No. 09-4037

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HUSSEY COPPER, LTD.

Appellant

v.

ARROWOOD INDEMNITY COMPANY, F/K/A
ROYAL INSURANCE COMPANY OF AMERICA

Appellee

On Appeal from the United States District Court
for the Western District of Pennsylvania
C.A. No. 07-0758
Honorable Joy Flowers Conti
Honorable Cathy Bissoon

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT

Lee M. Epstein, Esq.
FRIED & EPSTEIN LLP
Constitution Place
325 Chestnut Street, Suite 900
Philadelphia, Pennsylvania 19106
(215) 625-0123, Fax: (215) 625-0764
leeepstein@fried-epstein.com
Counsel for Amicus Curiae
United Policyholders

David L. Abney, Esq.
(Arizona State Bar No. 009001)
LAW OFFICES OF DAVID L. ABNEY
4025 East Chandler Blvd., No. 70-A8
Phoenix, Arizona 85048
(480) 734-8652
abneymaturin@aol.com
Counsel for Amicus Curiae
United Policyholders

Certification of Bar Membership,
Third Circuit Local Appellate Rule 28.3(d)

I, Lee M. Epstein, certify that I am a member in good standing of the bar of this Court.

Dated: March 16, 2010

/s/ Lee M. Epstein
Lee M. Epstein

Corporate Disclosure Statement,
Federal Rule of Appellate Procedure 26.1and
Third Circuit Local Appellate Rule 26.1.1

(1) Amicus Curiae United Policyholders is a not-for-profit, non-governmental corporate entity that has no parent corporation and is not affiliated with any publicly owned corporation.

(2) No publicly held company holds 10% or more of Amicus Curiae United Policyholders' stock.

(3) As far as Amicus Curiae United Policyholders is aware, there is no publicly held corporation—which is not a party to the proceeding before this Court, but which has a financial interest in the outcome of the proceeding.

(4) As far as Amicus Curiae United Policyholders is aware, this is not a bankruptcy proceeding or related to any bankruptcy proceeding.

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Amicus Curiae's Statement of Interest

Founded in 1991, United Policyholders is a California non-profit tax-exempt organization dedicated to educating the public on insurance issues and consumer rights. Its first major project was aiding over a thousand victims of a devastating October 1991 firestorm in the hills of Oakland and Berkeley, California. United Policyholders helped the victims understand their policies and receive prompt, fair insurance settlements.[1] United Policyholders has expanded on its tradition and mission by providing consumer-oriented insurance advocacy and education across America.[2]

In 1995, United Policyholders launched an Amicus Project to present state and federal appellate courts with balanced argument and authority on important insurance issues—from a general consumer perspective. After all, in the heat of litigation and appeals, no one else is presenting the general consumer view. Since 1995, United Policyholders has filed amicus curiae briefs in insurance-related state

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[1] *See*, *e.g.*, Kenneth Reich, *Under Covered Insurance Advocacy Group Aids Victims of Oakland Fire*, LOS ANGELES TIMES 3 (March 1, 1992) ("Because of some well-placed pressure by a nonprofit organization called United Policyholders, many insurers have retroactively upgraded their customers' policies, agreeing to pay higher settlements without filing lawsuits.").

[2] *See*, *e.g.*, Angela Lau, *Poizner Hails Recovery from Fires, Says Most Claims Are Resolved*, SAN DIEGO UNION-TRIBUNE B-3 (Nov. 10, 2009) (Karen Reimus, disaster recovery coordinator for the nonprofit United Policyholders, which educates consumers about their insurance rights, said [California Insurance Commissioner Steve] Poizner still has not fulfilled his promise to audit 2007 wildfire insurance claims so that his department could make it easier for future victims.").

and federal appellate cases throughout the United States. And those briefs have had a positive impact. For instance, Justice Ruth Bader Ginsburg cited a United Policyholders' amicus curiae brief as authority in a landmark, unanimous 1999 United States Supreme Court opinion on using anti-racketeering laws to combat insurance fraud.[3] Recent cases where this Court has accepted amicus curiae briefs from United Policyholders include:

- *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213 (3rd Cir. 2009).
- *General Refractories Co. v. First State Ins. Co.*, 500 F.3d 306 (3rd Cir. 2007).
- *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005).

United Policyholders has a strong interest in this appeal because the absolute pollution exclusion's meaning—and its interplay with the products-completed operations coverage—affect policyholders throughout the nation. Insurance policies are often the only viable source of defense and indemnification. The absolute pollution exclusion undercuts coverage that policyholders had bought and relied upon. If misapplied, as here, the absolute pollution exclusion can deny coverage that policyholders purchased and badly needed. Fighting that sort of endemic loss of essential coverage is part of United Policyholders' fundamental mission. It therefore has a strong interest in the Hussey-Copper case.

[3] *Humana Inc. v. Forsyth*, 529 U.S. 299, 314 (1999).

Legal Argument

1. The absolute pollution exclusion impacts policyholders and consumers throughout America. The exclusion is so unclear that even insurance agents, brokers, and producers don't know what it means.

The dispute between Hussey-Copper and its insurer affects far more than the parties before this Court. After all, while the absolute pollution exclusion has been a feature in general commercial liability policies for over two decades, insureds are still arguing about the exclusion's meaning and effect. This Court's opinion about the meaning and effect of the absolute pollution exclusion can provide much-needed guidance for insurers and policyholders across America. Guidance is badly needed since judicial consensus on the absolute pollution exclusion has remained elusive.[4] Pollution-related damages that insureds face without their insurance coverage can be crippling; the exposure that insurers confront is daunting.[5]

Not surprisingly, courts have struggled to understand what the absolute pollution exclusion means. Indeed, an insurance-risk analyst explained that when

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[4] *See*, *e.g.*, *Porterfield v. Audubon Indem. Co*., 856 So.2d 789, 800 (Ala. 2002) ("Rarely has any issue spawned as many, and as variant in rationales and results, court decisions as has the pollution-exclusion clause."). *See also* Robert D. Chesler & Phillip M. Kaczor, *The Absolute Pollution Exclusion at 20—Continuing Uncertainty*, 17(3/4) ENVT'L CLAIMS J. 279, 286 (Summer 2005) (discussing the "inconsistency of this judicial landscape" concerning the absolute pollution exclusion).

[5] *See Baughman v. United States Liability Ins. Co.*, 662 F.Supp.2d 386, 397 (D.N.J. 2009) ("The absolute pollution exclusion, and its predecessor the standard pollution exclusion, have generated tremendous amounts of litigation regarding the potentially enormous scope of pollution exclusions in CGL policies.").

the Insurance Services Office introduced its absolute pollution exclusion in the mid-1980s, some "purchasers of insurance must have been shocked to learn that they were without liability protection based on the exclusion dealing with contamination and pollution."[6] Like many American policyholders, the expert wondered "why an exclusion with such broad application is necessary for the specialty coverage afforded by the products-completed operations coverage forms, or even for products and completed operations coverage included in the [comprehensive general liability] forms."[7] In fact, the absolute pollution exclusion's vagueness makes it "virtually impossible" for insurance producers "to determine with any precision whether an insured is confronted with a pollution exclusion."[8]

Insurance professionals selling commercial general liability policies often "find the exclusion ambiguous."[9] And so agents and brokers are unprepared to

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[6] Donald S. Malecki, *Pollution Exclusion Minefield*, 152(1) ROUGH NOTES 34, 35 (Jan. 2009).

[7] *Id.* at 36.

[8] *Id*. *See also* Christopher Meeks, *The Pollution Delusion: A Proposal for a Uniform Interpretation of Pollution in General Liability Absolute Pollution Exclusions*, 77 GEO. WASH. L. REV. 824, 856 (April 2009) ("Although state courts across the country have attempted to reinterpret the exclusion to provide more guidance for insureds and insurers, these attempts have been largely unsuccessful and a significant amount of litigation continues over the meaning of this exclusion.").

[9] Victoria Sonshine Pasher, *CGL Pollution Exclusion Draws Heat from Agents*, 100(4) NAT'L UNDERWRITER 3, 24 (Jan. 22, 1996) ("But many agents find the exclusion ambiguous.").

advise consumers on the meaning of their coverage, or on the scope and impact of the absolute pollution exclusion.[10] Because of its lack of clarity, claims handlers and insurers also remain uncertain how to value and resolve claims involving the absolute pollution exclusion.[11] Many insurance experts believe that—despite its all-encompassing name—the absolute pollution exclusion "leaves undisturbed bodily injury and property damage arising out of the products/completed operations exposure even if pollution is involved."[12]

2. The Insurance Services Office marketed the absolute pollution exclusion to state insurance regulators by asserting that the exclusion did not defeat coverage under the products-completed operations clause. And the Insurance Services Office should know—because it was the absolute pollution exclusion's drafter

In the United States, the Insurance Services Office is the "primary organization in charge of the [insurance-policy] drafting process."[13] The office devises, copyrights, and sells access to standardized, multi-state policy forms.[14] Besides drafting, the organization "submits proposed language to state insurance

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[10] Thomas Klinedinst, Jr., *Pollution Confusion Frustrates Agents, Brokers*, 97(36) NAT'L UNDERWRITER 9 (Sept. 6, 1993) ("How can any agent or broker advise and direct a buyer when he or she is faced with the current incongruities and vagaries in the interpretation of the pollution exclusion?").

[11] Laura Hanson, *Clear as Mud? Absolute Pollution Exclusion Isn't So Absolute*, CLAIMS MAGAZINE 26, 27 (March 2007).

[12] George B. Flanigan, *A Perspective on General Liability Insurance and the Pollution Hazard: Exposures and Contracts*, 20(3) J. INS. REG. 296, 328 (Spring 2002).

[13] Michelle E. Boardman, Contra Proferentem: *The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1113 (2005-2006).

[14] *Id.*

commissioners and works with the commissioners, sometimes collectively, until the language is approved for use."[15]

In the mid-1980s, the Insurance Services Office devoted its lobbying efforts to getting approval from state insurance regulators for an absolute pollution exclusion. The Insurance Service Office's role in the drafting and marketing of similar provisions in commercial insurance contracts has been crucial. After all, "state regulators as a practical matter often are the only parties who are in a position to negotiate language changes in proposed commercial insurance contracts."[16] As a result it's reasonable to hold the Insurance Services Office and insurance companies "to the representations they made to regulators when seeking approval for a pollution-exclusion clause."[17]

Indeed, the Insurance Services Office and insurance companies obtained approval of the absolute pollution exclusion from often skeptical state insurance regulators "only by promising regulators that ordinary products and premises claims remained covered."[18] The regulatory-history evidence "overwhelmingly reveals" that the absolute pollution exclusion "was not intended to exclude insurance coverage for products or completed operations claims involving

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[15] *Id.*

[16] *Textron, Inc. v. Aetna Cas. and Sur. Co.*, 754 A.2d 742, 753 (R.I. 2000).

[17] *Id.*

[18] Lorelei S. Masters, *Absolutely Not Total: State Courts Recognize the Historical Limits of the 'Absolute' and 'Total' Pollution Exclusions*, 15(4) ENVT'L CLAIMS J. 451, 453 (Autumn 2003).

'pollutants.'"[19] Thus, in 1984, the Insurance Services Office issued a memorandum explaining to state insurance regulators that the absolute pollution exclusion "does not apply to damages arising out of products or completed operations nor to certain off-premises discharges of pollutants."[20]

Moreover, leading insurance-industry representatives have repeatedly admitted that the absolute pollution exclusion is "overdrafted" and "ambiguous."[21] But despite "either misrepresenting the scope of the exclusion or at least failing to note its arguable linguistic breadth, insurers have sought to apply the exclusion to deny coverage for the types of claims long covered by the [commercial general liability policy]."[22]

3. As recently as December 2009, respected appellate courts have held that the absolute pollution exclusion does not defeat coverage under the products-completed operations clause.

Many courts understand what insurers and the Insurance Services Office have admitted: An "absolute pollution exclusion" does not automatically nullify a

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[19] John A. McDonald, *Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems*, 7 COVERAGE 6, 10 (Nov./Dec. 1997).

[20] Insurance Services Office, Inc., *Explanatory Memorandum, Pollution Exclusion Endorsement* (1984) (quoted in Eugene R. Anderson and Jennifer D. Marell, *The Insurance Industry's So-Called Absolute Pollution Exclusion: An Absolute Oxymoron*, 4(2) J. ENVT'L LAW & PRAC. 12, n. 21 (Sep./Oct. 1996)).

[21] *Id.*

[22] Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the "Absolute" Exclusion in Context and in Accord with its Purpose and Party Expectations*, 34 TORT & INS. L.J. 2, 59 (1998-1999).

products-completed operations clause. Moreover, the Hussey-Copper case again illustrates how the absolute pollution exclusion an create ambiguity. The insurer first gives products-completed operations coverage and states specific exceptions for that coverage. But the insurer then adds an "absolute pollution exclusion" that can be—as here—misapplied to contradict the products-completed operations coverage's already listed exceptions. So when injury occurs, the insurer denies coverage, based on an exclusion to specific exceptions (which are themselves exclusions). It's no surprise that agents, brokers, producers, and insureds are befuddled. Meanwhile, insurers can keep the premiums, give no coverage, and profit from their policies' self-induced ambiguity.

The Hussey-Copper case showcases that ambiguity. The declarations pages for Hussey Copper's insurance policies separately listed coverage and limits for property damage arising from "products/completed operations."[23] The policies defined the "products-completed operations hazard" as including property damage occurring away from Hussey Copper's premises and arising from its product.[24] The policy then listed specific exceptions to that type of property-damage coverage, including property damage from products that Hussey Copper physically

[23] *See Joint Appendix to the Opening Brief*, Vol. II, Part 1 at 77 (March 9, 2010).

[24] *Id.* at 112, ¶11a.

possessed.[25]

The products-completed operations coverage could have listed a property-damage pollution exception. But it did not. Like any other policyholder, Hussey Copper found no relevant exception for the products-completed operations coverage. And so the insurer should have defended and offered to indemnify for off-premises pollution-related property damage arising from Hussey-Copper's own products. But instead of providing the products-completed coverage that the consumer had bought, the insurer argued that a pollution exclusion *not* appearing in the products-completed coverage's exceptions barred coverage. But under these and similar facts, that exclusion cannot erase the products-completed coverage. That was a key point that the New York Appellate Division made in the December 2009 *Griffith Oil* opinion.[26]

Griffith Oil's facts echo Hussey-Copper's plight. Confronting damage claims from a pipeline oil leak, Griffith Oil sued for a declaration that its insurer had a duty to defend and indemnify for pollution damages.[27] Relying on a pollution exclusion, the trial court held that the insurer had no duty to indemnify or defend.[28] But as in Hussey-Copper's case, the policy's "products completed

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[25] *Id.* at 112, ¶11a(1) and ¶11(c).

[26] *Griffith Oil Co., Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 892 N.Y.S.2d 711 (App. Div. 2009).

[27] *Id.* at 712.

[28] *Id.*

operations hazard" clause defined "property damage" as property damage occurring away from Griffith Oil's premises and arising from its "product."[29] The only relevant exception was for products "still in your physical possession."[30] The Appellate Division agreed that the damage was pollution damage arising from the product—and that the policy denied coverage for pollution.[31]

On the other hand, the Appellate Division also recognized that the products-completed operations clause defined insurance coverage (with a few exceptions)—and was *not* an exclusion.[32] The relevant exception in the products-completed operations clause appeared in the phrase "still in your physical possession."[33] That exception would exclude coverage if the product had caused pollution-related property damage while "still" in Griffith Oil's physical possession. But any ambiguity would be construed in favor of coverage.[34] Thus, since the pollution damage did not occur on Griffith Oil's premises or while in its possession, the

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[29] *Id.* ("The policy defines the term 'products completed operations hazard' in relevant part as 'property damage' occurring away from premises you own or rent and arising out of 'your product' . . . except: [p]roducts that are still in your physical possession.' It is undisputed that the oil leak constitutes pollution and that the policy excludes coverage for property damage caused by a pollutant.").

[30] *Id.*

[31] *Id.* ("It is undisputed that the oil leak constitutes pollution and that the policy excludes coverage for property damage caused by a pollutant.").

[32] *Id.* ("Here, however, the term 'products completed operations hazard' defines coverage rather than an exclusion of coverage.").

[33] *Id.* at 713.

[34] *Id.*

products-completed operations clause controlled—ensuring coverage.[35]

Griffith Oil is not an aberration. In the 1997 *Robert E. Lee & Associates* case, a pollution-damage claim arose from a gasoline leak that had contaminated off-premises property.[36] The Wisconsin Supreme Court reviewed the insurance contract's provisions in the entire policy's context—in light of the rule to strictly construe any exclusionary clause against the insurer.[37] The Court noted that the products-completed operations clause had a list of its own exclusions—but did *not* "contain its own pollution exclusion clause."[38] Since that clause gave coverage but lacked a pollution-damage exclusion—despite having *other* exclusions—the Court held that there was coverage.[39]

Conclusion

The scope and meaning of the absolute pollution exclusion are vital issues for American policyholders. Insurers can too readily misapply the absolute pollution exclusion to erase coverage that their policies are supposed to provide (with a few exceptions) through the products-completed operations coverage. Policy language and regulatory history prove that neither insurers nor the Insurance Services Office originally understood that the absolute pollution exclusion would

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[35] *Id.*

[36] *Robert E. Lee & Assocs., Inc. v. Peters*, 557 N.W.2d 457, 459 (Wis. App. 1999), *rev. denied*, 568 N.W.2d 298 (Wis. 1997).

[37] *Id.* at 463-64.

[38] *Id.* at 464.

[39] *Id.* at 464.

mechanically supersede the products-completed operations coverage. (In fact, they lobbied state regulators for the absolute pollution exclusion's adoption based on that understanding.) At the very least, however, the interplay of the provisions can—as has happened here—create an ambiguity requiring coverage. In general, the ambiguity that the absolute pollution exclusion engenders is so severe that insurance agents, brokers, and producers do not understand what they are selling. And when it most matters, insurance consumers find that they have paid dearly for coverage that is ambiguous or illusory.

Based on these factors, United Policyholders respectfully asks this Court to hold that the completed-products operations clause—as applied in cases such as this one—trumps the absolute pollution exclusion. That holding would help bring rationality to an unsettled area of insurance law—and help protect the rights and interests of insurance consumers nationwide.

Dated: March 16, 2010

Respectfully submitted,
/s/ Lee M. Epstein
Lee M. Epstein, Esq.
FRIED & EPSTEIN LLP
Constitution Place
325 Chestnut Street, Suite 900
Philadelphia, Pennsylvania 19106
(215) 625-0123, Fax: (215) 625-0764
leeepstein@fried-epstein.com
Counsel for Amicus Curiae United Policyholders

David L. Abney, Esq.
(Arizona State Bar No. 009001)

LAW OFFICES OF DAVID L. ABNEY
4025 East Chandler Blvd., No. 70-A8
Phoenix, Arizona 85048
(480) 734-8652, abneymaturin@aol.com
Counsel for Amicus Curiae United Policyholders

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1. This brief complies with the type-volume limitation of Fed. R.App. P. 32(a)(7)(B), since it contains 3,842 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman type style.

3. The undersigned certifies that the text of the electronic brief is identical to the text in the paper copies. The undersigned also certifies that a virus detection program, specifically ESET NOD 32, was run on the electronic brief—and detected no virus.

/s/ Lee M. Epstein
Counsel for Amicus Curiae United Policyholders
Dated: March 16, 2010

Certificate of Service

I hereby certify that, on the 16th day of March, 2010, a true and correct copy of the foregoing *Brief of Amicus Curiae, United Policyholders, in Support of Appellant, and for Reversal of the District Court*, was served through this Court's electronic docketing system (CM/ECF) upon the following:

Ralph J. Luongo, Esq.
CHRISTIE, PABARUE, MORTENSEN & YOUNG, P.C.
1880 JFK Blvd., 10th Floor
Philadelphia, Pennsylvania 19103
(215) 587-1615, rjluongo@cpmy.com
Attorneys for Appellee Arrowood Indemnity Company, f/k/a Royal Insurance Company of America

William M. Wycoff, Esq.
Kimberly A. Brown, Esq.
Stacey L. Jarrell, Esq.
THORP REED & ARMSTRONG, LLP
One Oxford Centre, 301 Grant Street, 14th Floor
Pittsburgh, Pennsylvania 15219-1425
(412) 394-2323
kbrown@thorpreed.com
Attorneys for Appellant

Leon B. Kellner, Esq.
Selena J. Linde, Esq.
DICKSTEIN SHAPIRO LLP
1825 Eye St., NW
Washington, DC 20006
(202) 420-5005, Fax: (202) 379-9328
lindes@dicksteinshapiro.com
Attorneys for Appellant

Ten true and correct copies have also been sent to the Clerk of Court's Office via Federal Express on this same date.

/s/ Lee M. Epstein
Counsel for Amicus Curiae United Policyholders
Dated: March 16, 2010