); Payne v. United States Fidelity & Guar. Co., 625 F. Supp. 1189, 1191-93 (S.D. Fla. 1985); Hecla Mining Corp. v. New Hampshire Ins. Co., 811 P.2d 1083, 1090-92 (Colo. 1991); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1217-22 (Ill. 1992); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 535 N.E.2d 1071, 1075-78 (Ill. App. Ct.) ("Specialty Coatings"), appeal denied, 545 N.E.2d 133 (Ill. 1989); Reliance Ins. Co. v. Martin, 467 N.E.2d 287, 289-90 (Ill. App. Ct. 1984); Grinnell Mut. Reinsurance Co. v. Wasmuth, 432 N.W.2d 495, 497-500 (Minn. Ct. App. 1988); Colonie Motors, Inc. v. Hartford Accident & Indem. Co., 538 N.Y.S.2d 630, 632 (N.Y. App. Div. 1989); Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S.2d 603, 604-05 (N.Y. App. Div. 1980); Farm Family Mut. Ins. Co. v. Bagley, 409 N.Y.S.2d 294, 295-96 (N.Y. App. Div. 1978); United Pacific Ins. Co. v. Van's Westlake Union, Inc., 664 P.2d 1262, 1266-67 (Wash. App. Div. 1983); Lumbermens Mut. Cas. Co. v. Plantation Pipe Line Co., 447 S.E.2d 89 (Ga. 1994); Thompson v. Temple, 580 So.2d 1133 (La. App. 1991); Bentz v. Mut. Fire, Marine & Inland Ins. Co., 575 A.2d 795 (Md. Ct. Spec. App. 1990); South Macomb Disposal Authority v. American Insurance Co., 572 N.W.2d 686 (Mich. Ct. App. 1997); SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305 (Minn. 1995); Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888 (Minn. 1994); Grindheim v. Safeco Ins. Co. of America, 908 F. Supp. 794 (D. Mont. 1995); Byrd v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 722 A.2d 598 (N.J. Super. Ct. App. Div. 1999); Continental Cas. Co. v. Rapid-American Corp., 609 N.E.2d 506 (N.Y. 1993); Lumbermens Mut. Cas. Co. v. S-W Industries, Inc., 39 F.3d 1324 (6th Cir. 1994), reh'g denied (1994); Snydergeneral Corp. v. Century Indem. Co., 113 F.3d 536 (5th Cir. 1997); Patz v. St. Paul Fire & Marine Ins. Co., 15 F.3d 699 (7th Cir.), *reh'g denied* (1994).

Can it be said that a provision is capable of only one exclusive interpretation and that no other reasonable interpretation exists when hundreds of jurists across the country have construed the provision otherwise? No.

The indisputable wide diversity in judicial opinion regarding the qualified polluter's exclusion requires a finding of ambiguity. Insurance policies found to be ambiguous should be construed in favor of the policyholder and in favor of coverage.

For all of the foregoing reasons, Joint *Amicus Curiae* respectfully requests that this Court reverse the ruling of the Trial Court below.

Dated: May 24, 2001

By: 

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