IN THE

SUPREME COURT OF VIRGINIA

Record No. 110669

PBM NUTRITIONALS, LLC,

Appellant,

v.

LEXINGTON INSURANCE COMPANY, ARCH INSURANCE COMPANY, and ACE AMERICAN INSURANCE COMPANY

Appellees.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT

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INTRODUCTION

Attorneys for *Amicus Curiae* United Policyholders respectfully move for permission to file an *amicus* brief in support of PBM Nutritionals, LLC, individually and on behalf of all others similarly situated. The amicus party will file its brief on September 6, 2011.

NATURE OF THE CASE AND STATEMENT OF FACTS

I. UNITED POLICYHOLDERS ADOPTS THE STATEMENT OF FACTS AS SET FORTH BY THE POLICYHOLDER, PBM NUTRITIONALS, LLC

As to the operative facts, United Policyholders adopts the Statement of Facts and procedural history as set forth by the policyholder, PBM Nutritionals, LLC ("PBM").

II. THE INSURANCE COMPANIES' POSITION IS A CLASSIC EXAMPLE OF THE OVERBROAD APPLICATION OF THE POLLUTION EXCLUSION

Insurance transfers risk. Here, PBM bought "all-risk" coverage meant to insure PBM for all loss that is not expressly excluded by the terms of the insurance policies. PBM incurred loss resulting from an incident occurring inside its manufacturing facility. The water filters used by PBM in manufacturing its infant formula broke down, causing the infiltration into the infant

formula of those filter elements, including cellulose and melamine. The insurance companies have denied PBM's losses based on pollution or contamination exclusions in the policies.

The insurance industry intended the pollution exclusion to respond to significant claims for damages and clean-up costs from industrial pollution of the environment. Indeed, that intention is still apparent today through the express inclusion of terms of art of environmental law included in the pollution exclusion provision that is attached to the standard commercial general liability ("CGL") policy, and in fact, those same words are in the exclusions in the "all risk" policies at issue in this case.

The pollution exclusion was born from the insurance industry's desire to limit its exposure to loss from industrial pollution of the environment. Instead of limiting application of the exclusion to environmental losses, as they promised to state insurance regulators they would, insurance companies have denied policyholders coverage for valid claims under cover of the pollution exclusion. A review of the drafting history and regulatory documents makes the intent of the exclusion clear.

Accordingly, this Court need not decide this matter in a vacuum. United Policyholders respectfully submits that this Court should consider the well-documented industry intention behind the exclusion and find that the pollution exclusions relied upon to deny PBM's claim were intended to be and are limited to claims for industrial pollution of the environment and thus are not a bar to coverage in this matter for losses not resulting from industrial pollution of the environment.

ARGUMENT

I. THE DRAFTING HISTORY AND INTENT OF THE POLLUTION EXCLUSION

The pollution exclusion was drafted by the insurance industry to address the limited exposure of industrial pollution of the environment. As shown below, numerous statements by the insurance industry show that the exclusion was intended to be so limited.

A. The Pollution Exclusion Was Drafted to Address Losses Caused by Industrial Pollution of the Environment

In the 1970s and 1980s, the United States saw an increase in the number and severity of damage resulting from

industrial pollution of the environment. Many policyholders began facing losses resulting from pollution and contamination that occurred from the improper disposal of industrial waste years — even decades — prior. In response to mounting concerns and public awareness of these issues, the government passed a series of laws, including the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"),[1] the Resource Conservation and Recovery Act,[2] the Clean Water Act[3] and the Clean Air Act.[4] These laws, enacted in the wake of well-publicized and catastrophic environmental disasters such as Love Canal in New York and Times Beach in Missouri, impose strict liability for damage caused to the environment by industrial pollution. They also impose the costs of remediation on parties allegedly responsible for the pollution which are often extremely

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[1] 42 U.S.C.A. §§ 9601 *et seq.*

[2] 42 U.S.C.A. §§ 6901 *et seq.*

[3] 33 U.S.C. §§ 1321 *et seq.*

[4] 42 U.S.C. §§ 7401 *et seq*.

significant due to the expense of cleaning polluted water and disposing of contaminated soil.

Due to the severity and expense of the environmental claims surfacing as well as their inherent uncertainty because of the often long dormancy period between disposal and resulting harm, insurance companies became increasingly concerned about their long-term exposure for these claims. Indeed, they worried that the potentially exorbitant cost of these government–mandated clean-ups of polluted sites would ultimately be borne by them. In response to these concerns, ISO,[5] on behalf of the insurance industry, filed a new CGL insurance policy form nationwide, which contained the provision that the insurance

[5] At the time it drafted the standard-form pollution exclusions, ISO was an unincorporated association of approximately 1,500 domestic property and casualty insurance companies and operated as the almost exclusive source of support services in this country for the insurance industry. "ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most [comprehensive general liability] insurance written in the United States is written on these forms." *Hartford Fire Ins. Co. v. Merrett Underwriting Agency Mgt. Ltd.*, 509 U.S. 764, 772 (1993).

industry called the "absolute" pollution exclusion.[6] A provision to exclude from coverage losses resulting from pollution was drafted to address typical industrial pollution of the type addressed under federal laws regulating the clean-up and liability scheme for environmental pollution such as CERCLA.

Further, at the time the insurance industry introduced the so-called "absolute" pollution exclusion, the insurance industry also submitted a companion pollution liability insurance policy to insurance regulators, which was designed to provide coverage via a separate policy for the excluded industrial pollution coverage.[7] As noted by former Louisiana Insurance

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[6] The "absolute" pollution exclusion, introduced in 1986, is a successor to the previous version of the pollution exclusion, known as the "sudden and accidental" exclusion, which only intended to apply to pollution damage expected and intended by the policyholder.

[7] In fact, largely in response to the environmental laws passed creating liability for the costs of clean-up and in response to the inclusion of the pollution exclusion in the standard CGL form, a new market for insurance products designed exclusively to cover industrial pollution of the environment and its clean-up costs emerged.

Commissioner James H. Brown, this companion policy only covered "environmental damage" from a "pollution incident":

> *"Pollution incident" means emission, discharge, release or escape of pollutants into or upon land, the atmosphere, or any watercourse or body of water, provided that such emission, discharge, release or escape results in "environmental damage."
>
> *"Environmental damage" means the injurious presence (injurious to the environment, not just the claimant) in or upon land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants or pollutants.[8]

Commissioner Brown aptly noted that ISO represented that this coverage would mirror the coverage excluded by the so-called absolute pollution exclusion.[9]

The Proceedings of the National Association of Insurance Commissioners ("NAIC"), published just prior to the adoption of the "absolute" pollution exclusion in 1986, also demonstrate that the insurance industry developed the exclusion

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[8] James H. Brown, *Letter to the Editor*, NATIONAL UNDERWRITER PROPERTY & CASUALTY ED., Apr. 22, 1996, at 31 (emphasis added) ("Brown Letter"), attached hereto at Addendum.

[9] Brown Letter at 31, 54.

to address Superfund liability. In these proceedings, the insurance industry neither proposed nor discussed using the "absolute" pollution exclusion to address ordinary, industrial accidents.[10]

The insurance industry initially expressed its concern to the NAIC over "pollution liability" when the federal Superfund statute was first considered by Congress. The American Insurance Association ("AIA") and other industry representatives voiced to the NAIC their concern that "the member companies of AIA will be asked to be the principal domestic source of post-closure liability insurance for hazardous waste disposal sites."[11] AIA's counsel pointed out to the NAIC that "[t]he extent of

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[10] *See generally* The Proceedings of the NAIC, 1981-1989, which are found on LEXIS, in the "NAIC" file, located in the "INSURE" library (the "NAIC Proceedings"). The citations utilized herein locate the pertinent portions of the Proceedings within that LEXIS file and library.

[11] James L. Kimble, Counsel, AIA, *The Need For A Post-Closure Liability Fund For Waste Disposal Sites* (July 25, 1980), NAIC Proceedings, 1982-4, 596 at *633 (hereinafter "*Post-Closure Liability*"). The AIA is a trade association of 152 publicly-owned property and casualty insurance companies. *Id.*

coverage for toxic substances pollution and hazardous waste disposal is limited by a restrictive endorsement [the "sudden and accidental" exclusion]. . . ."[12] He reported that the insurance industry's major concerns about liability insurance coverage for pollution were that "[t]he dissimilarities between the current liability theories for toxic substances discharges and disposal and the liability theories preferred in 'superfund' legislation will impede the development of an insurance market."[13]

The industry also filed with the NAIC a letter from the AIA to Mark G. Bender, a Senior Economist with the U.S. Treasury, on the subject of "Superfund Insurance Studies."[14] This submission again made clear that the insurance industry was concerned with the strict environmental cleanup liability imposed under the Superfund Statute:

> The American common law which has been relied upon in other environmental issues to determine

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[12] *Post-Closure Liability*, at *634.

[13] *Post-Closure Liability*, at *635.

[14] Correspondence from Dennis R. Connolly, Senior Counsel, AIA to Bender, NAIC Proceedings, 1982-4, 596 at *641.

> the rules of liability has tended to be more than adequate to redress the harms which may befall individuals or groups of claimants. It would have been wiser to have the compensation system which is sought under Superfund rely on this historical background of tort law development.[15]

The AIA was concerned with the Superfund statute because, in its view, it imposed a "revolutionary statutory liability system."[16] The AIA wrote that "[t]he imposition of a brand new and hitherto unanticipated retroactive liability on both insurer and insured is unjust, counterproductive, and should be deleted. Joint and several liability for the sweeping damages contemplated under Superfund is neither philosophically nor financially desirable."[17]

The NAIC was also provided with excerpts from a letter from the AIA to the EPA expressing concerns about Superfund:

> The dynamic combination in this law of new strict liability, limitation of defenses, and joint and several liability, all retroactively applied, will

[15] NAIC Proceedings, 1982-4, 596 at *642.

[16] NAIC Proceedings, 1982-4, 596 at *642.

[17] NAIC Proceedings, 1982-4, 596 *643.

> disrupt both past and future insurance arrangements."[18]

Kimble's comments to the NAIC made clear that the heart of the AIA's concern was Superfund's "imposition on insurers of new obligations beyond those contemplated by the parties to the insurance contracts can be devastating to the entire insurance industry."[19]

The NAIC ultimately appointed an Advisory Committee to study the issue of CGL and other insurance coverage for "pollution," while it reviewed the proposed "absolute" pollution exclusion.[20] The Advisory Committee's charge was to address Superfund-type environmental liability:

> The study will address the availability [of insurance coverage] issue from the perspective of generators and transporters of hazardous substances, owners/operators of sites involving the handling of toxic wastes, contractors engaged

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[18] Letter from James L. Kimble, Senior Counsel, AIA to the Office of the General Counsel of the EPA, NAIC Proceedings, 1982-4, 596 at *647.

[19] NAIC Proceedings, 1982-4, 596 at *647.

[20] *Report of the Advisory Committee on Environmental Liability Insurance* (Dec. 9, 1986), NAIC Proceedings, 1987-4, 867.

> in the removal of asbestos and in hazardous waste site cleanups, municipalities and others.[21]

It is telling that, when the insurance industry chose its limiting language for use in its insurance policies, it sought to ensure that its chosen language would be consistent with federal environmental statutes. The AIA informed the NAIC that:

> Experience with the federal EPA has indicated that the following definitions and concepts are acceptable:
>
> * * *
>
> 3. "hazardous substances" means smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials, waste constituents or other irritants, contaminants and pollutants.[22]

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[21] NAIC Proceedings, 1987-4, 867. The NAIC Advisory Committee was chaired by an insurance industry official, George M. Mulligan of the AIA. *Id.* In its summary of the "Background and History of the Problem," the Advisory Committee solely focused on "state and federal environmental laws and their administration, [and] examine[d] the development of insurance products and the underwriting and delivery systems dealing with pollution coverages." *Id.* This statement underscores that "pollution coverage" was equated with statutory environmental liability by both the Insurance Commissioners and the insurance industry.

[22] NAIC Proceedings, 1982-4, 596 at *685.

This statement directly equates the definition of pollutants being contemplated by the insurance industry to the concept of "hazardous substances" utilized by the Environmental Protection Agency. "Hazardous substances" is a term of art under the Superfund statute, which imposes liability for the unpermitted "release" of hazardous substances. Furthermore, the language of the so-called "absolute" pollution exclusion focuses on the "actual or threatened discharge, dispersal, release, or escape of pollutants...." It echoes the concept of liability for "actual or threatened release" of pollutants, which appears directly in the Superfund statute, creating liability for "a release, or a threatened release."[23]

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[23] *See, e.g.*, 42 U.S.C. §9607(a)(4)(A); *see also Porterfield v. Audubon Indem. Co.,* 856 So. 2d 789, 797 (Ala. 2002) ("Also, the absolute pollution-exclusion clause "incorporates the concept of a 'threatened discharge, disposal, release or a surge of pollutants.' 'Liability for a mere threat of an injury is a concept that is fundamental to modern environmental statutes, including CERCLA [Comprehensive Environmental Response Compensation Liability Act a.k.a. "Superfund," 42 U.S.C. § 9601 *et seq*.], but is foreign to normal tort liability,' and '[t]he incorporation of environmental liability terms and concepts into the absolute pollution exclusion illustrates that the exclusion was designed to be limited to injury for typical, industrial environmental damage.'") (internal citations omitted).

B. Numerous Insurance Industry Statements Confirmed the Pollution Exclusion Would Be Limited in Scope to Industrial Pollution of the Environment

The insurance industry made numerous statements following the introduction of the pollution exclusion that it was not intended to reduce any coverage, but was simply a clarification in the scope of coverage already available under the existing "sudden and accidental" pollution exclusion. The insurance industry desired this clarification in light of judicial decisions granting coverage for Superfund-type liability. The insurance industry admitted that the exclusion as drafted was overbroad and ambiguous, but asserted that "Nobody would read it that way."

1. "Nobody Would Read It That Way"

In 1985, the Texas State Board of Insurance conducted a hearing, during which the Board told representatives of the insurance industry that the wording of ISO's new pollution exclusion was ambiguous. The insurance company representatives agreed:

Mr. Harrell [representing Liberty Mutual]: It [the pollution exclusion] can be read that way [broadly and literally], just as today's policy [with] the [sudden and accidental] pollution [exclusion] can be read in context with the rest of the policy to exclude any products liability claim. You can read today's CGL policy and say that if you insure a tank manufacturer whose tank is put in the ground and leaks, that leak is a pollution loss. And the pollution exclusion if you read it literally would deny coverage for that. I don't know anybody that's reading the policy that way, and I think you can read the new policy just the way you read it [literally]. But our insured would be at the State Board—quicker than a New York minute if, in fact, every time a bottle of Clorox fell of a shelf at a grocery store and we denied the claim because it's a pollution loss.

Mr. Thornberry [of the Texas Insurance Board]: I have also heard the justification that if an insurance company denied the claim and you went to the courthouse, the Courts wouldn't read the policy that way.

Mr. Harrell: Nobody would read it that way.

Mr. Thornberry: I guess my problem is why do we have language that appears--if there's an ambiguity, why don't we have it cleared up rather than in the policy.

Mr. Harrell: We have overdrafted the exclusion. We'll tell you, we'll tell anybody else, we overdrafted it. But anything else puts us back

> where we are today [covering gradual environmental pollution].[24]

During the course of these hearings, the Board stated repeatedly that it believed the "absolute" pollution exclusion was ambiguous. No industry representative present denied it.

That same year, the State of New Jersey Department of Insurance conducted a hearing on the "absolute" pollution exclusion, because it was concerned that it "sought to sweep too many potential nonenvironmental liabilities within its reach."[25] This hearing consisted of testimony from various members of the insurance industry, including Michael A. Averill, the manager of the Commercial Casualty Division of ISO, who stated that the

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[24] Texas Board of Insurance, Transcript of Proceedings: Hearing to Consider, Discuss, and Act on Commercial Liability Forms Filed by the Insurance Services Office, Inc., Board Docket No. 1472 (Oct. 30, 1985), Vol. I at 6-10, *quoted in* 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. 1, 37 (1999) (emphasis added).

[25] Lorelie S. Masters, *Square Pegs into Round Holes: The Limits of the Absolute Pollution Exclusion in Product Claims*, SG004 ALI-ABA 121, 127 (2001) (hereinafter "*Square Pegs*").

new pollution exclusion was not intended to operate as an absolute bar to coverage:

> [The purpose of the change in policy language] is to introduce a complete on-site emission and partial off-site exclusion for some operations. For some operations. It is not an absolute exclusion.[26]

Significantly, in 1986, New Jersey rejected a proposed new exclusion from Aetna, because the "submission indicated no reduction of rates to reflect the proposed decrease in coverage."[27] As one commentator notes, "[w]hen New Jersey finally approved the 1986 exclusion for use in the State, it was approved without a reduction of rates, based on insurance-industry representations that the exclusion would not be applied as drafted."[28] Because

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[26] *Square Pegs*, at 127 (emphasis in original).

[27] *Square Pegs*, at 128 (*quoting* Letter from Deputy Commissioner Jasper Jackson to Robert C. Chilone, Superintendent of Insurance Department Affairs – Aetna Commercial Insurance Division, dated Nov. 20, 1985, at 2). *See also* E.R. Anderson et al., *Insurance Coverage Litigation*, §15.07[A], at 15-103 (noting that ISO explained that "the new ["absolute" pollution exclusion] should provide the coverage that insurers generally intend under the current ["sudden and accidental" pollution exclusion], though in a new format designed to reinforce the limitation of coverage.").

[28] *Square Pegs*, at 128-29.

there would be no decrease in coverage, the industry argued, there was no need for a corresponding rate reduction.[29]

Thus, the insurance industry's public, regulatory documents show that pollution exclusion was intended to address the industrial pollution of the environment. Furthermore, the industry agreed that the exclusion was ambiguous as drafted, but assured state regulators that it would not be broadly applied to bar coverage for claims outside of the context of industrial pollution of the environment. Such as the claims faced by PBM.

II. THIS COURT SHOULD LIMIT THE "POLLUTION EXCLUSION" TO ITS INTENDED SCOPE OF INDUSTRIAL POLLUTION OF THE ENVIRONMENT

While this Court has previously declined to judicially limit application of the pollution exclusion in the manner urged by United Policyholders, it is respectfully submitted that such a judicial limitation is more appropriate than ever and justified by the well-documented express intent of the insurance industry to apply the exclusion to claims for industrial pollution of the

[29] John A. MacDonald, *Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems*, 7-6 COVERAGE (Nov./Dec. 1997), attached hereto at Addendum.

environment. Such limitation is warranted by the ambiguous nature of the exclusions that have allowed them too broad an application and used only to deny policyholders coverage for valid claims that only tangentially involve a "pollutant" and because of the terms of environmental art used in the exclusions that have special significance in the realm of environmental law. Courts around the nation have agreed that the insurance industry should be bound by its promises. United Policyholder respectfully submits that this Court should hold PBM's insurance companies to the same standard.

A. The Pollution Exclusion Uses Words that are Terms of Environmental Art

As detailed above, the pollution exclusion was meant to correspond with environmental statutes enacted in the 1970s and 1980s and the exclusion that was drafted by the insurance industry contains terms that are specifically terms of environmental art. The ISO form pollution exclusion bars coverage for "bodily injury" from "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants."

The pollution exclusion at issue in the policies sold by the insurance companies here each contains a similar variant of this phrase. ACE's Contamination and/or Seepage and/or Pollution Exclusion precludes coverage for loss or damage from "actual, alleged, or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS." Arch's Pollution & Contamination Exclusion Endorsement precludes coverage for loss or damage from "actual, alleged, or threatened release, discharge, introduction, escape or dispersal of contaminants or pollutants." Lexington's Pollution, Contamination, Debris Removal Exclusion Endorsement precludes coverage for loss or damage from "actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS."

Accordingly, it is appropriate to consider the origins and meaning of these terms that are common between these policies and common between policies of insurance companies covering a variety of risks nationwide. To quote Justice Holmes, "a page of history is worth a volume of logic."[30]

[30] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

Decisions interpreting the exclusion have thus concentrated on the use of terms of art of environmental law such as "discharge" and "release" as evidence of the limited applicability of the clauses to industrial pollution of the environment. In explaining this concept, one court remarked as follows:

> "Discharge, dispersal, seepage, migration, release, and escape" is a list of the ways by which the pollutant must travel from a contained place to the injured person's surroundings and then cause injury. In contrast, injuries caused by irritants that normally are stationary, but that can be shifted or moved manually, are not excluded from coverage because they do not cause injury by one of the prescribed methods. For example, if a child were injured because he drank from a bottle of drain cleaner or some other household product, even if that product properly could be classified as a 'pollutant,' the injury would not be covered by the pollution exclusion because the pollutant was not disseminated by one of the prescribed methods.[31]

Similarly, a federal New York court said that such terms are "terms of art in environmental law, generally used to describe the improper disposal or containment of hazardous waste" and

[31] *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 953-54 (S.D.N.Y. 1996).

not the type of movement characteristic of lead paint poisoning, the issue in that case. *Sphere Drake Ins. Co. P.L.C. v. Y.L. Realty Co.*, 990 F. Supp. 240, 243 (S.D.N.Y. 1997). The court refused to extend the meaning to cover lead paint poisoning resulting from ingestion or inhalation of paint as "an overly broad interpretation" of the clause and "inconsistent with accepted usage and the expectations of the contracting parties." *Sphere Drake Ins. Co.,* 990 F. Supp at 243.

In *Continental Casualty Co. et al. v. Rapid-American Corp. et al.*, 80 N.Y.2d 640 (1993) ("*Rapid-American*"), the New York Court of Appeals examined whether a pollution exclusion precluded coverage for personal injury claims resulting from inhalation of asbestos. The Court found for the policyholder on the grounds that the exclusion was ambiguous. First, the Court determined that while asbestos could be considered an irritant, contaminant or pollutant covered by the exclusion, there was ambiguity as to whether the asbestos fibers inhaled by the claimants were "discharged into the 'atmosphere'" within the

meaning of the clause. *Rapid-American*, 80 N.Y.2d at 653.[32] Second, the Court found that the purpose of the clause was to exclude coverage for environmental pollution, evidenced by the policy's use of terms of art of environmental law such as "discharge" and "dispersal." *Rapid-American*, 80 N.Y.2d at 654.

As such, many courts have found the exclusion inapplicable where there has been no "release" or other movement into the environment.[33]

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[32] The Court also considered the fact that the insurance company had not proven that the personal injuries occurred solely from asbestos-contaminated air, as it was possible that the fibers could have been transmitted by contact with hands or clothing. *Rapid-American*, 80 N.Y.2d at 654.

[33] *See, e.g., Lefrak*, 942 F. Supp. at 954 (finding that there had been no release when child allegedly ingested lead paint chips); *Island Assocs., Inc. v. Eric Group, Inc.* 894 F. Supp. 200, 202 (W.D. Pa. 1995) (finding that there had been no release of fumes from site at which policyholder had used asbestos abatement compound); *Center for Creative Studies v. Life & Cas. Co.*, 871 F. Supp. 941, 946 (E.D. Mich. 1994) (finding that there was no release in situation where student claimed damages from exposure to photographic chemicals); *Danbury Ins. Co. v. Novella*, 727 A.2d 279, 284 (Conn. Super. 1998) (finding that ambiguity as to whether a "release" of lead paint caused injury to child); *Sandbom v. BASF Wyandotte, Corp.*, 674 So. 2d 349, 364 (La. App. 1996) (finding that absolute pollution exclusion did not apply to bodily injury to worker who was exposed to chemicals in a storage tank

Moreover, as presented to the NAIC, the definition of "pollutants" specifically was drafted to mirror regulations relating to industrial pollution of the environment. The connection to the environmental regulations is also apparent in the exclusions used by the insurance companies in the case before the Court. The definition of "contaminants" or "pollutants" in the ACE policy specifically states that it includes "hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act, or as designated by the U.S. Environmental Protection Agency." The Arch policy begins its definition by stating that pollutants include "any material, whether solid, liquid,

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because there was no release of chemicals); *Weaver v. Royal Ins. Co.*, 674 A.2d 975, 978 (N.H. 1996) (finding that it was unclear whether there had been a release in situation where child was injured by lead paint carried home in father's work clothes); *Roofers' Joint Trading, Apprentice & Educ. Comm. v. General Acc. Ins. Co.*, 713 N.Y.S.2d 615, 617 (N.Y. App. Div. 2000) (finding that there had been no "discharge, dispersal … release or escape" of pollutants where claimant was exposed to fumes from demonstration); *Generali-U.S. v. Caribe Realty Corp.*, 612 N.Y.S.2d 296, 299 (N.Y. Sup. 1994) (finding that the absolute pollution exclusion did not bar coverage for damage from lead paint chips as there had been no release).

gaseous or otherwise." Finally, the Lexington policy also makes explicit reference to these environmental terms in its definition which reads, in part:

> CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste . . . including but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency.

Words of environmental art and relating to environmental law were drafted into the pollution exclusion for reasons clearly articulated by the insurance industry. United Policyholders respectfully submits that it is appropriate for this Court to consider those reasons before applying similar exclusions to the circumstances of PBM's claims.

B. In the Right Context, Insurance Companies Improperly Argue that Anything Can Be a "Pollutant"

The insurance industry made early and repeated assurances that the pollution exclusion would not be overextended or applied too broadly. In direct contradiction to

these assurances, the application of the pollution exclusion has been abused to deny policyholders' valid, non-"pollution"-based claims. Indeed, since the absolute pollution exclusion made its debut in the mid-1980s, the insurance industry has attempted to apply the exclusion to preclude coverage for losses far afield from industrial pollution of the environment and never meant to fall within this exclusion. Insurance companies have attempted to bar coverage for any claim which even tangentially involves a substance that could be labeled a "pollutant." For example, insurance companies have used the exclusion to deny claims for damages resulting from:

> Bodily injury from carbon dioxide from human respiration;[34]
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> Burns to a child playing with a bottle of acid used in dyeing carpets;[35]
>
> A back injury incurred by a claimant fleeing from an onrushing cloud of chlorine gas;[36]

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[34] *See Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wis. 1997).

[35] *See Regent Ins. Co. v. Holmes*, 835 F. Supp. 579 (D. Kan. 1993).

A car accident caused by reduced visibility from smoke caused by a non-hostile fire;[37] and

Bodily injury to a bulldozer operator accidentally sprayed with sulfuric acid.[38]

Indeed, viewed in isolation, the terms "pollutants" and "contaminants" know no bounds, for "there is virtually no substance or chemical in existence" that would not irritate or damage some person or property.[39] Recognizing this, many courts have considered whether, in the circumstances before them, a particular substance is rightly considered a "pollutant" such as to fall within an exclusion for industrial pollution of the environment.

For example, the Supreme Court of California determined that a pollution exclusion did not exclude coverage for

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[36] *See Grow Group, Inc. v. North River Ins. Co.*, No. C 92-2328 (SC) 1992 WL 672265 (N.D. Cal. Aug. 14, 1992).

[37] *See Perkins Hardwood Lumber Co. v. Bituminous Casualty Corp.*, 378 S.E.2d 407 (Ga. App. 1989).

[38] *See Karroll v. Atomergic Chemetals Corp.*, 600 N.Y.S.2d 101 (N.Y. App. Div. 1993).

[39] *See Center for Creative Studies*, 871 F. Supp. at 945.

a landlord's liability for a tenant's death allegedly caused by the negligent spraying of pesticide to kill bees at the landlord's apartment building. *See MacKinnon v. Truck Ins. Exch.,* 73 P.3d 1205 (Cal. 2003) ("*MacKinnon*"). The California Supreme Court held that the application of the pollution exclusion is limited to injuries arising from events commonly thought of as pollution, *i.e.*, environmental pollution, and is not to be applied to "every possible irritant or contaminant imaginable." *MacKinnon,* 73 P.3d. at 1216. In reaching its conclusion, the court examined the history and purpose of the pollution exclusion which, "while not determinative, may properly be used by courts as an aid to discern the meaning of disputed policy language." *MacKinnon,* 73 P.3d at 1217. The court noted that "[i]t may be an overstatement to declare that 'discharge, dispersal, release or escape,' by themselves, are environmental terms of art. But, these terms, used in conjunction with 'pollutant,' commonly refer to the sort [of] conventional environmental pollution at which the

pollution exclusion was primarily targeted." *MacKinnon,* 73 P.3d at 1216.[40]

Furthermore, even if a particular substance may potentially be considered a contaminant or pollutant, the exclusion is meant to apply to substances other than the risks covered by the policy. For example, one court refused to apply an absolute pollution exclusion to gasoline leaks from a gas station because the sale of gasoline was a normal part of the policyholder's business operations. The court noted: "[t]hat an insurance company would sell a 'garage policy' to a gas station when that policy specifically excluded the major source of potential liability is, to say the least, strange."[41] Another found the exclusion inapplicable where the insurance company knew that the policyholder's business was pesticide application and

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[40] *See Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co.,* 864 F.2d 648, 653 (9th Cir. 1988) (drafting history should not be ignored in interpreting standard form exclusions).

[41] *See American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Ind. 1996).

thus the policy was intended to cover the policyholder's "normal operations."[42]

C. Many Courts Have Limited the Application of the Pollution Exclusion to Industrial Pollution of the Environment

Many courts have refused to grant the insurance industry its overzealous and overbroad application of the pollution exclusion and have refused to apply the exclusion to preclude coverage in circumstances other than those involving industrial pollution of the environment.[43]

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[42] *See Bentz v. Mutual Fire, Marine & Inland Ins. Co.*, 575 A.2d 795 (M.D. App. 1990).

[43] *See, e.g., Meridian Mut. Ins. Co. v. Kellman*, 197 F.3d 1178, 1181, (6th Cir. 1999); *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27, 30 (1st Cir. 1999); *Bituminous Casualty Co. v. Advanced Adhesive Technology*, 73 F.3d 335, 339 (11th Cir. 1996); *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 37 (2d Cir. 1995); *Regional Bank of Colorado v. St. Paul Fire & Marine Ins. Co.*, 35 F.3d 494, 498 (10th Cir. 1994); *Sargent Constr. Co. v. State Auto Ins. Co.*, 23 F.3d 1324, 1327 (8th Cir. 1994); *Boise Cascade Corp. v. Reliance Nat'l Indem. Co.*, 99 F. Supp. 2d 87, 102(D. Me. 2000); *Garfield Slope Housing Corp. v. Public Serv. Mut. Ins. Co.,* 973 F. Supp. 326, 336 (E.D.N.Y. 1997); *Lefrak Organization, Inc.*, 942 F. Supp. at 954; *Calvert Ins. Co. v. S & L Realty Corp.*, 926 F. Supp. 44, 46-47 (S.D.N.Y. 1996); *Island Assocs., Inc.*, 894 F. Supp. at 202; *Center for Creative Studies*, 871 F. Supp. at 945 n.5; *Regent Ins. Co.*, 835 F. Supp. at 582; *Regional Bank of*

In *Center for Creative Studies,* 871 F. Supp. 941, the underlying plaintiff brought an action seeking damages for

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Colorado v. St. Paul Fire & Marine Ins. Co., 35 F.3d 494 (10th Cir. 1994); *Westchester Fire Ins. Co. v. City of Pittsburg, Kan.*, 794 F. Supp. 353, (D. Kan. 1992); *Keggi v. Northbrook Property & Casualty Insurance Co.*, 13 P.3d 785, 790 (Ariz. App. 2000); *Grow Group, Inc.*, 1992 WL 672265 at 11; *Minerva Enters., Inc. v. Bituminous Cas. Corp.*, 851 S.W.2d 403, 404, (Ark. 1993); *Essex Ins. Co. v. Avondale Mills, Inc.*, 639 So. 2d 1339, 1341 (Ala. 1994); *Danbury Ins. Co.,* 727 A.2d 279; *American States Ins. Co. v. Koloms,* 687 N.E.2d 79 (Ill. 1997); *Insurance Co. of Ill. v. Stringfield,* 685 N.E.2d 980, 984 (Ill. App. 1997); *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 680 (Ky. App. 1996); *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 135, (La. 2000); *Sandbom*, 674 So. 2d at 363; *Avery v. Commercial Union Ins. Co.*, 621 So. 2d 184, 189 (La. App. 1993); *West v. Board of Commissioners of the Port of New Orleans*, 591 So. 2d 1358, 1360 (La. App. 1991); *Thompson v. Temple*, 580 So. 2d 1133, 1134 (La. App. 1991); *Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997, 999 (Mass. 1997); *Atlantic Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762, 764 (Mass. 1992); *Weaver*, 674 A.2d at 977; *S.N. Golden Estates, Inc. v. Continental Cas. Co.*, 680 A.2d 1114, 1118 (N.J. Super. 1996); *Roofers' Joint Trading, Apprentice & Educ. Comm. v. General Acc. Ins. Co.*, 713 N.Y.S.2d 615, 617 (N.Y. App. 2000); *Cepeda v. Varveris*, 651 N.Y.S.2d 185, 186 (N.Y. App. 1996); *Kenyon v. Security Ins. Co. of Hartford*, 626 N.Y.S.2d 347, 350 (N.Y. Sup. 1993); *Generali-U.S.*, 612 N.Y.S.2d at 299; *Karroll*, 600 N.Y.S.2d at 102; *West American Ins. Co. v. Tufco Flooring East, Inc.*, 409 S.E.2d 692, 699 (N.C. App. 1991) over-ruled on other grounds, *Gaston Cty. Dyeing Machinery Co. v. Northfield Ins. Co.*, 524 S.E.2d 558 (N.C. 2000); *Gamble Farm Inn, Inc. v. Selective Ins. Co.*, 656 A.2d 142, 146-47 (Pa. Super. 1995); *Kent Farms, Inc. v. Zurich Ins. Co.*, 998 P.2d 292, 295 (Wash. 2000).

exposure to "fumes" and "toxic fumes" from photographic chemicals she used to develop photographs in a darkroom. The court first traced the origin and developmental history of pollution exclusions, finding that the terms "discharge," "dispersal," "release" and "escape" were environmental terms of art matching those used in government environmental statutes.[44] The court concluded that the exclusion required a limiting principle because "without some *limiting principle*, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results." *Center for Creative Studies,* 871 F. Supp. at 945.

As one court explained, when considering the release of styrene vapors from flooring material that harmed the policyholder's chickens, the exclusion only aptly applies when there is a release into the environment:

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[44] *See Center for Creative Studies*, 871 F. Supp. at 944-45, 945 n.5 (noting further that the "absolute" pollution exclusion was specifically tailored to match government statutes)(*citing West-Am. Ins. Co. v. Tufco Flooring E., Inc.,* 409 S.E.2d 692, 699 (N.C. App. 1991)).

> Both the historical purpose underlying the pollution exclusion and operative policy terms indicate that a discharge into the environment is necessary for the clause to be applicable.
>
> * * *
>
> When the pollution exclusion was first instituted in the early 1970's, it applied, by its own terms, only to discharges of pollutants "into or upon land, the atmosphere or any water course or body of water. . . ." In 1985, the insurance industry amended the pollution exclusion clause in the standard commercial liability policy. . . . Even though the new pollution exclusion does omit language requiring the discharge to be "into or upon land, the atmosphere or any water course or body of water," [there is] no indication that the change in the language was meant to expand the scope of the clause to non-environmental damage. . . . The operative terms . . . of the pollution exclusion clause . . . are "discharge," "dispersal," "release," and "escape."[45]

Courts that have refused to apply a broad reading of the pollution exclusion have thus employed the drafting and regulatory intent of the exclusion as a way to limit its application so as to apply only to industrial pollution of the environment.[46]

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[45] *See West American Ins. Co.*, 409 S.E.2d at 699-700. (emphasis added) (citations omitted).

[46] *See, e.g.*, *MacKinnon*, 73 P.3d 1205 (finding that absolute pollution exclusion did not apply to injuries from fumes from application of pesticide); *Nautilus Ins. Co.*, 188 F.3d at 30;

In finding that a claim for coverage of personal injury from carbon monoxide exposure caused by negligent design and installation of a heater was not precluded by the pollution exclusion, one court succinctly noted:

> The historical purpose of pollution exclusion clauses has been to insure that industrial or commercial polluters would be compelled to bear the cost of their wrongdoing. This interpretation of the purpose of the clause, and therefore its impact, has led courts of most jurisdictions to limits its application accordingly.[47]

The Louisiana Supreme Court also found that the "total" pollution exclusion "was designed to exclude coverage for environmental pollution only."[48] In *Doerr*, plaintiffs, citizens of the St. Bernard Parish, brought an action for damages caused by

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Meridian Mut. Ins. Co., 197 F.3d at 1182; *Regional Bank*, 35 F.3d at 498; *Island Assocs.*, 894 F. Supp. at 202; *Center for Creative Studies*, 871 F. Supp. at 945; *Keggi*, 13 P.3d at 790; *Danbury Ins. Co.*, 727 A.2d at 281; *American States Ins. Co.*, 687 N.E.2d 79; *Motorists Mut. Ins. Co.*, 926 S.W.2d at 680; *Roofers' Joint Trading*, 713 N.Y.S.2d at 617; *Donaldson*, 564 N.W.2d at 732.

[47] *See Kenyon v. Security Ins. Co. of Hartford*, 626 N.Y.S.2d 347, 350 (N.Y. Sup. Ct. 1993).

[48] *See Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 127 (La. 2000) ("*Doerr*").

releases of hydrocarbons from an oil company's wastewater facility into the Mississippi River. Plaintiffs alleged that the hydrocarbons were drawn into the water system of the Parish, causing plaintiffs to suffer personal injuries following the consumption of the contaminated water. The Parish's insurance company filed a motion for summary judgment on the basis of a "total" pollution exclusion in its policy, a motion which was denied by order of the trial court, which was reversed on appeal.

The *Doerr* court initially focused on the fact that the exclusion, as worded, had virtually unlimited application and thus could be used to justify denying coverage for virtually any type of damage. The *Doerr* court then engaged in an extensive analysis of the drafting and regulatory history of the exclusion. On this basis, the *Doerr* court found that absolute and total pollution exclusions must essentially be limited in application to industrial pollution of the environment. The *Doerr* court explained that a literal reading of the exclusion would lead to absurd results and instead it gave the exclusion the interpretation that the insurance industry had put forth in seeking regulatory approval:

> In light of the origin of the pollution exclusions, as well as the ambiguous nature and absurd consequences which attend a strict reading of these provisions, we now find that the total pollution exclusion was neither designed nor intended to be read strictly to exclude coverage for all interactions with irritants or contaminants of any kind. Instead, we find that "[i]t is appropriate to construe [a] pollution exclusion clause in light of its general purpose, which is to exclude coverage for environmental pollution, and under such interpretation, [the] clause will not be applied to all contact with substances that may be classified as pollutants."[49]

In evaluating the applicability of pollution exclusions, the court indicated that the trier of fact should examine: (1) whether the insured is a "polluter" within the meaning of the exclusion; (2) whether the injury-causing substance is a "pollutant" within the meaning of the exclusion; and (3) whether there was a "discharge, dispersal, seepage, migration, release or escape" of a "pollutant" by the insured within the meaning of the policy.[50] Applying those factors and inquiries to the case before

[49] *See Doerr*, 774 So. 2d at 135 (internal citation omitted).

[50] *See Doerr*, 774 So. 2d at 135.

it, the *Doerr* court reversed the grant of summary judgment in favor of the insurance company.

United Policyholders is aware that this Court has previously confronted an issue involving the interpretation of the pollution exclusion and found, in that case, that coverage for the policyholder's loss was precluded pursuant to the exclusion. *City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc.*, 628 S.E.2d 539 (Va. 2006) ("*City of Chesapeake*"). It is respectfully submitted that the facts of PBM's loss are sufficiently distinguishable from those in *City of Chesapeake* to warrant a different result. In *City of Chesapeake*, the source of the alleged contamination was from the City's water treatment facility. Further, the underlying pleadings alleged a "discharge" or "release" from that facility into the domestic water supply. Here, the infiltration of broken down filter elements into PBM's infant formula was neither a discharge nor a release, nor did it leave or migrate from the policyholder's premises. PBM's loss is simply far afield from loss resulting from industrial pollution of the environment.

D. The Analysis Does Not Change in the First-Party Property Context

While less has been written on the intended application of the pollution exclusion outside of the liability insurance context, courts addressing the issue in the first-party property cases have come to the same conclusion: that the exclusion should be limited to traditional environmental pollution.

In *Vigilant Ins. Co. v. V.I. Tech.*, 676 N.Y.S.2d 596 (N.Y. App. Div. 1998) ("*V.I. Tech*"), a New York appellate court reversed a grant of summary judgment to the insurance company that it owed no obligation to indemnify the policyholder for damages resulting from the contamination of blood plasma pursuant to the policy's pollution exclusion. In so holding, the court disagreed with the lower court's conclusion that decisions examining the history of the pollution exclusion in light of third-party liability claims were irrelevant to first-party cases, stating that "[t]he commonly understood meaning of the language [of the pollution exclusion] in question should not be held to be different depending on whether it is used in a "first-party" or "third-party" policy. *V.I. Tech*, 676 N.Y.S.2d, at 597. In applying

the understanding of the historical context of the pollution exclusion to this claim as well as common policy interpretation, the appellate court stated:

> The pollution exclusion here does not apply to this contamination by leakage within a processing machine by "clear and unmistakable language," and there is "no other reasonable interpretation" except that it applies… No one would say defendant insured is a "polluter," because the ordinary meaning of the term would not apply. Neither can it be said that the words "release, discharge or dispersal" apply here, since in the context of "pollution," those words connote a spread beyond containment in the owner's premises, to the outside air, land or water.
>
> The availability of common language that could have been used to draft an unambiguous exclusion, *i.e.* contaminants or chemical refrigerant seepage, weighs in favor of defendant's position that the pollution language here at issue is either unambiguous is not applying to this internal contamination loss, or that it is ambiguous, in which case, "doubt must be resolved in favor of the insured and against the insurer."

V.I. Tech, 676 N.Y.S.2d, at 597-98.

Accordingly, there is no valid reason to apply any different interpretation or avoid considering the lengthy drafting

history of the pollution exclusion in the context of first-party property coverage.

For all of the foregoing reasons, United Policyholders respectfully requests that this Court reverse the lower court's decision and find that the pollution exclusions at issue in this case do not preclude coverage for PBM's loss as that loss was not the result of industrial pollution of the environment.

CONCLUSION

For the reasons stated herein, United Policyholders respectfully requests that this Court reverse the Circuit Court's decision refusing to limit the pollution exclusion to traditional environmental pollution and grant its motion for leave to submit an *amicus curiae* brief.

Dated: September 2, 2011 Respectfully submitted,

By: /s/ Ian D. Titley

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Addendum

Attached hereto are the following sources cited in United Policyholders' brief in support of PBM Nutritionals, LLC: (a) James H. Brown, *Letter to the Editor*, NATIONAL UNDERWRITER PROPERTY & CASUALTY ED., Apr. 22, 1996; (b) John A. MacDonald, *Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems*, 7-6 COVERAGE (Nov./Dec. 1997).

LETTERS

La. Commissioner Sounds Off On Pollution Exclusion

TO THE EDITOR:

The letter by K.A. Holtorff of Insurance Planning Associates in Omaha, Neb., in your Feb. 26 edition on the CGL pollution exclusion demands a response.

In discussing the applicability of the absolute pollution exclusion (APE) to various claims, the well-known example of the "slip and fall in bleach" was used. The conclusion was that if the person suffers a broken arm there should be coverage, but if the injury is a chemical burn then "the carrier is justified in denying coverage." This assessment of the APE is in error.

When the Insurance Services Office submitted the APE in the mid-1980s, it also submitted a buyback policy to restore the coverage carved out by the exclusion. The pollution liability buyback policy covers bodily injury and property damage resulting only from a "pollution incident." That term is defined in the policy as follows:

- "Pollution incident" means emission, discharge, release or escape of pollutants into or upon land, the atmosphere, or any watercourse or body of water, provided that such emission, discharge, release or escape results in "environmental damage."
- "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.
- "Environmental damage" means the injurious presence (injurious to the environment, not just the claimant) in or upon land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants or pollutants.

The crux of the above is, if the incident didn't result in "environmental damage," it was not a pollution incident and there would be no coverage under the buyback policy created to restore the coverage deleted by the APE.

The exclusion should not be read

Cont'd on Page 54

Louisiana Insurance Regulator Sounds Off On Pollution Claim

Cont'd from Page 31

more broadly than the policy which restores the deleted coverage.

When the ISO package was presented to regulators, it was represented that the buyback restored the coverage excluded by the APE; it was not represented that the buyback was more limited in scope than the exclusion.

Thus, APE cannot be read to exclude coverage for a chemical burn from a slip and fall in bleach in a store since there was no "pollution incident." To interpret APE otherwise is inconsistent with its purpose, eviscerates general liability coverage and defies the reasonable expectations of policyholders.

JAMES H. "JIM" BROWN
Louisiana Ins. Commissioner
Baton Rouge, La.

John A. MacDonald, Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems, Coverage, Nov./Dec., 1997 at 1.

Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems

by John A. MacDonald

The integrity of the insurance regulatory and judicial systems is under severe assault by members of the insurance industry. For several decades, large numbers of the nation's property and casualty insurers have repudiated the industry's official regulatory promises to state regulators. Insurance companies repudiated these promises through their interpretation of standard-form insurance policy language so as to exclude much of the coverage that the industry represented was provided. These insurance companies regularly take positions about the meaning of standard-form language during the handling of claims and in judicial filings that are completely opposite to the insurance industry's representations to state regulators. As a result, regulation of policy language and premiums is rendered meaningless.

This insurance regulatory crisis has reached mammoth proportions. The insurance industry spends over $1 billion a year litigating against its policyholders' claims for coverage.[1] Policyholders are forced to expend similar sums annually to litigate improper insurance industry claims-handling practices.[2] This assault has been unwittingly aided by numerous courts that have refused to allow policyholders to present drafting history of standard-form insurance policy language and industry representations made to secure state regulatory approval.

Unfortunately, the judicial system is often unable or unwilling to give these policyholders recourse because of the contract interpretation doctrine that bars the use of regulatory evidence in the interpretation of insurance policy language. *See, e.g. Heyman Assocs. No. 1 v. Insurance Co. of the State of Pa.*, 653 A.2d 122, 135 (Conn. 1995). The so-called "extrinsic evidence" includes evidence of industry officials' representations concerning the language's meaning and the regulator's intent concerning the scope and effect of the policy language that they approved.

Insurance companies, either directly or through major insurance industry groups as "*amicus curiae*," routinely fight discovery of drafting or regulatory history and implore courts not to examine "extrinsic" evidence that the policyholder produces concerning the regulatory approval of insurance policy language. Once freed of this embarrassing evidence, which typically supports the granting of coverage, insurance companies offer a revisionist interpretation contradictory to that which was provided to regulators. When insurance companies are free to abrogate their regulatory representations, the state insurance regulatory system is reduced to sham.

The insurance industry and judiciary are not solely responsible for the crisis. Insurance regulators must bear some of the blame. Insurance regulatory activity has most often been limited to providing initial review and approval of policy language. After insurance policy language is approved, regulators leave it to the parties or the judicial system to resolve disputes over policy language. Regulators, with rare exception, have not undertaken subsequent steps to ensure that members of the industry live up to the regulatory promises that induced approval of newer or modified insurance policy provisions.

Louisiana Insurance Commissioner James H. "Jim" Brown is an exception. Indeed, current interest in the regulatory integrity issue was spawned by the recent activities of the Louisiana Department of Insurance (LDOI). Several years ago, the LDOI began to recognize that the integrity of the insurance regulatory system is under attack. This is evidenced in this 1994 correspondence to ISO:

> It continues to be [the Louisiana Department of Insurance's] position that the [Insurance

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Services Office, Inc. "absolute"] pollution exclusion is being used in a manner which is contrary to and inconsistent with the representations made to the DOI at the time it was submitted for approval. Had ISO presented to the DOI the same explanation of the intent and effect of the exclusion on CGL coverage that is now being advocated by the industry it is extremely unlikely that the exclusion would have been approved for use in Louisiana, particularly in the absent of any significant rate reduction.

Letter from C. Noel Wertz, Senior Attorney, Louisiana Department of Insurance to Domenick J. Yezzi Jr., Asst. V.P., ISO (Oct. 25, 1994).

> The industry has succeeded in undermining the integrity of much of the nation's judicial and insurance regulatory system.

The LDOI's concern lay the industry's use of the "absolute" pollution exclusion was triggered by *South Central Bell v. Ka-Jon Food Stores of Louisiana*, 644 So.2d 357, *vacated, remanded*, 644 So.2d 368 (La. 1994) (*Ka-Jon*). The court noted that "insurers have abused pollution exclusions," criticizing "the insurers who deny coverage of non-environmental accidents even though the accidents have no greater connexity to the ["absolute"] pollution exclusion than does a morning drive to work." 644 So.2d at 362.

Following Wertz's letter, Commissioner Brown convened a Public Forum in September of 1995 and appointed an Absolute Pollution Exclusion Task Force in 1996. Brown concluded the three-year investigation of insurance company claims-handling abuses of the so-called "absolute" pollution exclusion by issuing an Advisory Notice restricting use of the "absolute" pollution exclusion to deny insurance coverage claims. Significantly, Brown limited the application to "active intentional industrial polluters." State of Louisiana, Advisory Letter Number 97-01 (June 4, 1997) at 4. (Advisory Letter).

Most other state regulators have been slow to realize that their own regulatory activity is a nullity when insurance companies abrogate their regulatory promises and courts refuse to examine regulatory history. The industry has succeeded in undermining the integrity of much of the nation's judicial and insurance regulatory system.

Providing Standard Explanatory Memoranda to State Regulators

The vast majority of CGL insurance policies issued to the nation's policyholders over the last three decades consist of standard form language that was drafted by the Insurance Services Office, Inc. (ISO) or its predecessors.[3] This language was submitted to state regulatory officials for approval. In most states, insurance companies could only use policy language that was approved for use in a particular state. *See, e.g.* La.Rev. Stat. § 22:620 (prohibiting the use of policy forms unless filed with and approved by the Commissioner of Insurance); Iowa Code § 515.109 (1995) (same); 40 Pa. C.S. § 477(b) (same).

ISO customarily filed new policy language along with a standard explanatory memorandum setting forth the insurance industry's explanation of the intent and effect of the policy language. The identical explanatory memorandum was filed nationwide. This standard explanatory memorandum was typically prepared by ISO or its predecessors, with assistance from representatives of a handful of insurance companies. In most instances, the standard explanatory memorandum would be the only official insurance industry regulatory description of the policy language at issue. On occasion, the memorandum might be supplemented by written submissions and, less often, by testimony of ISO or other representatives at formal regulatory hearings. The memorandum, as supplemented, was the industry's official representation of the intent and effect of the proposed policy language. The information supplied in the explanatory memorandum informed regulators' understanding of the industry's intended effect of the policy language and formed the basis of the approval (or disapproval) of insurance policy provisions. *See, e.g., Morton Int'l v. General Acci. Ins. Co.*, 629 A.2d 831, 874-75 (N.J. 1993), *cert. denied*, 512 U.S. 1245 (1994) (*Morton International*).

Policyholders had no hand in either the drafting or the regulatory approval of CGL policy language. Policyholders are dependent upon the insurance regulatory policy review and approval process to protect their interests. One standard-form language is approved by state regulators, policyholders are sold standard-form insurance policies on a "take-it-or-leave-it" basis.

As the New Jersey Supreme Court noted, "[a] basic role of the Commissioner of Insurance is 'to protect the interest of policy holders. . . .' " *Morton International*, 629 A.2d at 874; *see also*, La.Rev.Stat. § 22:2A(1). "Insurance is a business affected with

the public interest. . . ." Policyholders are similarly dependent on the judicial system to give meaning and effect to the insurance policy review and approval regulatory process when insurance companies abrogate their regulatory representations and deny valid insurance claims.

Regulatory Estoppel Applied Against Insurance Industry

The New Jersey Supreme Court stood up to protect the integrity of the insurance regulatory and judicial processes. *See Morton International*, 629 A.2d 831. The so-called "absolute" pollution exclusion that was the center of the Louisiana Insurance Department's concern was introduced in the mid-1980s. It replaced the "sudden and accidental" polluter's exclusion[4] which was first presented to the nation's regulators in 1970 by ISO's predecessors, the IRB and the MIRB. It is impossible to understand the extent of the assault on the insurance regulatory system without understanding the history of the "sudden and accidental" polluter's exclusion at issue in *Morton International*. The history of judicial and regulatory deception began with the industry's presentation of the "sudden and accidental" exclusion to regulators in 1970.

The IRB and MIRB, filed a "standard explanatory memorandum" with state regulators which purported to explain the intended effect of the exclusion. *See Morton*, 629 A.2d at 851 (citation omitted). In the Explanatory Memorandum, the industry's agents officially represented that:

> Coverage for pollution or contamination is not provided in most cases under present policies because *the damages can be said to be expected or intended and thus are excluded by the definition of occurrence*. The above exclusion *clarifies this situation* so as to avoid any question of *intent. Coverage is continued* for pollution or contamination caused injuries *when the pollution or contamination results from an accident* except that no coverage will be provided under certain operations for injuries arising out of discharge or escape of oil into any body of water.

Quoted in Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 Cornell L. Rev. 610, 626-27 (March 1990) (italics added).

Morton International contains the most exhaustive judicial review of the regulatory and drafting history of the "sudden and accidental" polluter's exclusion to date. *See*, 629 A.2d at 847-76. As in virtually every insurance coverage case, the insurance companies and their *amici* urged the New Jersey Supreme Court not to consider this history, thus attempting to avoid their representations 629 A.2d at 848. The court declined this invitation, noting that the "record together with the reported cases that address the regulatory history and the abundant independent commentary on the subject affords an accurate and comprehensive basis for our determination."[5] *Id.*

The court conducted its analysis by comparing the representations made in the Explanatory Memorandum with the industry's current position that "the pollution-exclusion clause precludes coverage for all pollution damage, whether or not intended, unless the *discharge* of pollutants was 'sudden' (meaning abrupt) and accidental, or a so-called boom event." 629 A.2d at 852.[6] The court found that the representation to regulators that most pollution damages were not covered under the standard-form CGL insurance policy was "simply untrue," "astounding," and "inaccurate and misleading." 629 A.2d at 852. The industry's statement that the exclusion clarified that most pollution damages were already excluded was "even more misleading." *Id.* The court wrote:

> Stated accurately, the pollution-exclusion clause, as construed today by the industry, eliminates *all* unintended pollution-caused damage that the occurrence policy had provided, except for the unusual "boom-event" type case in which the *discharge* of the pollutants was both sudden—meaning abrupt—and accidental. To describe a reduction of coverage of that magnitude as a "clarification" not only is misleading, but comes perilously close to deception. Moreover, had the industry acknowledged that the true scope of the proposed reduction in coverage, regulators would have been obligated to consider imposing a correlative reduction in rates.

629 A.2d at 852-53 (emphasis in original).

The court found that the statement in the Explanatory Memorandum that coverage was continued for an "accident" was "camouflage" and that "the conclusion is virtually inescapable that the [Explanatory] memorandum's lack of clarity was deliberate." *Id.* at 853. "Supplemental explanations submitted by the IRB to state regulatory agencies were similarly lacking in candor." 629 A.2d at 853.

Because the insurance industry misrepresented the effect of the polluter's exclusion to the New Jersey Department of Insurance, *and thereby avoided either disapproval of the exclusion or a reduction of rates*,[7] the New Jersey Supreme Court applied regulatory estoppel:

> Although we have not heretofore applied the estoppel doctrine in a regulatory context, its application to these circumstances is appropriate and compelling. A basic role of the Commissioner of Insurance is "to protect the interests of policy holders" and to assure that "insurance companies provide reasonable, equitable, and fair treatment to the insuring public." In misrepresenting the effect of the ["sudden and accidental"] pollution exclusion clause to the Department of Insurance, the [Insurance Rating Board, an ISO predecessor] misled the state's insurance regulatory authority in its review of the clause, and avoided disapproval of the proposed endorsement as well as a reduction in rates. As a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB, its designated agent, in presenting the pollution-exclusion clause to state regulators.

629 A.2d at 874 (citation omitted). The Supreme Court refused to enforce the "sudden and accidental" exclusion in the manner urged by the insurance companies, as [t]o do so "would contravene . . . public policy requiring regulatory approval of standard industry-wide policy forms to assure fairness in rates and in policy content, and would condone the industry's misrepresentation to regulators in New Jersey and other states concerning the effect of the clause." *Id.*

If all courts followed the lead of the New Jersey Supreme Court, the integrity of the insurance regulatory and judicial systems would not be facing the severe threat that exists today. Unfortunately, many courts simply refuse to consider regulatory history, nullifying the effect of state insurance regulatory systems. *See, e.g. Dimmitt Chevrolet v. Southeastern Fidelity Ins. Corp.*, 636 So.2d 700 (Fla. 1994) (*Dimmitt Chevrolet*) (refusing to consider the regulatory history despite the pleas of the Florida Attorney General).

Other Courts: 'Dishonesty' in the Insurance Industry's Regulatory Filings

Other courts that have been willing to look at either the regulatory or drafting history of pollution exclusions have found that the insurance industry has not lived up to its promises.

A federal court in Georgia also made findings about the IRB's 1970 representations. The court found "dishonesty" in the IRB's regulatory presentation because it "downplayed the substantial effect the pollution exclusion clause would have on existing coverage in an effort to obtain approval for the clause's insertion into insurance policies." *Claussen v. Aetna Cas. & Sur. Co.*, 676 F. Supp. 1571, 1573 and at n.4 (S.D. Ga. 1987) (subsequent history omitted) (footnote omitted). Answering a certified question in the same case, the Georgia Supreme Court agreed with the District Court's findings and interpreted the exclusion in favor of coverage. *See, Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686, 689 (Ga. 1989).

The Wisconsin Supreme Court found that the insurance regulators relied on the IRB's representation that the "sudden and accidental" clause "clarified but did not reduce the scope of coverage" and enforced the clause in accordance with the industry's representations. *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 575 (Wis.), *modified*, 157 Wis. 2d 507 (Wis. 1990) (1990).

This finding was echoed by the West Virginia Supreme Court:

> [I]n view of the fact that in the present case the insurance group representing Liberty Mutual unambiguously and officially represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage under the policies involved, . . . this Court must conclude that the policies . . . covered pollution damage, even if it resulted over a period of time and was gradual, so long as it was not expected or intended.

Joy Technologies v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 499-500 (W.Va. 1992).

The Third Circuit came to the same conclusion. *New Castle County v. Hartford Acci. & Indem. Co.*, 933 F.2d 1162, 1198 (3d Cir. 1991), *cert. denied*, 507 U.S. 1030 (1993).

The Indiana Supreme Court came to a similar result, relying on the insurance industry's drafting history:

> If one considers the insurance industry's own interpretation of the contractual language, it becomes clear that there exists a lack of clarity.
>
> * * *
>
> [T]he insurance industry's own understanding of this language indicates that "sudden" can be understood to mean "unexpected."

American States Ins. Co. v. Kiger, 662 N.E.2d 945, 947, 948 (Ind. 1996) (*Kiger*).

1970 Misrepresentations Were Pre-Conceived and Intentional

The deception found by the above courts and others was no accident. The evidence suggests that key insurance industry representatives planned deception from the very beginning of the industry's introduction of polluter's exclusions to insurance regulators. These representatives did not want the insurance industry to acknowledge to regulators that

the "sudden and accidental" exclusion would represent a reduction in coverage under the CGL insurance policy, for fear that the regulators would order a reduction of rates.

Francis X. Bruton, of Aetna Casualty and Surety Company (Aetna), was one of the primary drafters of the "sudden and accidental" polluter's exclusion. He provided the draft exclusion to the IRB. *See* Stanzler, et al., *Coverage for Environmental Cleanup Costs: History of the Word "Damages" in the Standard Form Comprehensive General Liability Policy*, 1990 Colum. Bus. L. Rev. 449, 487-88 n.103 (1990). An internal memorandum written by Aetna's counsel, S.B. Guiney, copied to Bruton, reveals the plan to be less than forthcoming to regulators about the effect of the exclusion. The intent was to minimize outcry and avoid a rate reduction:

> There may be a hue and cry because there will be no reduction in premium despite the fact that coverage would appear to be cut back; and, *We don't want to concede that there is a cut back in coverage because this is tantamount to admitting that all such cases are now covered*, whereas *some* of them may not be covered.

Memorandum from Guiney, Aetna, to Aetna Cas. & Sur. Co. (May 7, 1970) (quoted *in* Amy Timmer, *Are They Lying Now or Were They Lying Then? The Insurance Industry's Ambiguous Pollution Exclusion: . . .*, 46 Baylor L.Rev. 355, 373 n.68 (1994) (Timmer) (italics added)).[8]

This memorandum is important because it was written shortly before the IRB filed the polluter's exclusion with state insurance regulators across the country. Aetna was an *amicus curiae* in the *Morton International* case. Aetna submitted four appendices of drafting and regulatory history material to the Supreme Court. Not surprisingly, the Guiney Memorandum was not included in this material. The Memorandum was uncovered and submitted to the New Jersey Supreme Court during rehearing. Rehearing was denied without an opinion.

As set forth in *Morton International*, the statement in the IRB and MIRB Explanatory Memorandum that most pollution damages were not covered under the standard-form CGL was "simply untrue," "astounding," and "inaccurate and misleading." 629 A.2d at 852. The Guiney Memorandum's statement that Aetna did not want to admit that there was any cutback in coverage because that would be "tantamount to admitting that all such cases are . . . covered" may explain the motive for the misstatements.

A glaring inconsistency was evident in the industry's position that the "sudden and accidental" exclusion did not reduce insurance coverage, but merely clarified "intent." The insurance industry told the regulators that the coverage excluded under the "sudden and accidental" exclusion would be provided on a "buyback" basis. How could one buy back coverage that supposedly was not "intended" in the policy to begin with?

> **The evidence suggests that key insurance industry representatives planned deception from the very beginning of the industry's introduction of polluter's exclusions to insurance regulators.**

This inconsistency in the representations made to the nation's insurance regulatory was publicly raised during an insurance industry technical conference held later in 1970. *See* MIAA and MIRB, *Mutual Insurance Technical Conference Proceedings, Casualty and Automotive Underwriting Conference*, pp.35-36 (Bellevue Stratford Hotel, Philadelphia, PA, Nov. 16-19 (1970). One questioner asked about the inconsistency in the regulatory representations that, although the polluter's exclusion was merely a clarification that coverage was *already* excluded under the policy, the industry would be offering an endorsement to "buy back" the coverage excluded under the exclusion. The panelist, R. Young, General Liability Underwriting Manager for Employers Mutual Liability Ins. Co., responded, "It hasn't been raised to my knowledge, to any of our underwriters. I suspect it may be raised, but it is something I would just as soon keep quiet about." *Id.* at 36. When asked if any insurance company was actually offering the "buyback" policy, Young responded that he did not know of any insurance company that planned to offer the buyback coverage and that was another subject that he wanted to keep quiet about. *Id.*

No one present expressed concern that industry representations to regulators were wrong.

The evidence is clear that in 1970 the insurance industry knowingly misrepresented the scope of existing insurance coverage under the CGL policy, the scope of the "sudden and accidental" exclusion, and the industry's real intent with respect to the coverage to be provided after the exclusion.

This was done for one simple reason—greed! The insurance industry simply wanted to avoid having the insurance regulators order a reduction in rates.

'Absolute' Misrepresentations Mirror 'Sudden and Accidental' Misrepresentations

Deceit is also evident when comparing the insurance industry's 1980s regulatory representations concerning the so-called "absolute" pollution exclusion with its subsequent litigation position.

Deceit Doubled: 'Absolute' Pollution Exclusion 'Merely Clarified' Prior Coverage

As with the "sudden and accidental" exclusion, the ISO regulatory filing memorandum concerning the "absolute" pollution exclusion contained statements that were deceptive and untrue. ISO initially represented to the regulators that the purpose of the "absolute" pollution exclusion was to serve policyholders' needs:

> We believe that there are circumstances where the use of a total exclusion is warranted. For example, the risk may have many exposures to pollution loss but has elected to self-insure that exposure or purchase a separate pollution policy.

ISO, *Explanatory Memorandum, Pollution Exclusion Endorsement* (1984). ISO made it seem as if policyholders were clamoring for an "absolute" pollution exclusion, not the insurance industry. ISO claimed that some policyholders wanted to "self-insure," implying that some policyholders were willing to bear the risk in return for a savings in insurance premiums.

The falsity of this claim is demonstrated by the fact that ISO sought and obtained the approval of the "absolute" pollution exclusion *without a reduction* in rates. When one "self-insures," *i.e.*, forgoes insurance coverage, one does so in order to avoid paying insurance premiums. Once approved, the "absolute" pollution was not merely offered to policyholders that wanted to self-insure, it became part of the standard-form CGL policy. The "absolute" pollution exclusion was foisted on the nation's policyholders without any premium savings, whether they liked it or not.

In a misstatement that mirrors the 1970s representation of the "sudden and accidental" exclusion as a mere clarification of intent,[9] ISO similarly justified the "absolute" pollution exclusion's preclusion of cleanup costs by stating: "Clean-up costs are specifically excluded as a clarification of current intent." *Id.* In *Morton International*, the New Jersey Supreme Court found that the industry misrepresented the intent of the "sudden and accidental" pollution exclusion. This "clarification" claim similarly distorts the truth. The "sudden and accidental" exclusion, which was to be replaced with the "absolute" pollution exclusion, was not directed to environmental cleanup costs as a category and the language of the exclusion contains no mention of "clean-up costs."

ISO claimed that some policyholders wanted to 'self-insure,' implying that some policyholders were willing to bear the risk in return for a savings in insurance premiums.

The ISO "absolute" pollution exclusion regulatory and drafting history demonstrates that the "absolute" pollution exclusion was also represented as not intended to apply to pollution damages that were covered under the prior "sudden and accidental" exclusion:

> The pollution exclusion is completely rewritten in a new format designed to reinforce the limitation of coverage. In the current contract coverage is excluded if the introduction of pollutants was other than "sudden and accidental."[10]
>
> Because of the broadening of coverage through court interpretations of current language there was considerable discussion of whether or not pollution should be completely excluded under the new Coverage Forms. This would have been a cut-back in coverage and would have meant that an insured with even minimal exposure to pollution loss would have had to purchase a separate pollution liability policy to obtain protection. Thus *it was decided that the new forms should provide the coverage that insurers generally intend under the current contract, though in a new format designed to reinforce the limitation of coverage.*

ISO, *Seminar on Commercial Lines Policy and Rating Simplification, Including The New Commercial General Liability Policies* at 4 (Spring/Summer, 1985) (italics added). Again, history has not borne out this representation. Insurance companies routinely use the "absolute" pollution exclusion to deny claims in all cases involving alleged "pollutants," even when those claims would be covered under the insurance industry's *current* restrictive interpretation of the "sudden and accidental" exclusion, let alone under the pro-coverage interpretation given to regulators in 1970.

A 1984 ISO Explanatory Memorandum filed with state insurance regulators also pointed out that "the

exclusion does not apply to damages arising out of products or completed operations nor to certain off-premises discharges of pollutants. . . ."[11] ISO reiterated these coverage exceptions to the scope of the exclusion in a 1985 Workbook describing the application of the 1985 policy forms and endorsements, in a printed response to concerns raised over the new pollution endorsement, in remarks made to the Independent Insurance Agents Association 1988 Annual Meeting, and in written testimony submitted at the November 3, 1988 Hearing of the National Association of Insurance Commissioners Committee Working Group.[12] In a March 11, 1985, letter to the Commonwealth of Pennsylvania Insurance Department, ISO again reaffirmed that coverage is not excluded under the "absolute" pollution exclusion for "products" and "completed operations" claims.[13]

At 1985 New Jersey Department of Insurance hearings, Michael Averill, manager of ISO's Commercial Casualty Division testified that the "absolute" pollution exclusion "is not an absolute exclusion."[14] Robert J. Sullivan, Vice President for Government Affairs, Crum & Forster Insurance Companies similarly told the New Jersey regulators that "these are not total, absolute pollution exclusions, it does have *significant coverage* for completed operations and product liability in [and] certain off-site discharges."[15]

When the revised CGL insurance policy "absolute" pollution exclusion was first approved, some states required that an explanatory notice be provided to policyholders. *See*, ISO, *Commercial General Liability Program Instructions* (1986) at 1 ("the use of policyholder notices . . . has been suggested, and in fact required in some states"). ISO drafted such a standard-form notice. With respect to the new, "absolute" pollution exclusion, the ISO notice informed policyholders that:

> Pollution Liability—The new policies do not cover this liability if the pollutants escape from your premises or a waste disposal or treatment facility. . . . Certain pollution exposures away from your premises—including many that arise out of your products or work—*are covered* regardless of whether the emission was "sudden" or not. See exclusion f. under Coverage A for details.

Id. at 3 (italics added). ISO included a table explaining the "Highlights of Current and Revised Contracts." *Id.* at 7. ISO noted that under the "absolute" pollution exclusion, "pollution liability" was:

> Excluded if emission originates on named insured's premeses or a waste disposal or treatment facility. Off-site emissions covered unless pollutants are waste or unless the pollutants are brought to jobsite in connection with insured's or subcontractor's operations.

Id. at 7. Reiterating what was promised in its regulatory representations, ISO noted the "[r]esulting coverage embraces products-completed operations exposure for both sudden and gradual emissions." *Id.*

When the "absolute" pollution exclusion was introduced, the insurance industry informed both insurance regulators and policyholders that the "absolute" pollution exclusion had limited application to pollution that originated on the named policyholder's own premises or at waste disposal facility. At the same time, policyholders and regulators were told that the "absolute" pollution exclusion would not exclude insurance coverage for products and completed operations.[16] The Texas State Board of Insurance also held hearings in 1985. Several ISO members conceded that the so-called "absolute" pollution exclusion was "overdrafted," thereby implicitly admitting that it was ambiguous. A Texas regulator, Mr. Thornberry, queried "[i]If there's an ambiguity, why don't we have it cleared up rather than in the policy?" Mr. Harrel, a Liberty Mutual Insurance Company representative replied that "[w]e'll tell you, we'll tell anybody else, we overdrafted it."[17] The Associate Director of Travelers, Edwin J. Rinehimer, also conceded to the Texas regulators that what was considered "pollution" under the so-called "absolute" pollution exclusion was unclear:

> [Q]uite frankly we could talk a long time about what does and does not constitute a pollution claim even under this new form.

Id.

Texas regulator Thornberry noted that the exclusion's language was so broad that it would exclude coverage if an alkali or acid spilled on a grocery store and child fell in it and became disfigured. Liberty Mutual's Harrel stated that "I don't know anybody that's reading the policy that way, and I think you can read the new policy just the way you read it." He underscored that "our insured would be at the state board—someone said yesterday—quicker than a new york minute if, in fact, every time a bottle of clorox fell off a shelf at a grocery store and we denied the claim because it's a pollution loss." Mr. Thornberry iterated that one of the justifications for approving the overbroad language was that "if an insurance company denied the claim and you went to the courthouse, the courts wouldn't read the policy that way." Mr. Harrel responded that "Nobody would read it that

way."[18] Today, as recognized by Insurance Commissioner Brown and some courts, insurance companies regularly ask courts to read it "that way."[19]

As it did in other states, ISO requested that the Texas Insurance regulators revise the insurance manuals to reflect the exceptions to the "absolute" pollution exclusion:

> [W]e are proposed that the following rule be added to Division Six of the Commercial Lines Manual . . .:
>
> 9. Pollution Exclusion
>
> To exclude bodily injury and property damage arising out of the discharge of pollutants with the exception of bodily injury and property damage arising out of products, completed operations and certain off-premises discharges of pollutants, use Pollution Exclusion Endorsement GL 21 33 [,the "absolute" pollution exclusion].

ISO, *Explanatory Memorandum, Pollution Exclusion Rule* (1985) at 1 (attached to letter from R.G. Foster, Manager, ISO, to State Board of Insurance (Jan. 23, 1985)).

It is clear that the nation's insurance commissioners understood that 'absolute' pollution exclusion did not exclude insurance coverage for products, completed operations, and certain off-premises claims.

It is clear that the nation's insurance commissioners understood that "absolute" pollution exclusion did not exclude insurance coverage for products, completed operations, and certain off-premises claims. When ISO first proposed the so-called "total" pollution exclusion as an option replacement for the "absolute pollution exclusion, ISO informed the insurance regulators that the new "total" "endorsement eliminates the pollution coverage left in the policy by the underlying basic ["absolute"] pollution exclusion–products/completed operations coverage and certain off-premises discharges." ISO, *Commercial General Liability Pollution Endorsements Filling Explanatory Memorandum* (1998) at 2. The NAIC's working group described the "total" pollution exclusion as "an option to delete the pollution coverage from the products and completed operations coverage. . . ." NAIC, *Report of the ISO/CGL Working Group of the Commercial Lines—Property and Casualty (D) Committee* (New Orleans, La., Dec. 12, 1988) at 3.

The regulatory history evidence overwhelmingly reveals that the "absolute" pollution exclusion: 1) was not "absolute"; 2) was only intended to exclude insurance coverage for a limited class of releases occurring at the named policyholder's premises or at third-party waste disposal and storage facilities; 3) was not intended to exclude insurance coverage for products or completed operations claims involving "pollutants"; 4) was not intended to apply to most off-premises discharges; and, 5) was admitted by the insurance industry to be "overdrafted" and "ambiguous."

In *South Central Bell v. Food Stores of Louisiana*, 644 So.2d 357, *vacated, remanded*, 644 So.2d 368 (La. 1994), (*Ka-Jon*), which first brought the regulatory integrity crisis to Commissioner Brown's attention, State Farm Insurance Company, again supported by the IELA and 20 of the largest property-casualty insurance company groups, urged the Louisiana Supreme Court to apply an alleged "literal" interpretation of the "absolute" pollution exclusion that was eschewed during the Texas regulatory process cited above. The Louisiana Supreme Court rejected the insurance companies' invitation:

> [A] literal application of certain portions of the ["absolute" pollution] exclusion, the method advanced by [the insurance company], precludes coverage of many routine business accidents. [footnote omitted] The all inclusiveness of the words used in the exclusion are adverse to both the policy's nature and its primary purpose which is to insure Ka-Jon against fortuitous accidents and incidental business risks of running its convenience store. The literal application of the exclusion's words leads to absurd consequences and is at odds with the policy's nature. CGL policies protect against the premises, operations, products, completed operations and independent contractor hazards of the insured. No reasonable insured would intend for a pollution exclusion to basically eviscerate this coverage. — —

644 So.2d at 364.

Despite the regulatory representations evidencing the contrary, the insurance industry has filed innumerable legal briefs in which it is asserted that the exclusion is what is called "absolute," and has applied it to exclude insurance coverage even for products liability and completed operations claims. For instance, 21 major property and casualty insurance companies recently filed an *amicus curiae* brief in the United States Court of Appeals for the Third Circuit in which it was argued that the "absolute" pollution exclusion barred insurance coverage for a products liability claim against a manufacturer for bodily injury caused by carbon mon-

oxide emissions from its allegedly defective product. *See*, Brief of *Amicus Curiae* Insurance Environmental Litigation Association (IELA), *Reliance Insurance Co. v. Moessner*, No. 95-1899, 1997 WL 434866 (3d Cir. Aug. 5, 1997) (brief dated September 23, 1996). The Third Circuit disagreed, holding that the "absolute" pollution did not bar coverage of this products liability claim. 1997 WL 434866 at *4, *11 ("Under VE's original insurance policy [containing the "absolute" pollution exclusion]; Moessner's vaporator-related claim would have been covered.").

It will be recalled that ISO's advisory notice to policyholders represented that "[c]ertain pollution exposures away from your premises—including many that arise out of your products or work—*are covered* regardless of whether the emission was "sudden" or not." ISO, *Commercial General Liability Program Instructions* (1986) at 1. Highlands Insurance Company recently argued that every premises at which a contractor performs operations is a premises "occupied" by the contractor and, hence, the "absolute" pollution exclusion barred all insurance coverage for pollutant-related damage related to contractors' work operations. *See Highlands Ins. Co. v. Kelley-Coppedge, Inc.*, No. 2-96-173-CV, 1997 WL 476325 (Tex. App.—Forth Worth, July 17, 1997), *petiton for review pending*.

Highland's position is directly contradictory to the regulatory representations and to the position that ISO espoused in its advisory notice to policyholders. Ironically, in a 1985 workbook that described the impact of the "absolute" pollution exclusion, ISO noted that "there is coverage for some-off site emissions, including the Products/Completed Operations exposure" and provided examples of claims that would still be covered, including:

> The insured or a subconcontractor, while working at a jobsite ruptures an oil pipe by accidentally ramming it with a bulldozer.

ISO, *Workbook: Policy Forms and Endorsements Policywriting Rules* (1985) at 34. Additionally, a 1989 ISO explanatory memorandum submitted to the Texas State Board of Insurance and other regulators noted that, with respect to incidents at third-party premises, the 1988 revision of the "absolute" pollution exclusion "clarifies that the exclusion only applies if the pollutants are brought onto the site by the insured, contractor or subcontractor." ISO, *Commercial General Liability Explanatory Memorandum—Purpose of Revision* (1989) at 3.

As *Ka-Jon*, *Moessner*, and *Kelley-Coppedge* demonstrate, the insurance industry ignores its regulatory promises as soon as it has secured the regulators' approval of new policy revisions.

'Absolute' Exclusion Was Only Intended To Apply to Superfund-Type Liability

The history of the "absolute" pollution exclusion reveals that the exclusion was drafted in response to the passage of the Superfund statute and only intended to apply to Superfund-type environmental liability.[20] The "absolute" pollution exclusion was specifically developed by the industry to address Superfund-type strict liability for injury to the environment caused by disposal of hazardous substances. The exclusion was not intended to exclude insurance coverage for ordinary tort liability, such as that involving products liability or completed operations exposures. This fact was reflected in the analysis of the Louisiana Supreme Court, which recognized that the "absolute" pollution exclusion was the insurance industry's response to federal and state legislation "to ensure [environmental] cleanup costs, to correct environmentally harmful conditions caused by pollution activities, are borne by those who caused the pollution." *Ka-Jon*, 644 So. 2d at 363.

The Louisiana Supreme Court's observations in this regard are strengthened by examining the drafting and regulatory history. A review of the published Proceedings of the National Association of Insurance Commissioners (NAIC), from the time that the Superfund statute was adopted in 1980 through the adoption of the "absolute" pollution exclusion in 1986 and its revision in 1988, reveals that the insurance industry developed the "absolute" pollution exclusion solely for the purpose of addressing Superfund-type liability for environmental pollution. *See generally*, NAIC Proceedings (1981 through 1989).[21] Indeed, the major concern expressed to the NAIC by the insurance industry was the Superfund statute's imposition of retroactive, strict liability for the generation and disposal of hazardous substances.

During the discussions that led up to the passage of the Superfund statute, the American Insurance Association (AIA)[22] and other industry representatives pointed out to the NAIC that the insurance industry was concerned that, under its old CGL insurance policies, it would have to reimburse policyholders for Superfund cleanup liability which was imposed retroactively. The AIA stated that "the member companies of AIA will be asked to be the principal domestic source of post-closure liability insurance for hazardous waste disposal sites." Kimble, Counsel, AIA, *The Need For A Post-Closure Liability Fund For Waste Disposal Sites* (July 25, 1980), NAIC Proceedings, 1982 Vol. II at 633. Kimble pointed out that "[t]he extent of coverage for toxic substances pollution and haz-

ardous waste disposal is limited by a restrictive endorsement [,the "sudden and accidental" polluters exclusion]. . . ." *Id.* at 634.[23]

Kimble noted that the insurance industry had major concerns about the new Superfund statute: "The dissimilarities between the current liability theories for toxic substances discharges and disposal and the liability theories preferred in 'superfund' legislation will impede the development of an insurance market." Id. at 635. Kimble suggested that "it would be against public policy to offer liability for hazardous substances pollution. Certainly, the concept of readily available, inexpensive coverage for *intentional* pollution is neither rational nor appealing." *Id.* at 634 (underlining added). Kimble's statements also confirm that, as it did in 1970, the industry told the insurance commissioners that it only wanted to exclude insurance coverage for intentional polluters.

Another submission to the insurance commissioners was made by attorney Robert S. Faron, of LaBoef Lamb, a law firm that represent insurance interests in the environmental area. Faron told the NAIC that:

> Insurers will have to assess their exposures to the new liabilities created by Superfund. Superfund does not provide liabilities that can be easily and accurately assessed. Due to the expansive definitions of "hazardous waste," "removal" or "remedial costs" and "liability," the act creates an extremely broad and powerful tool for the Environmental Protection Agency and the Justice Department to use in actions to control activities of those "persons" releasing or threatening release of hazardous substances into the environment.

Robert S. Faron, Esq., *Superfund Liability: A Super Headache to Insure*, NAIC Proceedings, 1982 Vol. II at 636, 639.

In a reference to the impact of retroactive liability, Faron noted that insurance companies "will have to determine the extent that their existing coverages may be compounded by Superfund liability requirements." *Faron, Id.* Faron's concerns about Superfund liability for a *threatened* release is significant, given that the subsequently-proposed "absolute" pollution exclusion specifically addressed "threatened" releases, something that the predecessor "sudden and accidental" polluter's exclusion did not. The inclusion of the "threatened release" concept in the "absolute" pollution exclusion confirms that it was intended to address Superfund-type liability.

Throughout the early 1980s, as Superfund began to be implemented, the insurance industry continued to express concern to the NAIC about the implications of the statute on the insurance industry and its market. The NAIC was provided with an October 16, 1981 letter from the AIA to Mr. Mark G. Bender, a Senior Economist with the U.S. Treasury, on the subject of "Superfund Insurance Studies." Correspondence from Dennis R. Connolly, Senior Counsel, AIA to Bender, NAIC Proceedings, 1982 Vol. II at 641. The AIA made it clear that the insurance industry was not concerned with environmental liability *per se*, but specifically with the strict environmental cleanup liability imposed under the Superfund Statute:

> The American common law which has been relied upon in other environmental issues to determine the rules of liability has tended to be more than adequate to redress the harms which may befall individuals or groups of claimants. It would have been wiser to have the compensation system which is sought under Superfund rely on this historical background of tort law development.

Id. at 642. The AIA thus expressed no concern over its provision of insurance coverage for environmental liabilities under common law tort theories such as negligence, nuisance, and trespass.

> The AIA made clear that the heart of the AIA's concern was Superfund-imposed retroactive liability for which the insurance industry would be responsible under old insurance policies.

The AIA was concerned with the impact of the Superfund statute, however, because the AIA felt that it imposed a "revolutionary statutory liability system." *Id.* The AIA wrote, that "[t]he imposition of a brand new and hitherto unanticipated retroactive liability on both insurer and insured is unjust, counterproductive, and should be deleted. Joint and several liability for the sweeping damages contemplated under Superfund is neither philosophically nor financially desirable." *Id.* at 643.

The NAIC was provided with excerpts from a letter to the EPA from the AIA, in which its counsel expressed concern over the long-tail liability of insurance companies under old insurance policies for retroactive liability imposed under Superfund:

> The dynamic combination in this law of new strict liability, limitation of defenses, and joint and several liability, all retroactively applied, will disrupt both past and future insurance arrangements."

Letter from James L. Kimble, Senior Counsel, American Insurance Association to the Office of the General Counsel of the Environmental Protection Agency (quoted in *Id.*, 1982 Vol. II at 647). By providing Kimble's comments to the NAIC, the AIA made clear that the heart of the AIA's concern was Superfund-imposed retroactive liability for which the insurance industry would be responsible under old insurance policies:

> Where catastrophic losses are possible, even likely, a system which includes *such wrenching expansions of liabilities should not be imposed retroactively. The imposition on insurers of new obligations beyond those contemplated by the parties to the insurance contracts can be devastating to the entire insurance industry.* They have collected their premiums and retained reserves based upon the law as the parties understood it at the time of contract. It is neither just nor sound practice to expand these obligations by legislative fiat at this time.

Id. at 648 (italics added).

In another paper it provided to the NAIC on Superfund, the AIA again noted that:

> The imposition on insurers of new obligations beyond those contemplated by the parties to the insurance contracts can be devastating to the entire insurance industry. Insurers have collected their premiums and set aside reserves based upon the law as the parties understood it at the time of contract. It is neither just nor sound practice to expand these obligations by legislative fiat.

American Insurance Association, *Comments on Environmental Pollution, Legislation & Regulation*, December 28, 1981, NAIC Proceedings, 1982 Vol II. at 683. The AIA concluded that "the awesome combination of strict liability, direct action, limitation of defenses, and joint and several liability, all retroactively applied, will disrupt both past and future insurance arrangements." *Id.*

It is clear that, by the time the NAIC was reviewing the "absolute" pollution exclusion, the insurance industry had convinced the NAIC that the exclusion was directed towards addressing Superfund-type liability. In June of 1985, while the "absolute" pollution exclusion was being considered for regulatory approval, the NAIC appointed an Advisory Committee on Environmental Liability Insurance. *Report of the Advisory Committee on Environmental Liability Insurance* (Dec. 9, 1986), 1987 NAIC Proc. Vol. I at 869. The Advisory Committee's mission was, among other things, to produce a study concerning "a history of the [insurance] coverages for environmental exposures, the impact of recent legislative, judicial, and regulatory developments. . . ." *Id.* The NAIC's charge to the Advisory Committee stated:

> The study will address the availability [of insurance coverage] issue *from the perspective of generators and transporters of hazardous substances, owners/operators of sites involving the handling of toxic wastes, contractors engaged in the removal of asbestos and in hazardous waste site cleanups,* municipalities and others.

Id. (quoting the charge given by the Task Force) (italics added). This charge underscores that the insurance commissioners understood that the insurance industry's concern for pollution-related insurance to be addressed in the "absolute" pollution exclusion was the new *statutory* liability for damages caused by the generation and disposal of hazardous wastes.

The Advisory Committee was chaired by George M. Mulligan of the AIA. *Id.* In its summary of the "Background and History of the Problem," the Advisory Committee's Report focused on "state and federal laws and their administration, [and] examine[d] the development of insurance products and the underwriting and delivery systems dealing with pollution coverages." *Id.* This statement also underscores that "pollution coverage" was equated with statutory environmental liability by both the insurance commissioners and the insurance industry.

The foregoing regulatory history evidences that the "absolute" exclusion was solely intended to address environmental cleanup liability imposed by the Superfund statute and similar state strict liability statutes. This is buttressed by the advisory notice that ISO issued to policyholders in 1986, which stated that "[t]he new policies [with the "absolute" pollution exclusion"] do not cover this liability if the pollutants escape from your premises or a waste disposal or treatment facility." *See*, ISO, *Commercial General Liability Program Instructions* (1986) at 3 ("Important Notice to Policyholders"). Several pages later ISO reiterated that "Pollution Liability" was "[e]xcluded if emission originates on named insured's premeses or a waste disposal or treatment facility." *Id.* at 7.

Nowhere in the regulatory history is there any evidence that the insurance industry informed either the insurance regulators or the public that the "absolute" exclusion was intended to apply to the ordinary industrial, commercial, or similar accidents for which it now routinely denies claims under the guise of the exclusion.

Courts Agree the 'Absolute' Pollution Exclusion Only Applies to Environmental Pollution

Further evidence can be found by a comparison of the key concepts and language of the exclusion with the terms of art in the Superfund statute. 42 U.S.C. § 9601 *et seq.* This comparison reveals that the definition of "pollutants" in the exclusion contains many key terms drawn from the environmental liability concepts and terms of art contained in Superfund statute.

One of the key concepts in the "absolute" pollution exclusion is its purported application to "bodily injury" or "property damage" that "aris[es] out of the actual, alleged, or *threatened* discharge, dispersal, release, or escape of pollutants . . ." The inclusion of the modifying word "threatened" provides unmistakable evidence that the exclusion was drafted with the Superfund statute as its primary focus.

Liability for a "threatened" release is found in the Superfund statute. It creates liability for "a release or threatened release." *See, e.g.*, 42 U.S.C. § 9607(a). The statute creates liability for a government's or third party's cleanup costs that are incurred in addressing such a release or threatened release. 42 U.S.C. § 9607(a)(4)(A).

> The foregoing regulatory history evidences that the 'absolute' exclusion was solely intended to address environmental cleanup liability imposed by the Superfund statute and similar state strict liability statutes.

Other key terms in the "absolute" pollution exclusion are also found in the Superfund statute. A Superfund "release" means any . . . discharging, . . . escaping, . . . into the environment." 42 U.S.C. § 9601(22). As the Illinois Supreme Court has noted, "discharge, dispersal, release, or escape . . . add contours to the general concept of a release of an environmentally toxic pollutant." *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1220.[24]

Some of the strongest evidence of the linkage between the wording of definition of pollutants in the "absolute" pollution exclusion and the Superfund Statute is found in the Appendix to the AIA's December 28, 1981 comments to the NAIC. *See* AIA, *Comments on Environmental Pollution, Legislation & Regulation*, (Dec. 28, 1981), NAIC Proceedings, 1982 Vol. II at 683. The AIA noted that:

> Experience with the federal EPA has indicated that the following definitions and concepts are acceptable:
>
> * * *
>
> 3. "hazardous substances" means smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials, waste constituents or other irritants, contaminants and pollutants.

Id. at 685. This statement directly indicates that the insurance industry was considering drafting an exclusion that equated the definition of pollutants to the concept of hazardous substances as used by the Environmental Protection Agency. As discussed above, "hazardous substances" is a term of art under Superfund, which imposes liability for the unpermitted "release" of hazardous substances.

The Abuses that Concerned Louisiana Regulators

The regulatory history of the "absolute" pollution exclusion indicates that it was designed to address Superfund-type liability. Evidence that members of the insurance industry were contradicting their regulatory promises by using the exclusion to deny other claims caused the Louisiana Insurance Department to express its concern to ISO in 1984. *See* Letter from C. Noel Wertz, Senior Attorney, La. Dep't. of Ins., to Domenick J. Yezzi Jr., Asst. V.P., ISO (Oct. 25, 1994) ("[T]he absolute pollution exclusion is being used in a manner that is contrary to and inconsistent with the representations made to the [Department of Insurance] at the time it was submitted for approval.").

Some of this evidence came from the *Ka-Jon* decision which noted:

> Jurisprudence evinces that insurers construe the exclusion to encompass and, therefore, have attempted to excluded insurance coverage of incidents, where sparks from burning trash ignite a brush fire which creates a black cloud of smoke over a roadway thereby causing a traffic accident; where renters of a home are overcome by carbon monoxide fumes leaking from a gas heater located in the bathroom; and where chicken stored in a freezer at a chicken processing facility becomes contaminated from vapors released when a nearby room was resurfaced.

644 So.2d at 363.

Besides those listed in the *Ka-jon* opinion, a number of similar misuses of the "absolute" pollution

exclusion were brought to the attention of the Louisiana insurance regulators. In one, the policyholder filed an insurance claim for damage to twenty parked cars that resulted from a painting contractor overspraying them. "According to the adjuster, air borne paint fit the strict definition of a pollutant in the policy (liquid and has a chemical in it!)."[25] Fortunately, this was one of the rare claims that was eventually paid by the insurance company. In another claim, the insurance company denied insurance coverage for suit brought because of alleged adverse reactions from chlorine and other standard chemicals contained in the municipal swimming pool water. The insurance company denied the claim, "since the chemicals were a pollutant."[26] In another example, an employee operating equipment at an off-premises job-site, collided with and ruptured a pipe. The rupture caused 300 gallons of biocide to spill into a water treatment plant. The insurance company applied the so-called "absolute" pollution exclusion to deny the claim.[27]

There are scores of circumstances described in court decisions in which insurance companies sought to apply the "absolute" pollution exclusion in manners contrary to the regulatory representations. Many of these decisions were also brought to the attention of the Louisiana Insurance Department:

- bodily injuries caused a release of carbon monoxide released from a restaurant heater when squirrels blocked up the system's chimney. *Gamble Farm Inn, Inc. v. Selective Ins. Co.*, 656 A.2d 142 (Pa. Super. Ct. 1995);
- products liability claims related to the manufacture of furnaces. *Park-Ohio Indus., Inc. v. Home Indem. Co.*, 975 F.2d 1215 (6th Cir. 1992), *reh'g denied*, (6th Cir. Nov. 9, 1992));
- injuries to a mechanic sustained from pesticide dripping from the policyholder's pesticide container when the container fell off a truck and lodged on an automobile the mechanic subsequently hoisted up on a lift. *Red Panther Chem. Corp. v. ICSOP*, 43 F.3d 514 (10th Cir. 1994));
- smoke inhalation injuries that numerous patrons suffered when a night club caught fire; *Clarendon Place Corp. v. Landmark Ins. Co.* No. 18039/90, (N.Y. Sup. Ct., Bronx Co. 1995) *reported in* Mealey's Litig. Rep.-Ins., Apr. 24, 1995 at 19);
- flooding of a house with raw sewage caused when a contractor hired by the policyholder power and light company accidentally destroyed a sewer main. *Pacific Corp. v. Wausau Ins. Co.*, No. 93-1569 (Or. Cir. Ct. July 5, 1994);
- injuries to hockey players, referees, and patrons from excessive carbon monoxide being emitted by a malfunctioning ice grooming machine. *Essex Ins. Co. v. Tri-Town Corp.*, 863 F. Supp. 38 (D. Mass. 1994);
- injuries to surrounding residents from ammonia released when a pressure relief valve in a warehouse operator's cold storage system failed. *American States Ins. Co. v. F.H.S., Inc.* 843 F. Supp. 187 (S.D. Miss. 1994);
- damages for a multi-car collision that resulted when smoke from wood a lumber company was burning drifted across a highway. *Perkins Hardwood Lumber Corp. v. Bituminous Cas. Corp.*, 378 S.E.2d 407 (Ga. Ct. App. 1989);
- injuries resulting from the failure to remove lead-based paint from an apartment. *Oates v. State* 597 N.Y.S. 2d 550 (N.Y. Ct. Cl. 1993) (subsequent history omitted);
- claims based on the seepage of cigarette smoke from a basement pool and billiards club into a tenant's apartment. *Demakos v. Travelers Ins. Co.*, 613 N.Y.S.2d 709 (N.Y. App. Div. 2d Dep't 1994);

The "absolute" pollution exclusion was never intended to be nor represented to regulators to be "total" or "absolute." In fact, ISO reiterated to Louisiana regulators in 1995 that the "absolute" pollution exclusion was *not* "absolute":

> . . . In the aftermath of the elimination of the sudden and accidental qualification, *the new exclusion has been at times mislabeled as absolute. This is an unfortunate misnomer. Given the coverage exceptions I mentioned earlier, this is not an absolute pollution exclusion.*

Statement of Robert Miller, ISO Regional Vice President for the Southern Region, to the Louisiana Insurance Commissioner, Sept. 6, 1995 (Transcript at 57) (italics added).

The Willingness to Consider Drafting Regulatory History

In insurance coverage cases, particularly those dealing with pollution exclusions, the result is often directly dependent on the court's willingness to consider the regulatory or drafting history. When courts refuse to consider regulatory and drafting history, the insurance regulatory system is rendered meaningless.

In *Dimmitt Chevrolet v. Southeastern Fidelity Insurance Corp.*, 636 So. 2d 700 (Fla. 1994), a narrow 4-to-3 majority held that, "[b]ecause we conclude that the policy language is unambiguous,

we find it inappropriate and unnecessary to consider the arguments pertaining to the drafting history of the pollution exclusion clause." *Id.* at 705. The Connecticut Supreme Court also refused to consider any evidence concerning the representations made to the insurance regulators. *Heymann Assocs. No. 1 v. Insurance Co. of the State of Pa.*, 653 A.2d 122, 135 (Conn. 1995). The Connecticut Supreme Court's justification for its refusal to consider the regulatory evidence was identical to that of the Florida Supreme Court, "[b]ecause we hold that the absolute pollution exclusions are unambiguous . . . , the parol evidence rule bars the introduction of any extrinsic evidence to vary or contradict the plain meaning of the term 'pollutant' as it is used in the ["absolute" pollution] exclusions." 653 A.2d at 135.

The unfortunate irony is that had the *Heymann Associates* court examined the regulatory history of the "absolute" pollution exclusion, it would have learned that the insurance industry admitted that the definition of "pollutant" was ambiguous. In regulatory testimony urging approval of the exclusion, the insurance industry's agents stated that "[w]e'll you, we'll tell anybody else, we overdrafted it." *See* Texas State Board of Insurance, Transcripts of Proceedings , *Hearing to Consider, Discuss, and Act on Commercial General Liability Forms Filed by The Insurance Services Office, Inc.* (Oct. 31, 1985), R. 1388-90, at 8-9 (emphasis supplied). An overdrafted provision is *per se* ambiguous because its apparent scope is broader than its intended effect.

Part of the problem is that the ambiguity that results from an "overdrafted" provision is never obvious from the face of the provision. If a provision "says too much," the *intended* meaning, as opposed to the *apparent* meaning, cannot be determined in a factual vacuum. The thesis behind the parol evidence rule—that the *final*, written contract is the best evidence of *the parties' intent*—is ill-suited to the realities of insurance policies.

Insurance policy language is drafted and finalized by the insurance industry's agents *before* it is presented to state regulators. The explanatory memorandum and supplemental documents or testimony are also created *after* the language is finalized. Based upon their understanding of the intent of the policy language, which is largely informed by the explanatory memorandum and other *post-drafting* materials, the regulators approve the language. The *first time* the policyholder sees the language is when the policy is issued, typically several months after it actually went into effect. Standard form insurance policy language is obviously not the final, written expression of an *understanding between the insurance company and the policyholder.*

Standard form policy language such as the "absolute" pollution exclusion is copyrighted by ISO and, once approved, is mandated by most state insurance departments. Under such circumstances, the reasoning behind the parol evidence rule is inapplicable to standard-form insurance policy language and use of the parol evidence rule in insurance coverage cases usually results in a gross miscarriage of justice!

Nevertheless, there are scores of published decisions and untold numbers of unpublished decisions in which courts have refused policyholders' attempts to introduce evidence concerning the basis upon which insurance regulators approved policy language. *See, e.g. Transamerica Ins. Co. v. Duro Bag Mfg.*, 50 F.3d 370, 373 (6th Cir. 1995); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 151-52 (7th Cir. 1994); *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 555 N.E.2d 568, 573 (Mass. 1990).

On the other hand, courts that are willing to review the drafting or regulatory history almost invariably find for the policyholder. *Compare Cincinnati Ins. Co. v. Flanders Electric Motor Serv., Inc.*, 40 F.3d 146, 151-52 (7th Cir. 1994) (Indiana law), *with Kiger*, 662 N.E.2d at 947-48.

> An overdrafted provision is *per se* ambiguous because its apparent scope is broader than its intended effect.

The most dramatic example of the impact of a court's failure to consider regulatory and drafting history recently occurred in the Alabama Supreme Court. In its initial decision interpreting the polluter's exclusion, the Alabama Supreme Court initially failed to consider the "sudden and accidental" exclusion's regulatory and drafting history. The Court accepted the insurance company's argument that "sudden" had a temporal meaning. Hence, the exclusion was held to exclude insurance coverage for unintended and unexpected gradually-occurring pollution damage. *Alabama Plating Co. v. United States Fire and Guaranty Co.*, 1996 Ala. LEXIS 465, at *2-8 (Ala. Aug. 30, 1996), *op. withdrawn, op. substituted*, 690 So. 2d 331, Ala. 1996) 1996 Ala. LEXIS 475 (Dec.20, 1996).

On rehearing, however, the Supreme Court gave extensive consideration of the regulatory and drafting history. 1996 Ala. LEXIS 475, at *10-11 ("This evidence includes both contemporary statements by insurance industry representatives [footnote

omitted] and standard form letters sent to state insurance departments, including the Alabama Department of Insurance."). The Supreme Court found that the insurance industry's 1970 representations indicated that "sudden and accidental" was intended to mean "unexpected and unintended." 1996 Ala. LEXIS 475, at *14. The Court then held that the exclusion did not preclude insurance coverage for unexpected and unintended gradual pollution damage and withdrew its prior opinion. *Id.*

Regulatory estoppel is not a new concept. Regulatory estoppel has long been applied in patent litigation, where it is known as "prosecution history estoppel" or "file wrapper estoppel." *See, e.g., Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U.S. 38 (1893); *Dean Rubber Mfg. Co. v. Killian*, 106 F.2d 316 (8th Cir.), *cert. denied*, 308 U.S. 624 (1939); *Builders Concrete, Inc. v. Bremerton Concrete Prod. Co.*, 757 F.2d 255, 260 (Fed.Cir. 1985). The essence of regulatory estoppel was set forth in *Zenith Laboratories, Inc. v. Bristol-Myers Squibb Co.*, in which the Circuit Court of Appeals pointed out that a regulated party should not be able to obtain through litigation what it gave up or eschewed during the regulatory process. 19 F.3d 1418, 1424 (Fed. Cir.), *cert. denied* 513 U.S. 995 (1994).

In prosecution history estoppel, the court looks at limitations that the patent applicant put on the claimed patent in order to obtain regulatory approval. Similarly, in regulatory estoppel in the insurance context, courts look to the limitations placed on proposed policy language that the insurance industry represented in explanatory memorandum and testimony to regulators. *See, e.g., Morton International*, 629 A.2d 847-857, 870-880.

In *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931 (Fed. Cir. 1987), *cert. denied*, 485 U.S. 1009 (1988), the lower court had failed to consider the limitations placed on a patent by the patent holder during the regulatory process (*i.e.*, failed to consider the regulatory history). The lower court had limited its review to the words in the patent claim, much as do courts in insurance coverage cases when they restrict their review to the policy language and refuse to review the regulatory and drafting history. The Federal Circuit pointed out the injury to regulatory integrity that results from this approach:

> In interpreting the claims, the district court committed fundamental legal error when it analyzed each by a single word description of one part of the claimed tie. In patent law, a word ("teeth"; "hinge"; "ledge") means nothing outside the claim and the description in the specification. *A disregard of claim limitations, as here, would render claim examination in the PTO [the regulatory body] meaningless. If, without basis in the record, courts may so rewrite claims, the entire statutory-regulatory structure that governs the drafting, submission, examination, allowance, and enforceability of claims would crumble.*

833 F.2d at 938 (*italics added*).

This same point was made in the context of insurance regulation by the Florida Attorney General and in the dissent of Justice Overton in the *Dimmitt Chevrolet* case. Justice Overton severely chided a narrow majority of the Florida Supreme Court for its refusal to consider the drafting and regulatory history of the "sudden and accidental" polluter's exclusion:

> The State of Florida . . . has asserted that representations similar to those made to the insurance commissioners of New Jersey, West Virginia, and Georgia, were made to the Florida Insurance Department at the time the insurance industry sought approval of the clause in Florida. I find that the record supports such a conclusion. *See, e.g.*, . . . correspondence by the insurance industry to the Florida Department of Insurance, dated May 28, 1970, [text of letter omitted].
>
> This is the exact language that the Supreme Court of New Jersey classified as deceptive, misleading and untrue due to the insurance industry's current position as to coverage. . . .
>
> Given the representations the insurance industry made to Florida and other states, I agree with the New Jersey Supreme Court's conclusion that, as a matter of public policy, the Court should not allow the insurance industry to benefit from its misrepresentations and nondisclosures. To do so would essentially now reward insurance companies with windfall profits for nondisclosures and misrepresentations the insurance industry made to this State more than twenty years ago when it was seeking approval of the pollution exclusion clause at issue here. As noted by the Florida Attorney General in his *amicus* brief to this Court:
>
> > The important public policy of protecting . . . consumers from misleading coverage representations would be reduced to a sham if insurers were permitted to characterize the pollution exclusion as a mere clarification in order to obtain regulatory approval and then characterize it in court papers as a radical reduction of coverage 23 years later at the point of claim. To protect the integrity of Florida's regulatory scheme, insurers . . . should be held to the formal explanations originally made to the Florida Insurance Department, which rep-

> resents the interests of Florida citizens in approving and reviewing form endorsements. The public policy of the state is entitled to no less weight than the identical public policy of the State of New Jersey.

636 So. 2d at 714.

State insurance departments are similarly charged with protecting the interests of the public. Public policy and the integrity of the insurance regulatory and judicial systems require that the members of the insurance industry not be allowed to repudiate their regulatory representations. As the Louisiana Insurance Commissioner, for one, has realized, insurance regulators must act for themselves if they do not wish the insurance language approval process to be rendered meaningless by an insurance industry that has systematically repudiates its regulatory representations and a judicial system that often appears not to care.

Narrowing the Scope of the 'Absolute' Pollution Exclusion

On June 7, 1997, the Louisiana Insurance Department issued its Advisory Notice. The language of the Advisory Notice manifested the Insurance Department's concern over the insurance industry's assault on the regulatory process by confirming that the Department "will take such action as is necessary to assure that the integrity of the regulatory process is not undermined." Advisory Notice at 2.

The focus on protecting the integrity of the regulatory process was presaged in two letters to the editor written by Commissioner Brown one year earlier. In one letter, Commissioner Brown expressed his concern over the insurance industry's expansive use of the "absolute" pollution exclusion to deny all manner of insurance claims. He wrote that the "supposed definition [of the "absolute" pollution exclusion] has been expanded even further to mean if any potential pollutant, *i.e.*, household bleach, is involved in the accident, the [insurance] company can rely on the ["absolute" pollution exclusion] to be relieved of responsibility." James H. "Jim" Brown, Letter to the Editor, *Louisiana Agent's Voice* (May 1996) at 16. Commissioner Brown noted that when the "absolute" pollution exclusion was presented to Louisiana regulators it was represented to be "far more narrow in scope." *Id.* "While it was intended to protect the insurance company from ruin as a result of a mega-disaster, it was not intended to allow them to collect premiums, but refuse to provide deserved coverage, as they see fit." *Id.* Commissioner Brown noted his "public stand . . . and call to return to the intent of the ["absolute" pollution exclusion], *as approved*." *Id.* (underlining added).

In an earlier letter, Commissioner Brown recited the regulatory history of the "absolute" pollution exclusion, which reveals that the exclusion was represented to only exclude coverage for significant environmental damage:

> When the Insurance Services Office submitted the APE [to insurance regulators] in the mid-1980s, it also submitted a buyback policy to restore the coverage carved out by the exclusion. The pollution liability buyback policy covers bodily injury and property damage resulting only from a "pollution incident." That term is defined in the policy as follows:
>
> > *"Pollution incident" means emission, discharge, release or escape of pollutants into or upon land, the atmosphere, or any watercourse or body of water, provided that such emission, discharge, release or escape results in "*environmental damage*."
> >
> > *"Environmental damage" means the injurious presence (*injurious to the environment, not just the claimant*) in or upon land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants or pollutants.

James H. Brown, La. Ins. Commissioner, Letter to the Editor, *National Underwriter Prop. & Casualty Ed.*, April 22, 1996 at 30 (underlining added). Commissioner Brown aptly noted that "[t]he exclusion should not be read more broadly that the policy which restores the deleted coverage." *Id.* at 30, 54.

Commissioner Brown also asserted that regulatory estoppel should bar insurance companies from asserting an interpretation of the "absolute" pollution exclusion that is contrary to that given to the nation's insurance regulators in order to secure its approval:

> When the ISO package was presented to regulators, *it was represented that the buyback restored the coverage excluded* by the ["absolute" pollution exclusion]; it was not represented that the buyback was more limited in scope than the exclusion.

Id. at 54.

Using the example of a substance that the insurance industry would assert to be an excluded "pollutant," Commissioner Brown wrote that the "absolute" pollution exclusion "cannot be read to exclude coverage for a chemical burn from a slip and fall in bleach in a store since there was no 'pollution incident.'" He concluded that "[t]o interpret

the ["absolute" pollution exclusion] otherwise is inconsistent with its purpose, eviscerate general liability coverage and defies the reasonable expectations of policyholders." *Id.*

Given Commissioner Brown's earlier statements, it came as no surprise that the June 1997 Advisory Notice was founded in the concept of regulatory integrity:

> The appropriate use of standard pollution exclusions in claims handling is an issue of grave concern. The LDOI will take such action as is necessary to assure that the integrity of the regulatory process is not undermined. It is of critical importance that such exclusions are used in a manner which is consistent with their stated purpose.

Advisory Notice at 2.

> The Insurance Department informed the insurance industry that the denial of claims under the 'absolute' pollution exclusion has to be consistent with 'the regulatory record which establishes the stated purpose of the exclusion....'

The Advisory Notice established that the Department's investigation revealed that insurance companies were interpreting the preclusive effect of the "absolute" pollution exclusion in a manner that was inconsistent with the regulatory representations made about the "buyback" policy:

> [O]ur review has disclosed a number of incidents where the standard pollution exclusions have been used to disavow coverage even though there was no underlying pollution incident which would justify use of the exclusion. We are also concerned that the broad definition given to the term "pollutant" creates an opportunity for abuse.
>
> * * *
>
> This is a particular concern as regards commercial enterprises whose ongoing business activities do not present a risk to the environment. For example, we have found instances where it has been argued that any thing and/or matter that harms a person, whether or not it has toxic or hazardous properties, is *de facto* an irritant and therefore a pollutant, thereby triggering the pollution exclusion.

Advisory Notice at 2.

The Insurance Department informed the insurance industry that the denial of claims under the "absolute" pollution exclusion has to be consistent with "the regulatory record which establishes the stated purpose of the exclusion . . . " *Id.* The heart of the Advisory Notice set forth the Insurance Department's understanding of the scope of the "absolute" pollution on when it was originally approved in the mid-1980s:

> Therefore, in handling claims the LDOI strongly advises insurers to consider the following in deciding whether or not a claim triggers a policy's pollution exclusion.
>
> 1) Does the claim involve an incident which caused an environmentally significant discharge of pollutants resulting in environmental damage?
>
> 2) Do the policyholder's regular business activities place it in the category of an "intentional active industrial polluter?"
>
> 3) Does the claim involve an injury alleged to have been caused by a product, including exposure to fumes, which was being used in accordance with its intended purpose.
>
> 4) Does the claim involve an injury alleged to have been caused by exposure to asbestos or lead?
>
> If the answer is "NO" to (1) or (2), or "YES" to(3) or (4) of the above, the denial of coverage and/or refusal to provide a defense may result in administrative action.

Advisory Notice at 4.

Conclusion

In limiting the use of the "absolute" pollution exclusion in claims handling to a manner that is consistent with the insurance industry's regulatory representations, Commissioner Brown has protected both policyholders and the integrity of the Louisiana insurance regulatory system. Elsewhere, however, the insurance industry remains free to pursue "business as usual," as it has done for the past 30 years—saying one thing to the insurance regulators to maximize insurance premium dollars and the opposite to the policyholders and the courts to avoid providing the very insurance coverage that these premium dollars were supposed to buy.[28]

Given the overwhelming evidence of insurance industry regulatory and judicial deceit over the past 30 years, it is evident that the integrity and usefulness of the state insurance regulatory system is under sustained attack. The judicial system largely has been slow, unable, or unwilling to recognize the scope of the problem.

Insurance regulators must act now if they wish to protect the integrity and usefulness of their own insurance policy and premium rate review and approval process. The State of Louisiana has shown the way.

Notes

1. See Brief of Amicus Curiae American Ins. Assoc. at 3, (filed 2/25/93) Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., 626 N.E.2d 878 (Mass. 1994)(No. SJC-06165). See also Leslie Scism, Tight-Fisted Insurers Fight Their Customers To Limit Big Awards, Wall St. J., Oct. 15, 1996, at 1; Robert H. Gentlin, Fighting The Client, Best's Review P/C, Feb. 1997, at 49, 50 (noting that the $1 billion figure includes only what the insurance industry spends on property and casualty insurance litigation. When life and health insurance litigation expenditures are added, "the legal costs of coverage battles with policyholders may far exceed $1 billion[.]"

2. Insurance companies buy legal services in bulk and are able to retain counsel at a significant discount versus the hourly fees that policyholders typically pay.

3. ISO's predecessors include the Mutual Insurance Rating Bureau (MIRB), the National Bureau of Casualty Underwriters (NBCU), and the NBCU's own successor, the Insurance Rating Board (IRB). These organizations jointly drafted the 1965 and 1973 revisions of the standard, "occurrence" CGL insurance policy, along with the "sudden and accidental" polluter's exclusion that was first introduced in 1970. ISO drafted the 1985 revisions of the CGL insurance policy, the "absolute" pollution exclusion, and its progeny.

4. Many policyholders prefer the use of "polluter's exclusion" over "pollution exclusion," because the former better illustrates the intent that the exclusions were only addressed to intentionally-caused pollution.

5. Despite arguing that the New Jersey Supreme Court not consider any drafting or regulatory history, amicus curiae, Aetna Casualty and Surety Co. (Aetna) submitted hundreds of pages of drafting and regulatory documents into the record.

6. This continues to be the insurance industry's current litigation position throughout the country.

7. The Louisiana Insurance Department made the same observation with respect to the insurance industry's presentation of the "absolute" pollution exclusion. See, Advisory Notice.

8. It is unknown whether Bruton agreed with the sentiments expressed in the Guiney Memorandum. It is known that Bruton was listed as a recipient.

9. As interpreted by the insurance industry today, the "sudden and accidental" exclusion represented a reduction in the CGL coverage. See, Morton International, 629 A.2d at 852.

10. Note the reference to "the introduction of pollutants." This is what ISO said about the "sudden and accidental" exclusion in 1985. In 1970 ISO's predecessors told regulators in Louisiana and elsewhere that the "sudden and accidental" language merely clarified the intent of the "occurrence" definition that expected or intended "damages" were excluded. See, e.g., Morton International, supra.

11. Insurance Services Office, Inc., Explanatory Memorandum, Pollution Exclusion Endorsement (1984).

12. See ISO, Workbook: Policy Forms and Endorsements, Policy Writing Rules, at 34 (1985); ISO Makes the Case for the CGL: Insurance Services, Inc. responds to concerns raised at The Joint Forum on ISO's Proposed CGL Policy Forms, Chicago, Illinois, August 1985, at 19; Richard R. Savage, Executive Vice President of ISO, Remarks at the Independent Insurance Agents Association Annual Convention, at 4-5 (1986); ISO, Written Testimony for the November 3, 1988 Hearing of the NAIC Committee Working Group; ISO Filing Related to CGL Miscellaneous Change: Pollution Endorsements, at 20 (1988).

13. See Letter from ISO to the Commonwealth of Pennsylvania Insurance Department, dated March 11, 1985 at 2 (emphasis supplied).

14. Testimony of Michael A. Averill, Transcript of Proceedings before the New Jersey Department of Insurance Commissioner's Staff (Dec. 18, 1985) at 15. (emphasis added).

15. See Department of Insurance, Commissioner's Staff, Testimony of Robert J. Sullivan, Vice President for Government Affairs, Crum & Forster Insurance Companies, Transcript of Proceedings before the New Jersey Department of Insurance, (Dec. 18, 1985), at 31 (emphasis added).

16. In 1990, ISO testified to Texas insurance regulators that "failure to adequately warn is considered a products/completed operations coverage." See Texas State Board of Insurance, Transcripts of Proceedings , Hearing to Consider Subjects Relating to General Liability Insurance and Rules and Regulatory Responsibilities of the State Board of Insurance Concerning Gneral Liability Insurance and General Liability Insurance Policy Forms (Apr. 30, 1990), Board Docket 1747, at 15 (Testimony of Richard Lautenslager, Asst. Reg. Mgr., ISO, Dallas, Tex.). Thus, the "absolute" pollution exclusion does not apply to exclude defense or indemnity for causes of action premised upon failure to warn.

17. See Texas State Board of Insurance, Transcripts of Proceedings , Hearing to Consider, Discuss, and Act on Commercial General Liability Forms Filed by The Insurance Services Office, Inc. (Oct. 31, 1985), R. 1388-90, at 8-9 (emphasis supplied).

18. See Transcript of Proceedings, Hearing to Consider, Discuss, and Act on Commercial General Liability Forms Filed by the Insurance Services Office, Inc. (Oct. 31, 1985), R. 1388-90, at 7-8 (emphasis supplied).

19. The Texas regulatory history insurance demonstrates that regulators should never approve insurance policy language that is ambiguous or overdrafted. Approving

such language on the representation that the insurance industry will give the language a narrow scope is an invitation to insurance industry misuse of the language, both intentional and unintentional, to improperly deny insurance claims. This loose regulatory practice also risks misinterpretation of the policy language by the courts, many of which will be misled by the apparent "plain meaning" of ambiguous or overbroad policy language, as well as by their own refusal to examine the regulatory history.

20. There are limitations to the "absolute" pollution exclusion's application even to true environmental liability claims. As discussed above, the exclusion does not apply to these claims if they arise out of products-liability, completed operations, and certain off-premises discharge claims. Additionally, its terms only apply to "bodily injury" and "property damage" claims. Thus, it does exclude the insurance coverage for liability for nuisance, trespass, or invasion of right of private occupancy claims that is provided for under separate "personal injury" insurance coverage provisions.

21. The NAIC Proceedings are published and available on LEXIS ("Insurance" library, "NAIC" file) and in public libraries.

22. The AIA is a trade association of 152 publicly-owned property and casualty insurance companies. Kimble, Counsel, AIA, The Need For A Post-Closure Liability Fund For Waste Disposal Sites (July 25, 1980) (hereinafter "Kimble") at 633.

23. Kimble's comment underscores that, although "limited," there was coverage under the sudden and accidental exclusion for "toxic substances pollution and hazardous waste disposal."

24. See also, Continental Cas. Ins. Co. v. Rapid-American, 609 N.E.2d 506, 512 (N.Y. 1993) (the terms "discharge," "dispersal," "release," and "escape" are environmental terms of art); Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762, 764 (Mass. 1992); Sullins v. Allstate Ins. Co., 667 A.2d 617, 623 (Md. 1995); Essex Ins. Co. v. Avondale Mills, Inc., 639 So. 2d 1339, 1341 (Ala. 1994); West American Ins. Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692, 699 (N.C. Ct.App. 1991); Thompson v. Temple, 580 So.2d 1133 (La. Ct. App. 4th Cir. 1991); Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995) (a reasonable interpretation of the pollution exclusion clause is that it applies only to environmental pollution); Westchester Fire Ins. Co. v. Pittsburg, Kansas, 768 F.Supp. 1463, 1468 (D. Kan. 1991) (substances must generally be recognized as polluting the environment); LeFrak Organization, Inc. v. Chubb Custom Ins. Co., 942 F. Supp. 949 (S.D.N.Y. 1996) (insurance company argument ignores that " 'discharge,' 'dispersal,' 'release,' and 'escape' are environmental terms of art, regardless of the language that follows").

25. Correspondence from Teri L. Harris, Account Manager, Harris Insurance, to Todd Muller, Technical Affairs AVP, Independent Insurance Agents of America (Sept. 16, 1994) (Attached as part of Submission 8, to Transcript of Public Forum in the Matter of the Revision of the Absolute Pollution Exclusion, Louisiana Department of Insurance (Sept. 6, 1995)).

26. Correspondence from David C. Ebertz, Barlow Agency, Inc., to Todd A. Muller, Independent Insurance Agents of America (April 22, 1994) (Attached as part of Submission 8, to Transcript of Public Forum in the Matter of the Revision of the Absolute Pollution Exclusion, Louisiana Department of Insurance (Sept. 6, 1995)).

27. See Notice of Occurrence/Claim (March 23, 1994) (partially redacted) and claims denial letter, claim No. 223-41474 (partially redacted)(April 6, 1994) (Attached as part of Submission 8, to Transcript of Public Forum in the Matter of the Revision of the Absolute Pollution Exclusion, Louisiana Department of Insurance (Sept. 6, 1995)).

28. The Texas Department of Insurance has recently began an inquiry into the "absolute" pollution exclusion. See Lonkevich, Texas Eyes Pollution Exclusion, National Underwriter Prop. & Casualty/Risk & Benefits Management Ed. (Aug. 4, 1997) Vol. 101, No. 31, at 4.

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on this 6th day of September 2011.

/s/ Natasha Monell Arez
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