EXHIBIT D

Supreme Court Of The State Of New York
Appellate Division: Third Department

Third Department Index
No. 65599

THE COUNTY OF COLUMBIA, NEW YORK,

Plaintiff-Appellant,

against

CONTINENTAL INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY and FIREMEN'S INSURANCE COMPANY OF NEWARK, N.J.,

Defendants-Appellees.

BRIEF AND APPENDIX OF *AMICUS CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF CONTINENTAL INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY AND FIREMEN'S INSURANCE COMPANY OF NEWARK, N.J.

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Table of Contents

Table Of Authorities

Statutes and Authorities

Legislative Materials

Miscellaneous

INDEX TO EXHIBITS

INTEREST OF AMICUS CURIAE

The Insurance Environmental Litigation Association ("IELA") is a trade association of major property and casualty insurers. IELA was formed, in part, to appear as amicus curiae in environmentally-related insurance coverage cases and to assist courts in the determination of important insurance coverage questions presented in such litigation. IELA members have entered into insurance contracts in New York and throughout the nation containing provisions similar to those at issue in the instant case. IELA is therefore vitally interested in the judicial interpretation of these coverage provisions.

Because of its members' extensive experience with the interpretation and application of the contract provisions before the Court, IELA has a unique perspective on the issues presented. Drawing on this experience, IELA's brief will show that enforcing the terms of insurance contracts as written is essential to the integrity of the insurance underwriting process and to the promotion of long-term environmental goals.

IELA files this brief on behalf of Allstate Insurance Co., American International Group, Chubb Group of Insurance Companies, CIGNA Property & Casualty Companies, Crum & Forster Corporation, Fireman's Fund Insurance Companies, Hanover Insurance Company, Hartford Insurance Group, Home Insurance Company, Liberty Mutual Insurance Company, Maryland Insurance Group, Prudential Reinsurance Company, Royal Insurance Co., St. Paul Companies, Selective Insurance Group of America, State Farm Fire & Casualty Company, The Travelers Insurance Companies, and United States Fidelity & Guaranty Company. Appellees Aetna Casualty & Surety Co. and Continental Insurance Co. are IELA members; this brief is not submitted on their behalf.

STATEMENT OF FACTS AND PROCEEDINGS[1]

This case involves a policyholder that intentionally deposited harmful wastes at a dumpsite. Barred from obtaining insurance coverage by the pollution exclusions contained in its policies, the policyholder turns to the policies' personal injury provisions in an attempt to create coverage for this clearly excluded liability. This Court should reject the policyholder's stratagem and uphold the trial court's denial of coverage.

The policyholder, appellant County of Columbia, New York (the "County"), brought this action against appellees Aetna Casualty & Surety Company ("Aetna"), Continental Insurance Company ("Continental"), and Firemen's Insurance Company of Newark, New Jersey ("Firemen's") (collectively, the "Insurers"). The County seeks a declaration that the Insurers are obligated under various general liability insurance policies to defend and indemnify the County against an underlying claim for pollution-related injury resulting from the County's intentional dumping of harmful materials onto the ground at a landfill.

In December 1981, the County and the Town of Claverack, New York (the "Town"), entered into the Columbia County Solid Waste Management Agreement, pursuant to which the County intentionally deposited refuse and other solid waste onto the land at a dumpsite. Slip op. at 2. The County subsequently leased the dumpsite, where it continued its polluting activity. *Id.* at 2. On May 15, 1986, the County signed a New York State Department of Environmental Conservation Order on Consent (the "Consent Order"), admitting to the discharge of "leachate into the

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1 IELA's statement of facts is drawn from the trial court's opinion of September 30, 1991 ("Slip. op."), unless otherwise noted.

ground water . . . in violation of Section[s] 360.8(a)(3) and 703.5 of 6 NYCRR." *Id.* at 2.

On January 30, 1989, the H.K.S. Hunt Club, Inc. (the "Hunt Club"), a neighboring landowner, brought the underlying action against the County and the Town, citing the Consent Order as proof that the dumpsite was discharging leachate into the groundwater in violation of New York law. Slip op. at 2-3. The Hunt Club alleged that the continued dumping by the County and the Town had caused permanent damage to its soil, surface water, and groundwater. *Id.* at 3. The Hunt Club also alleged that the operation of the landfill constituted trespass, nuisance, and interference with the use of property. In its answer to the Hunt Club's complaint, the County admitted that it had signed the Consent Order and that it had intentionally deposited the refuse and solid waste on the land. *Id.* at 2-3.

On March 28, 1990, the County brought the instant action against Aetna, Continental, and Firemen's, seeking coverage under various general liability policies issued between 1981 and 1989. In response, the Insurers moved for summary judgment on the grounds that the pollution exclusion clauses contained in their policies precluded coverage for the underlying action. The County subsequently filed a cross motion for partial summary judgment.

On September 30, 1991, the Supreme Court, County of Columbia (Connor, J.), granted summary judgment to the Insurers. The trial court denied the County coverage on three separate grounds. First, the trial court held that a pollution exclusion barring coverage for pollution except where the polluting discharge was both "sudden" and "accidental" precluded coverage because the deliberate deposit of waste in a landfill could not be considered "accidental." Slip op. at 6-7. Second, the court denied the County coverage under an "absolute" pollution exclusion barring coverage for property damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants," since the underlying action

alleged "property damage arising from actual discharges of pollutants." *Id.* at 8. Finally, the trial court rejected the County's contention that "personal injury" provisions in the policies covering liability for the enumerated torts of "wrongful entry or eviction or other invasion of the right of private occupancy" extended to the underlying allegations of trespass, nuisance, and interference with use of property. *Id.* at 7.

SUMMARY OF ARGUMENT

The trial court correctly found that liability arising from the County's long-term, intentional dumping of refuse and solid waste is precluded under the pollution exclusion barring coverage for all but "sudden and accidental" discharges, because the County's intentional polluting can not be considered "accidental" under the Court of Appeals' mandate in *Technicon, infra,* and *Powers Chemco, infra.* Similarly, the absolute pollution exclusion, barring coverage for all pollution-related claims without any exception, precludes any coverage to the County. Because the underlying action is about pollution-related property damage, these pollution exclusions control this case.

The County nevertheless attempts to create coverage through a roundabout reading of the policies' personal injury coverage for liability for "wrongful entry or eviction or other invasion of the right of private occupancy." The County contends that these provisions afford coverage for the underlying claims of trespass, nuisance, and interference with the use of property — counts evidently included in the underlying complaint to capitalize on a New York statute offering treble damages for such offenses.

Courts have repeatedly repudiated the County's stratagem of linking environmental property damage with personal injury coverage. The enumerated

torts of "wrongful entry" and "eviction" are far different from the underlying claims of trespass, nuisance, and interference with the use of property. Both "wrongful entry" and "eviction" require purposeful acts aimed at the infringement of possessory rights. Under the principle of *ejusdem generis*, long recognized in New York, the phrase "other invasion of the right of private occupancy" must also be interpreted to include the element of the purposeful infringement of possessory rights. The County's "willful violation" of New York environmental regulations is, as the trial court held, an additional reason to deny personal injury coverage in this case.

This Court should ignore the improperly introduced and nonprobative extrinsic evidence that the County and Opposing Amici seek to inject into this appeal, as well as the Opposing Amici's far-fetched argument that the doctrine of judicial estoppel has any application here. Instead, public policy dictates that the insurance contracts be enforced as written — with neither the pollution exclusion clauses nor the personal injury provisions affording any coverage for the County's intentional polluting activities.

ARGUMENT

I. THE POLLUTION EXCLUSIONS IN THE INSURERS' POLICIES PRECLUDE COVERAGE OF ANY LIABILITY ARISING OUT OF THE COUNTY'S LONG-TERM AND INTENTIONAL DISCHARGE OF WASTE.

As the trial court correctly found, the pollution exclusions contained in the policies preclude coverage for any liability arising from the County's long-term, intentional dumping of refuse and solid waste onto the land.

All of the policies in this case contain pollution exclusions. The pollution exclusion in certain of the policies bars coverage for pollution with a narrow

exception for pollution caused by discharges that were both "sudden" and "accidental."[2] As the Court of Appeals has stated in unmistakably clear terms:

> [s]ince the exception is expressed in the conjunctive, both requirements must be met for the exception to become operative. Stated conversely, discharges that are either nonsudden or nonaccidental block the exception from nullifying the pollution exclusion.

Technicon Electronics Corp. v. American Home Assur. Co., 74 N.Y.2d 66, 75, 542 N.E.2d 1048, 1050, 544 N.Y.S.2d 531, 533 (1989), *recon. denied*, 74 N.Y.2d 843, 545 N.E.2d 874 (1989). *See also Powers Chemco, Inc. v. Federal Ins. Co.*, 74 N.Y.2d 910, 911, 548 N.E.2d 1301, 1302, 549 N.Y.S.2d 650, 651 (1989) (the "exception to the exclusion for liability arising from pollution is not operative unless the occurrence in question was *both* 'sudden' and 'accidental'"). Following *Technicon* and *Powers Chemco*, this Court has recognized that, under New York law, "it is now unmistakably clear" that the application of the "sudden and accidental" exception to the pollution exclusion "consists of two distinct inquiries, each of which must be satisfied independently as a prerequisite to coverage." *Borg-Warner Corp. v. Insurance Co. of North America*, 174 A.D.2d 24, 30-31, 577 N.Y.S.2d 953, 957 (3d

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2 Other policies at issue in this case contain a so-called "absolute" pollution exclusion, which bars coverage for *all* pollution-related claims. This exclusion provides in part that:

> 1. [Coverage is precluded for] bodily injury or property damage arising out of actual, alleged or threatened discharge, dispersal, release or escape of pollutants.
>
> A. At or from premises owned, rented, or occupied by the named insured;
>
> B. At or from any site or location used by or for the named insured or others for the handling, storage, disposal, processing or treatment of waste.

The trial court correctly held that "[s]ince the underlying action Complaint alleges property damage arising from actual discharges of pollutants, coverage is expressly excluded" under the policies containing the absolute pollution exclusion. Slip op. at 8.

Dep't 1992), *leave to appeal denied*, 3-14 Mo. No. 554, slip op. (N.Y. July 2, 1992) (attached hereto as Exhibit 1). [3]

Here, it is undisputed that the County intentionally discharged polluting waste onto the land. Slip op. at 3. By definition, such discharges are not "accidental" and are therefore not covered. As the trial court properly held, "the depositing of refuse and other solid waste material cannot be viewed as 'accidental' within the meaning of the exception" to the pollution exclusion. *Id.* at 6-7. The trial court's decision is required by binding, directly applicable precedent from this Court and the Court of Appeals. *See, e.g.*, *Technicon*, 74 N.Y.2d at 75 ("[i]nasmuch as the underlying complaint alleges and [the policyholder's] answer concedes that its dumping of wastes was deliberate, the occurrence cannot be 'accidental' within the meaning of the policy").[4] Earlier this year, this Court recognized the weight of this precedent by holding that "[w]here . . . the discharge itself was intentional, *coverage is unavailable as a matter of law*." *Borg-Warner*, 174 A.D.2d at 32 (emphasis added).

The trial court's conclusion that the County's discharge of pollution was not "accidental" is dispositive of this issue. Even if this Court were to focus upon the applicability of the "sudden" prong of the exception, however, the result would be the same. Indeed, this Court recently recognized the temporal meaning of the term "sudden," holding that, "for a release or discharge to be 'sudden' within the meaning

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3 Because it involves an exception to an exclusion, the burden of proving a sudden and accidental discharge is on the policyholder. As this Court recognized earlier this year, "although an insurer generally must prove the applicability of an exclusion, it is the insured's burden to establish the existence of coverage. Here, because the existence of coverage depends entirely on the applicability of the exception to the exclusion, the insured has the duty of demonstrating that it has been satisfied." *Borg-Warner*, 174 A.D.2d at 31 (citing precedent from New York and other jurisdictions).

4 *Accord EAD Metallurgical, Inc. v. Aetna Cas. & Sur. Co.*, 905 F.2d 8, 10-11 (2d Cir. 1990) (discharge non-accidental when complaint alleged that manufacturer, *inter alia*, arranged for the disposal of waste in town landfill).

of the pollution exclusion, it must occur abruptly or quickly or 'over a short period of time.'" *Borg-Warner*, 174 A.D. 2d at 31 (citing *Technicon* and other cases). Here, as in *Borg-Warner*, "it is undisputed that the discharges took place over a period of many years" and were therefore "nonsudden." *Id.* at 31.[5]

In an attempt to escape the weight of this precedent, the County boldly asserts that the pollution exclusion is either "ambiguous" or somehow irrelevant in this case because the policies containing the exclusion include among the risks covered "garbage or refuse dumps." The discharge of pollutants excluded by these policies, claims the County, "cannot be construed to mean the covered act of placing wastes *into* a landfill." *See* Appellants' Brief ("County Brief") at 47-48.

The County's argument is wholly without merit. As the trial court correctly held, "[t]he fact that the dump is a covered location does not obviate the application of the pollution exclusion clause for claims of property damage due to contaminant discharges from the dump." Slip op. at 7-8. Other courts have agreed. *See, e.g.*, *Ludlow's Sand & Gravel Co. v. General Accident Ins.*, No. 87-CV-1239, transcript at 22-23, 30-40 (May 13, 1991) (attached hereto as Exhibit 3) (rejecting the policyholder's contention that the policy covered the escape of pollutants from a landfill and denying coverage to the policyholder because the discharge of pollutants was not "sudden" under the exception to the pollution exclusion). While the policies

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5 The legislative history of the two New York statutes that first mandated the use of the pollution exclusion, 1971 N.Y. Laws, Ch. 765, and then repealed that requirement, 1982 N.Y. Laws, Ch. 856, confirms that, in conformity with New York public policy, the pollution exclusion was intended to bar coverage for all forms of non-sudden pollution. *See, e.g.*, Statement of Chairman of State Senate Committee on Conservation and Recreation, 1982 N.Y. Laws Ch. 856 (Bill Jacket) (Exhibit 2 attached hereto at A-9) ("[a]t present, New York is alone in the country in its restriction of permitting insurance to be issued to cover *gradual or non-sudden pollution*") (emphasis added); Memorandum of Attorney General Robert Abrams (Exhibit 2 at A-14-15) ("[t]he purpose of this bill is to amend the Insurance Law to remove the prohibition against liability insurance for environmental pollution resulting from *gradual release of pollutants*") (emphasis added).

at issue provide coverage for a number of risks associated with the landfill, pollution is not one of them.

Moreover, the County's argument violates the fundamental principle that "exclusion clauses *subtract* from coverage." *Weedo v. Stone-E-Brick*, 81 N.J. 233, 405 A.2d 788, 795 (1979). As the New Jersey Supreme Court recognized, the function of an exclusion "is to restrict and shape the coverage otherwise afforded." *Weedo*, 405 A.2d at 790. *See also Upjohn Co. v. New Hampshire Insurance Co.*, 438 Mich. 197, 205-207, n.6, 476 N.W.2d 392, 396-397, n.6 (1991) ("simply stated, it is our belief that exclusions exclude"); *American Motorists Ins. Co. v. General Host Corp.*, 667 F. Supp. 1423, 1429 (D. Kan. 1987), *aff'd*, 946 F.2d 1482 (10th Cir. 1991) ("[i]t is not a novel idea that exceptions to a broad blanket of coverage can be made"). The County's argument is merely an attempt to distract the Court from the relevant New York law that governs the issue. This Court should reject the County's far-fetched argument.

II. THE HUNT CLUB'S UNDERLYING COMPLAINT ACTUALLY SEEKS RELIEF NOT FOR PERSONAL INJURY BUT FOR POLLUTION DAMAGE CLEARLY EXCLUDED BY THE POLICIES.

Frustrated by the obvious applicability of the pollution exclusion clauses to the underlying claims,[6] the County turns to the personal injury provisions contained in each of the policies, which provide coverage for liability for "wrongful

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6 The County apparently concedes that the absolute pollution exclusion bars coverage in this case, since it fails to discuss this exclusion in its brief to this Court. Indeed, it must: as the trial court noted, other New York courts have refused to find coverage in the face of similar pollution exclusions. Slip op. at 8. *See also Alcolac, Inc. v. California Union Ins. Co.*, 716 F. Supp. 1546, 1549 (D. Md. 1989) (the "absolute" pollution exclusion "is just what it purports to be — absolute").

entry or eviction or other invasion of the right of private occupancy."[7] Both the County and Opposing Amici attempt to squeeze the alleged injury resulting from the County's intentional dumping of pollutants into the limited definition of "personal injury." As the trial court recognized, however,

> [t]he complaint in the underlying action also does not allege the offenses of wrongful entry or eviction or any other invasion of the right of private occupancy. Courts have construed this coverage narrowly and rejected finding coverage thereunder for allegations of trespass, nuisance, and interference with the use of property resulting from waste handling, disposal practices and contaminant migration.

Slip op. at 7.

The underlying case is about pollution and property damage, not personal injury. The Hunt Club's complaint actually seeks recovery for environmental property damage, even though it is partially cast in terms of trespass, nuisance, and interference with use of property.[8] It is the essential character of the underlying claims that governs coverage. *See, e.g.*, *Western Casualty & Sur. Co. v. Palmyra*, 650 F. Supp. 981, 984 (E.D. Mo. 1987) (no personal injury coverage since "the mere casting of [the causes of action of the underlying complaint] as claims for damages for invasion of privacy does not alter their character as 'arising out of' the [uncovered] unlawful wiretap"; *Pleasure Driveway & Park Dist. v. Aetna Casualty &*

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7 All of the relevant policies at issue contain an endorsement providing personal injury liability coverage. "Personal injury" is defined in relevant part as follows:

> "Personal Injury" means injury arising out of one or more of the following offenses committed during the policy period
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> * * *
>
> wrongful entry or eviction or other invasion of the right of private occupancy.

8 The Hunt Club's complaint appears to have been artfully drafted to take advantage of Section 853 of the New York Real Property Actions And Proceedings Law, which offers the allure of treble damages. N.Y. Real Prop. Acts. § 853 (McKinney 1992). In fact, the Hunt Club's complaint explicitly requests treble damages under this statute.

Sur. Co., 80 Ill. App. 3d 1093, 400 N.E.2d 651, 653 (1980) (no personal injury coverage since "when read in context" the underlying complaint refers to uncovered wrongful termination and antitrust violations); and *Nichols v. Great American Ins. Co.*, 169 Cal. App. 3d 766, 215 Cal. Rptr. 416 (1985) (no personal injury when the underlying claim was for uncovered airwaves piracy).

The County and Opposing Amici urge this Court to recognize a type of coverage that the County neither bargained nor paid for. Black-letter insurance law, however, dictates that courts cannot rewrite insurance contracts to expand coverage beyond that agreed upon by the parties to the contract. *See Adorable Coat Co. v. Connecticut Indemn. Co.*, 157 A.D.2d 366, 369, 556 N.Y.S.2d 37, 39 (1st Dep't 1990) ("[a] court may not create policy terms by implication or rewrite an insurance contract"), and *Bretton v. Mutual of Omaha Ins. Co.*, 110 A.D.2d 46, 49, 492 N.Y.S.2d 760, 763 (1st Dep't 1985) ("[a]n insurer is entitled to have its contract of insurance enforced in accordance with its provisions and without a construction contrary to its express terms"). *See also Weedo*, 405 A.2d at 795 (insurance contracts cannot be construed to "afford[ ] indemnity in an area of insurance completely distinct from that to which the policy applies in the first instance").

That is precisely what the County seeks to do here. Because "property damage" coverage is barred by the pollution exclusions, the County has turned elsewhere in a desperate search for coverage. It has turned to an entirely distinct type of coverage -- personal injury -- in an attempt to create precisely that coverage excluded by the clear terms of the pollution exclusions, the provisions which govern the property damage claims under the policies at issue.

A. The Personal Injury Endorsements Provide The County With Coverage Only For The Enumerated Torts, Not For Claims Of Trespass, Nuisance, And Interference With The Use Of Property.

Even if the pollution exclusions did not control the outcome of this case,[9] the personal injury provisions would not afford the County any coverage under the policies. As the trial court recognized, these provisions provide coverage only for liability for the enumerated torts of "wrongful entry or eviction or other invasion of the right of private occupancy" — not the Hunt Club's underlying allegations of trespass, nuisance, and interference with the use of property. Slip op. at 7.

Personal injury coverage does not provide a general grant of coverage. Instead, coverage under these provisions is limited solely to the enumerated torts. Personal injury coverage "builds from the ground up: It affords coverage only for defined risks." *Martin v. Brunzelle*, 699 F. Supp. 167, 170-71 (N.D. Ill. 1988). *See also Aetna Casualty & Sur. Co. v. First Sec. Bank*, 662 F. Supp. 1126, 1132 (D. Mont. 1987) (holding that "'personal injury' coverage applie[s] only to claims actually arising out of the enumerated torts"), and *American & Foreign Ins. Co. v. Church Schools*, 645 F. Supp. 628, 633-34 (E.D. Va. 1986) (personal injury coverage applies only to claims arising out of the torts listed). Quite plainly, for coverage to be afforded, it must be based on one of the specific "offenses" listed in the policy. Personal injury coverage "does not contain a general promise of coverage but specifies coverage-triggering offenses." *Puritan Ins. Co. v. 1330 Nineteenth St.*

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9 This Court need not determine whether the general pollution exclusion clauses apply to these personal injury provisions, barring coverage here. *See Thompson-Starrett Co. v. American Mut. Liab. Ins. Co.*, 276 N.Y. 266, 270, 11 N.E.2d 905, 906 (1937) ("in construing an endorsement to an insurance policy the endorsement and policy must be read together and . . . the policy remains in full force and effect except as altered by the words of the endorsement").

Corp., 1984 Fire & Casualty Cas. 1149, 1153 (D.D.C. 1984). *See generally*, Appleman, 7 *Insurance Law* § 4501.14.

In the instant case, if Aetna, Continental, and Firemen's had intended to provide coverage to the County for trespass, nuisance, or interference with the use of the property, they would have included these specific torts within the definition of personal injury in the policies. They did not. Because personal injury coverage is clearly limited only to those specific torts which are within the policy definition, personal injury coverage is not provided for trespass, nuisance, or interference with the use of property.

Courts have regularly repudiated the stratagem used here by the County, rejecting claims for insurance under personal injury provisions when the underlying action does not involve wrongful entry or eviction, but instead, damage caused by environmental pollution. For instance, in *Morton Thiokol, Inc. v. General Accident Insurance Co.*, No. C-3956-85, slip op. at 28 (N.J. Super. Ct., Ch. Div. Aug. 27, 1987) (attached hereto as Exhibit 4), a decision whose logic persuaded the trial court, the policyholder sought coverage for common law public nuisance and New Jersey Spill Act claims arising from the release of mercury from a mercury processing plant into a nearby creek. The policyholder argued that the finding of a nuisance in the underlying action brought the case within the personal injury provisions of its policies, which, like the ones issued to the County, insured against damages due to "wrongful entry or eviction or other invasion of the right of private occupancy." The court squarely rejected the policyholder's claim. According to the court:

> The plaintiff has confused the concept of trespass with wrongful entry. Its argument that the common law distinction between nuisance and trespass has been blurred has no relevance to the insurance contract clause with respect to "personal injury". . . The seepage of toxic

> waste has nothing at all to do with the possession of Berry's Creek. The personal injury clause[s] of the policies do not provide coverage to plaintiff.

Id. at 28.[10]

In *Ludlow's*, a case remarkably similar to the instant one, the policyholder was the owner and operator of a landfill that had accepted for disposal hazardous industrial wastes for a number of years, thus allegedly contaminating the surrounding groundwater. The underlying suit sought damages for the leaching of the hazardous wastes from the landfill. The policyholder claimed personal injury coverage. *Ludlow's*, transcript at 4-6. The United States District Court for the Northern District of New York granted summary judgment to the insurers. In doing so, the court rejected the policyholder's claim that coverage was provided by the personal injury provisions of the general liability policies. *Ludlow's Sand & Gravel Co., Inc. v. General Accident Inc. Co.*, No. 87-CV-1239, order (N.D.N.Y. May 16, 1991) (attached hereto as Exhibit 5). *See also Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, No. 86-MR-308, transcript at 9 (Ill. Cir. Ct., Lake County May 17, 1989) (attached hereto as Exhibit 6) (discounting the applicability of the personal injury clause of the policy because the case revolved around the pollution exclusion), and *Gregory v. Tennessee Gas Pipeline Co.*, 948 F.2d 203, 209 (5th Cir. 1991) (denying personal injury coverage for pollution claims, as such coverage "would render the pollution exclusion meaningless").

Both the County and Opposing Amici ignore the logic of these well-reasoned decisions. Instead, they rely heavily upon *Titan Holdings Syndicate, Inc. v. Keene*,

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10 Although *Morton Thiokol* is a New Jersey case, the trial court explicitly adopted its reasoning. Nevertheless, both the County and Opposing Amici attempt to distinguish *Morton Thiokol* from the instant factual situation on the grounds that alleged environmental damage in *Morton Thiokol* took place on public land, not private land. County Brief at 33-34; Brief of Opposing Amici at 17-18, n. 17. This alleged distinction is a red herring: the holding of *Morton Thiokol* was *not* predicated on any sort of public/private distinction. Even the County concedes that the *Morton Thiokol* court merely "noted" this fact. County Brief at 33.

898 F.2d 265 (1st Cir. 1990). County Brief at 26-27 and Brief of Opposing Amici at 15. The *Titan* court, however, erred in concluding that nuisance was "[an]other invasion of the right of private occupancy." *Id.* at 272. This holding ignores the principle of contract construction known as *ejusdem generis*. *See infra* at 19-20. Moreover, *Titan* is based on a perceived expansive definition of invasion of the right of private occupancy under New Hampshire law as noted in *Town of Goshen v. Grange Mut. Ins. Co.*, 120 N.H. 915, 424 A.2d 822 (1980) (deciding that under New Hampshire law an invasion of the right of private occupancy need not involve "an appreciable and tangible interference with the physical property itself"). New York law, however, takes a much more restrictive approach. *See infra* at 16-18.[11]

Since trespass, nuisance, or interference with the use of property are not torts enumerated in the insurance contracts at issue, there is no coverage under the personal injury provisions of these contracts.

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11 Other courts have similarly found *Titan* unpersuasive. *See, e.g., Gregory*, 948 F.2d at 209 (rejecting policyholder's argument that *Titan* supports personal injury coverage for pollution claims.)

The other cases cited by the County are also unpersuasive. For instance, *Napco v. Fireman's Fund Ins. Co.*, No. 90-0993, slip op. (W.D. Pa. May 22, 1991) (attached hereto as Exhibit 7), *on appeal*, involved a policy that, unlike those here, explicitly deleted the exclusions to the policy and focused on property rights. The court in *High Voltage Engineering Corp. v. Liberty Mutual Ins. Co.*, No. 90-00566, slip op. (Mass. Super. Ct. Jan. 24, 1992) (attached hereto as Exhibit 8), as a Massachusetts court, felt itself bound by the First Circuit's decision in *Titan*. The court in *Northrop Corp. v. American Motorist Ins. Co.*, No. C 710571, slip op. (Super. Ct. Cal. April 8, 1992) (attached hereto as Exhibit 9), *on appeal*, incorrectly finding an ambiguity in the personal injury provisions at issue, applied California's special rule that unless there is evidence of "specially crafted language" all ambiguities should be construed against the insurer.

1. Wrongful Entry And Eviction Are Fundamentally Different Torts From Trespass, Nuisance, And Interference With The Use Of Property.

The personal injury provisions in the policies at issue specifically cover "wrongful entry" and "eviction." These two torts are significantly different from trespass, nuisance, and interference with the use of property, the three torts enumerated in the Hunt Club's underlying complaint. In particular, none of the underlying claims requires *purposeful* acts aimed at the infringement of a *possessory* interest in property, the key elements of the torts of "wrongful entry" and "eviction."

The County points out that "wrongful entry or eviction or other invasion of the right of private occupancy" are undefined in the policies at issue. County Brief at 19, 22. However, the common law provides clear, steadfast definitions of these torts.

Coverage for "wrongful entry or eviction or other invasion of the right of private occupancy" is designed for claims arising from landlord-tenant relationships. Wrongful entry is committed when the current possessor of property is dispossessed by someone else who, without title, claims or acquires a possessory interest in the property. As has long been recognized in New York, "[w]henever one person enters upon and takes *permanent possession* of the real property of another, claiming title thereto . . . an unlawful entry and ouster has been made." *Leprell v. Kleinschmidt*, 112 N.Y. 364, 369, 19 N.E. 812, 814 (1889) (emphasis added).[12] *See*

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12 *Leprell*'s "unlawful entry" is synonymous with the term "wrongful entry," showing that New York courts *do* recognize the tort of unlawful entry, notwithstanding the County's suggestions to the contrary. County Brief at 23. Moreover, "unauthorized entry" is *not* synonymous with "wrongful entry," as the County asserts in its roundabout attempt to link trespass with wrongful entry. *Id.* at 23. "Unauthorized" refers instead to a withholding of authority or approval; it does not mean "wrongful" or "unlawful."

also Railroad Co. v. Perkins, 49 Ohio St. 326, 332, 31 N.E. 350, 351 (1892) (a person commits wrongful entry when he "wrongfully enters *and possesses* without any title") (emphasis added); *Davis v. Dennis*, 43 Wash. 54, 85 P. 1079 (1906) (explaining that "gist of the action" was "wrongful entry of the appellants on the possession of the respondents"); and *Raymond v. The T., St. L. & K.C.R.R. Co.*, 57 Ohio St. 271, 48 N.E. 1093 (1897) (wrongful entry claim filed against railroad company which dispossessed the claimant who was thereby put "out of possession").

In the instant action, wrongful entry's requisite element of interference with possessory rights is lacking: the Hunt Club has not alleged either that it no longer retains possession of its property or that the County has taken possession of the Hunt Club's land. In *Morton Thiokol*, the court rejected the policyholder's attempt to equate trespass with wrongful entry for this very reason:

> Wrongful entry with respect to real estate is the going upon land for the purpose of taking possession of it. Here, no one sought to take possession of Berry's Creek, neither the land that forms its bed, nor the waters flowing through it.
>
> The plaintiff has confused the concept of trespass with wrongful entry. Its argument that the common law distinction between nuisance and trespass has been blurred has no relevance to the insurance contract clause with respect to "personal injury." Wrongful entry, eviction and occupancy all have to do with the possession of property . . . The personal injury clause of the policies do not provide coverage to plaintiff.

Morton Thiokol, slip op. at 28. *See also Gregory v. Tennessee Gas Pipeline Co.*, 948 F.2d 203 (5th Cir. 1991) (no personal injury coverage for pollution migrating from insured municipality's lake where underlying complaints did not allege the active, intentional conduct required for wrongful entry).

Like wrongful entry, eviction also requires that the tortfeasor dispossess the property-holder and acquire possession of the property itself. In New York, an

eviction "occurs only when the landlord wrongfully ousts the tenant from *physical possession* of the leased premises. There must be a *physical expulsion or exclusion.*" *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 82, 256 N.E.2d 707, 709, 308 N.Y.S.2d 649, 653 (1970) (citations omitted) (emphasis added). *See also Union Dime Savings Bank v. Frohlich*, 57 A.D.2d 862, 394 N.Y.S.2d 255 (2d Dep't 1977) (holding that eviction did not occur when "tenants were not physically expelled or excluded from the demised premises").[13]

Moreover, it is well settled that a *temporary* trespass by a landlord on the premises that is not intended to deprive the tenant of possession does not amount to wrongful eviction. Rather, eviction is an "act of permanent character." *Kahn v. Bancamerican-Blair Corp.*, 327 Pa. 209, 193 A. 905, 906 (1937). *See also Morton Thiokol*, slip op. at 28 (holding that "eviction means a dispossession through legal process. The State was not dispossessed of the waters of Berry's Creek"). Unlike wrongful entry and eviction, trespass, nuisance, and interference with the *use* of property do not purposefully infringe upon possessory rights. Besides, these torts are of a temporary rather than permanent nature. *See, e.g., Carr v. Town of Fleming*, 122 A.D.2d 540, 541, 504 N.Y.S.2d 904, 906 (4th Dep't 1986) (noting that a "trespass is temporary in nature").

Since trespass, nuisance, and interference with the use of property are wholly different from wrongful entry and eviction, there is no coverage for these torts in the personal injury provisions contained in the Insurers' policies.

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13 Courts in other jurisdictions agree that in order that "there be an eviction by the landlord, in the legal sense, it is necessary that the tenant *no longer retain possession of the premises* . . ." *Manifold v. Schuster*, 67 Ohio App. 3d 251, 259, 586 N.E. 2d 1142, 1147 (1990) (quoting 2 Tiffany, *Landlord and Tenant* § 185(d) and 1263 and citing Ohio precedent) (emphasis added). *See also Kuriger v. Cramer*, 345 Pa. Super. 595, 498 A.2d 1331, 1338 (1985) (wrongful eviction is an act by a landlord that "interferes with a tenant's possessory right to the demised premises") (citations omitted).

2. Under The Principle Of *Ejusdem Generis*, "Other Invasion Of The Right Of Private Occupancy" Also Refers To Dispossession of Property.

The phrase "other invasion of the right of private occupancy" in the grant of personal injury coverage for "wrongful entry or eviction or other invasion of the right of private occupancy" does not open the door to a flood of coverage for torts alien to the policies, such as the underlying allegations of trespass, nuisance, and interference with the use of property. Instead, basic principles of contract construction require that this phrase be limited to offenses, like wrongful entry and eviction, that involve the wrongful *dispossession* of property.

Under the doctrine of *ejusdem generis*, long recognized in New York, when general words follow a specific classification, the general terms are construed to include only those things of equal or inferior rank to the enumerated class. *See, e.g.*, *Forward Industries v. Rolm of New York Corp.*, 123 A.D.2d 374, 376, 506 N.Y.S.2d 453, 455 (2d Dep't 1986) (specific terms in contract restrict meaning of comprehensive words that follow them under principle of *ejusdem generis*); *Traylor v. Crucible Steel Company*, 192 A.D. 445, 183 N.Y.S. 181 (1st Dep't 1920), *aff'd*, 232 N.Y. 583, 134 N.E. 581 (1922) (rule of *ejusdem generis* applies to construction of contract, limiting general phrase to the specific terms which precede it); and 22 N.Y. Jur. 2d, Contracts §223 (1982) ("rule of *ejusdem generis* is applied in the construction of contracts" in New York).

When applying the doctrine of *ejusdem generis*, the general term "other invasion of the right of private occupancy" can only mean an offense in which the offender interferes with the occupier's possessory right in the property. As one court has explained:

> 'Other invasion of the right of private occupancy' is simply *part* of a more complete definition of 'personal injury,'

> following directly on the heels of 'wrongful entry or eviction.' Ejusdem generis principles draw on the sensible notion that words such as 'or other invasion of the right of private occupancy' are intended to encompass actions of the same general type as, though not specifically embraced within, 'wrongful entry or eviction.'

Martin v. Brunzelle, 699 F. Supp. at 170. *See also Nichols*, 215 Cal. Rptr. at 421-22 (1985) (meaning of phrase "other invasion of the right of private occupancy" "is reinforced by its conjunction with the words 'wrongful entry or eviction'"; no coverage where there is "no invasion of any interest attendant to the *possession* of real property") (emphasis added); *Red Ball Leasing, Inc. v. Hartford Acc. & Indem. Co.*, 915 F.2d 306, 312 (7th Cir. 1990) (applying rule of *ejusdem generis* to find "other invasion" language limited to invasions of real property); *Morton Thiokol*, slip op. at 28 ("[w]rongful entry, eviction and occupancy all have to do with the possession of property").[14]

Thus, just as coverage for wrongful entry or eviction must involve an interference with possession of real property, so too coverage for "other invasion of the right of private occupancy" must involve at least this minimum requirement. Because the Hunt Club's complaint does not allege that the County attempted to take possession of the Hunt Club's property or to oust the Hunt Club from possession of its own property, there is no coverage under this personal injury provision.

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14 The County ignores this fundamental common law canon of contract construction. Instead, the County asserts that nuisance is clearly contemplated by the "other invasion" language, arguing that "[i]nterference with the use and enjoyment of property resulting from pollution constitutes a nuisance under New York law." County Brief at 24 (citing *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970)). The County's argument is irrelevant. *Boomer* decidedly did not hold, nor could it, that either "nuisance" or "interference with the use of property" are interchangeable with the torts of "wrongful entry or eviction or other invasion of the right of private occupancy."

B. The County's Willful Violation Of A Penal Statute Provides An Additional Reason To Refuse The County Any Personal Injury Coverage Under The Policies.

The trial court held that a further, alternative or supplementary reason[15] for denying personal injury coverage to the County stems from its "willful violation of a penal statute or ordinance."

The personal injury endorsements to the policies explicitly provide that coverage does not apply to personal injury "arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the insured." The County has admitted to signing the Consent Order with the New York Department of Environmental Conservation confessing that it was "currently discharging leachate into the groundwater and is thus in violation of Sections 360.8(a) and 703.5 of 6 NYCRR." Slip op. at 2-3. Because the Hunt Club's complaint alleged that the County violated the Consent Order, the trial court properly held that the County was not entitled to any personal injury coverage. *Id.* at 7.

The County and Opposing Amici attempt to undermine the trial court's reasoned finding. For instance, the County asserts that the environmental regulations encompassed by the Consent Order were not "penal," since they involved *civil* violations rather than *criminal* violations. County Brief at 44-45. There is no basis in New York law for this arbitrary civil/criminal decision — as the

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15 The trial court implicitly acknowledged that the County's "willful violation of a penal statute" was a *supplementary* reason to deny personal injury coverage to the County. Indeed, as demonstrated above, the fact that the underlying torts do not correspond with the policies' enumerated torts is sufficient to rule against the County on personal injury coverage.

County implicitly concedes by failing to cite a single New York case in support of this proposition.[16]

Both the County and Opposing Amici also argue that the term "willful" is ambiguous under New York law. County Brief at 45-46; Brief of Opposing Amici at 24. These bald assertions ignore the definition of "willful" that the Court of Appeals put forth less than two years ago in an insurance context:

> The term "willful" is not defined in the Insurance law or regulations, but we find some guidance as to its unremarkable meaning in a civil regulatory context as "no more than intentional and deliberate."

American Transit Ins. Co. v. Corcoran, 76 N.Y.2d 977, 979, 565 N.E.2d 485, 487, 563 N.Y.S.2d 736, 738 (1990) (citing a long line of New York cases). Here, the County has admitted that its activities at the dumpsite were intentional and deliberate — thus fulfilling *Corcoran's* precise definition of "willful."

C. The Selected, Extra-Record Extrinsic Materials That The County And Its Amici Seek To Inject Into This Appeal Are Inadmissible And Irrelevant.

Seeking to distract attention from the unambiguous meaning of the personal injury provisions, both the County and especially Opposing Amici rely upon alleged interpretations of those provisions by the "insurance industry." These materials are misleading and unpersuasive, since the County and Opposing Amici are seeking to apply selected broad propositions allegedly asserted by insurers in different contexts

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16 Instead, the County cites the Penal Law, contending that it relates exclusively to criminal offenses. County Brief at 44. In fact, the Penal Law never mentions the civil/criminal distinction, but instead defines "offense" as "conduct for which a sentence to a term of imprisonment or to a fine is provided by . . . any order, rule or regulation of any governmental instrumentality." N.Y. Penal Law § 10.00 (McKinney 1992). Thus, if the Penal Law is relevant to the policy language, the County's violation of the environmental regulations fulfills this definition.

to the discrete facts and circumstances of this case, with its unique "personal injury" issue.

The use of this material is also improper. In the first place, most of the extrinsic materials introduced by the County and Opposing Amici on appeal were not admitted into evidence below. It is a fundamental canon of appellate procedure that "matters not raised below will not be considered for the first time upon appeal." *Van Alstyne on Behalf of "P" v. David "Q"*, 92 A.D.2d 971, 972, 460 N.Y.S.2d 848, 850 (3d Dep't 1983).

Moreover, most of the materials that the County and Opposing Amici seek to introduce on appeal violate New York's rules governing the use of extrinsic evidence and are therefore not admissible. As this Court held less than five months ago, when parties to a contract set down their agreement in a clear and complete manner, extrinsic evidence is generally inadmissible to add to or vary the agreement. *Serna v. Pergament Distributors, Inc.*, 582 N.Y.S.2d 550, 552 (3d Dep't 1992) (evidence outside the four corners of the document as to what was really intended but unstated is generally inadmissible). Even when ambiguity exists, the extrinsic evidence must be of a certain caliber: it must aid the court in resolving the ambiguity in the policy. *See, e.g., Klein v. Empire Blue Cross & Blue Shield*, 173 A.D.2d 1006, 1010, 569 N.Y.S.2d 838, 842-843 (3d Dep't 1981) (holding that where tendered extrinsic evidence on interpretation of ambiguous contract is "conclusory and cannot resolve the equivocality of the language of the contract," contract interpretation remains a question of law for the court).

Here, there is no ambiguity in the policies at issue and, more specifically, in the terms "wrongful entry or eviction or other invasion of the right of private occupancy." As demonstrated above, these terms have precise meanings well grounded in the common law. See *supra*, p. 16-20. Even if the Court were to hold that ambiguities exist in the policies, however, the various strands of extrinsic

material offered by the County and its Amici would not clear up these ambiguities. Instead, this "evidence" attempts to bind Aetna, Continental, and Firemen's to alleged "pro-coverage" statements unrelated to the contractual language at issue, statements allegedly made in the past by an undefined "insurance industry."

For example, both the County and Opposing Amici cite a brief alleged to have been filed by a non-party insurance company in a different proceeding in another jurisdiction, as well as an article written by Kirk A. Pasich (an attorney who regularly represents policyholders in coverage disputes), as "proof" that the "insurance industry" has previously represented that personal injury coverage encompasses trespass and nuisance claims. County Brief at 35-36; Brief of Opposing Amici at 11-12. It would be grossly unfair to hold Aetna, Continental, and Firemen's accountable for statements made by different insurers in different proceedings, or to consider the opinions of an author whose bias is glaringly obvious.[17] Besides, these strands of "evidence" do not explain any ambiguities in the policies, as they must under New York law. *Serna*, 582 N.Y.S.2d at 552; *Klein*, 173 A.D.2d at 1010.[18]

Similarly, Opposing Amici cite four briefs allegedly written by other insurers in different cases to support Opposing Amici's irrelevant, yet sweeping proposition that "the insurance industry has represented that exclusions must be read narrowly

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17 For an article with a different viewpoint on personal injury coverage, *see* Foggan, Lawrence, and Renberg, *Looking For Coverage In All The Wrong Places: Personal Injury Coverage In Environmental Actions*, 3 Environmental Claims Journal 291 (Spring 1991) (attached hereto as Exhibit 10). The authors represent insurers in environmental coverage disputes.

18 In an attempt to avoid the fact that the County has no personal injury coverage for liability from its "willful violation of a penal statute," the County's Amici dwell on a brief allegedly filed by Aetna in a different case two years ago, allegedly asserting that the term "willful" requires a "preconceived design." The County's Amici ignore the New York Court of Appeals' recent decision in *Corcoran* that holds that "willful" means "no more than intentional and deliberate." *See supra*, p. 22.

in favor of coverage." Brief of Opposing Amici at 21-23. Aetna, Continental, and Firemen's had *nothing whatsoever* to do with these briefs, nor is there any indication of the factual contexts of these cases or the policy provisions involved.[19] Claiming "judicial estoppel,"[20] Opposing Amici assert that the Insurers should not be allowed to "contradict themselves." Brief of Opposing Amici at 30-33.

The doctrine of judicial estoppel, however, applies only to factual positions. Expressions of opinions and legal conclusions — the type of "pro-coverage" statements alleged here — do not trigger application of the doctrine. *See, e.g., Bates v. Cook, Inc.*, 615 F. Supp. 662, 672 (M.D. Fla. 1984) (judicial estoppel generally does not apply to legal conclusions). Besides, most of these alleged "pro-coverage" statements were made by entities other than Aetna, Continental, and Firemen's. The doctrine of judicial estoppel can apply only to prior statements made by parties, not by nonparties (such as the "insurance industry" continually referred to by Opposing Amici).[21]

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19 Both the County and Opposing Amici argue that, because a drafting committee allegedly did not make certain revisions to a so-called standard policy, the "insurance industry" reached the conclusion that the pollution exclusion does not apply to personal injury coverage. County Brief at 40-41; Brief of Opposing Amici at 12-13. Of course, neither the committee nor the "insurance industry" ever made such an affirmative statement.

20 The doctrine of judicial estoppel does not encompass "widely recognized principles," as Opposing Amici assert. Brief of Opposing Amici at 30. Instead, judicial estoppel is recognized as a "rather vague" doctrine. 1B Moore's Federal Practice, ¶ .405[8] (Bender 1988).

21 Considering that insurance companies have filed tens of thousands of briefs across the country in a number of courts and in a vast variety of contexts, it would not be surprising if Opposing Amici were able to find a few briefs from the "insurance industry" asserting contrary positions to the ones taken here by Aetna, Continental, and Firemen's. This is mere gamesmanship. The purpose of judicial estoppel is to promote "common law views of fair dealing." 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, Jurisdiction 2d § 4477 (1981). In the instant case, there is no indication that Aetna, Continental, and Firemen's have not dealt honestly and fairly with the County.

Opposing Amici thus fail to allege the requisite elements of the doctrine of judicial estoppel. This Court should disregard Opposing Amici's groundless argument that the doctrine should apply to the Insurers in this proceeding.

III. PUBLIC POLICY SUPPORTS APPLICATION OF THE CONTRACTUAL LANGUAGE AS WRITTEN.

Sound public policy dictates that the insurance contracts at issue be enforced as written. The policyholder here is a county that repeatedly and deliberately deposited harmful waste on land. Other entities that seek to benefit from rulings that disregard clear contractual language to create non-contractual coverage for environmental cleanup costs are giant industrial corporations, major long-term polluters now asking courts across the country to transfer the costs of their past environmental practices to insurers who never agreed to bear them. Accepting the contentions of these policyholders, small and large, undermines the function of insurance contracts and retards the attainment of environmental goals.

Insurers recognize that, under CERCLA and similar federal and state statutes enacted in recent years, waste generators and other polluters face huge retroactively imposed cleanup costs. But the possible harshness of the fundraising mechanisms imposed by these statutes and the needs of governmental entities for cleanup funds provide no basis for expanding and distorting insurers' contractual obligations. *See, e.g., Finci v. American Casualty Co.*, 323 Md. 358, 593 A.2d 1069 (1991) (state agency's goal of collecting funds provides no legal basis for invalidating policy exclusion).

Ignoring or twisting the meaning of language used in the policies — like "wrongful entry or eviction or other invasion of the right of private occupancy" — harms the public interest, affecting the future of insurance in New York. When insurers are faced with uncertainty that contracts will be enforced as written,

rational underwriting becomes impossible. This uncertainty may result in increased rates, as underwriters must compensate for uncertainty as to how courts will treat contractual language in the future. In the context of environmental claims, such a transformation of the liability insurance contract could expose insurers to liabilities many times greater than their surplus and indeed greater than the capacity of the industry as a whole.[22] Judicially created pollution coverage for industrial polluters could have a serious effect on the cost and availability of all types of insurance for other policyholders in New York and elsewhere.[23]

Forcing polluters to pay for environmental cleanup, rather than permitting them to foist such costs onto their liability insurers, accords with legislative intent and is the most effective way to protect the environment. CERCLA imposed the costs of cleaning up the environment on polluters — those who had "profited or otherwise benefitted from commerce involving [hazardous] substances."[24] Current public policy as enacted by Congress and New York requires that those whose activities resulted in pollution shoulder the burden of correcting and preventing environmental injury. Undoubtedly this retroactively imposed obligation creates problems for many polluters. But there is simply no legal basis for courts to shift those obligations to insurers who did not contract to assume them and whose ability

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22 *See, e.g.*, United States General Accounting Office, *Insurance Liability for Cleanup Costs at Hazardous Waste Sites: Hearings Before the Subcomm. on Policy Research and Insurance of the Comm. on Banking, Finance and Urban Affairs, House of Representatives*, 101st Cong., 2d Sess. 50 (1990) ("Potential Liability of Property/Casualty Insurers for Costs of Cleaning Up Hazardous Waste Sites").

23 The EPA itself has explained that the limited availability of insurance for CERCLA contractors is based in part on the fact that "[c]ourts in key jurisdictions have imposed retroactive liabilities on insurers for pollution damages and cleanup costs that were never intended to be covered." EPA, *Superfund Response Action Contractor Indemnification*, 54 Fed. Reg. 46012, 46013 (Oct. 31, 1989).

24 *Environmental Emergency Response Act*, S. Rep. No. 848, 96th Cong., 2d Sess. 1, 98, *reprinted in* 1 *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability Act of 1980* (statement of EPA Administrator Costle).

to carry out their socially beneficial insurance function could be seriously threatened if they were forced to do so.

CONCLUSION

For the foregoing reasons, the decision of the trial court should be affirmed.

Respectfully submitted,

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