Case No. E037627

IN THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

STATE OF CALIFORNIA,
Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE,
Respondent.

UNDERWRITERS AT LLOYD'S LONDON, et al.,
ALLSTATE INSURANCE COMPANY, et al.,
Real Parties in Interest.

Riverside County Superior Court Case No. 239784,
Consolidated with Case No. RIC-381555
The Honorable E. Michael Kaiser

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS, CONSUMER FEDERATION OF AMERICA, AND THE CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE IN SUPPORT OF APPELLANT STATE OF CALIFORNIA

David A. Gauntlett (SBN 96399)
Eric R. Little (SBN 169021)
GAUNTLETT & ASSOCIATES
18400 Von Karman, Suite 300
Irvine, California 92612
Phone: (949) 553-1010

Attorneys for *Amici Curiae*
United Policyholders, Consumer Federation of America, and The Center for Community Action and Environmental Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

A. Statement Of The Case

United Policyholders, Consumer Federation of America ("CFA"), and the Center for Community Action and Environmental Justice ("CCAEJ" or the "Center") adopt the Statement of the Case set forth in Appellant's Opening Brief dated July 29, 2005.

B. Summary Of Issues

United Policyholders, CFA, and CCAEJ adopt the Summary of Issues set forth in Appellant's Opening Brief drafted July 29, 2005. This *amicus curiae* brief focuses on the first issue stated by Appellant, *i.e.*, that the liability insurance companies are estopped from arguing the interpretation they now argue as to the meaning of the qualified pollution exclusion, as it is contrary to the representations previously made to state insurance regulators.

C. Interest Of *Amici Curiae*

As set forth more fully in the application for leave to file this brief, United Policyholders is dedicated to educating the public on insurance issues and consumer rights. CFA is a coalition of over 300 national, state, and local consumer, senior citizen, labor, farm, cooperative, and rural organizations representing more than 50 million people in matters pertaining to the well-being of the American consumer. Members of CFA have insurance similar to the Appellant. CFA has a three-fold mission: to

assist state and local organizations, to provide information to the public on consumer issues, and to conduct consumer research projects. CCAEJ creates partnerships with organizations that are working on issues related to environmental justice, social justice and economic development. CCAEJ's goal is to build a strong movement for change, and it accomplishes this goal by actively seeking opportunities to bring together groups of people working on a variety of social, economic and environmental justice issues. CCAEJ's executive director is Penny Newman. Through CCAEJ, Ms. Newman has led community efforts to ensure adequate cleanup of the Stringfellow acid pits, to monitor the performance of government agencies involved in cleanup efforts, and to protect the health and well-being of its members. Like United Policyholders, CFA and CCAEJ are deeply concerned about the regulation of the insurance industry and about payment of insurance claims.

United Policyholders, CFA, and CCAEJ all have a vital interest in seeing that policyholders obtain the full measure of the insurance they buy and that policyholders, regulators, and the public at large can rely upon insurance companies' regulatory representations.

II. ARGUMENT

Amici urge this Court to conclude, as the State has argued in Appellant's Brief at 7-30, that the defendant insurance companies should be estopped from asserting a meaning of an insurance policy provision

contrary to representations made to state insurance commissioners. The State's brief substantiates that the pollution exclusion was drafted in an historical context in which the insurance industry understood – and represented to regulators and the public – that the qualified pollution exclusion with an exception allowing coverage of "sudden and accidental" releases would continue coverage for liabilities arising from gradual pollution, if the damage was not expected or intended.

In addition to the arguments and evidence marshaled in the Appellant's Brief, this Court should estop any temporally restrictive interpretation of the pollution exclusion because the insurance commissioners to whom representations were made concerning the continuation of coverage for gradual releases are the representatives of policyholders for purposes of insurance policy language assembly. There is no meaningful opportunity for policyholders to negotiate the language of standard form insurance policy terms submitted to state insurance commissioners. It is important that representations made by insurance companies to state insurance commissioners regarding the meaning of an insurance policy provision be enforced, because that is the only way policyholders can be protected, and the integrity of the insurance system depends on it.

A. Insurance Commissioners Are The Representatives Of Policyholders And The Public, And Industry Ratings Organizations Are The Representatives Of Insurance Companies, For Purposes Of Insurance Policy Language Assembly.

Under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, the "business of insurance" is exempted from federal antitrust laws to the extent it is regulated by state law. *Id.* § 1012(b). As a result, California, like most states, has enacted comprehensive insurance regulations so as to exempt insurance companies from the antitrust laws. *See In re Insurance Antitrust Litig.* (N.D. Cal. 1989) 723 F. Supp. 464, 472-475, *rev'd on other grounds* (9th Cir. 1991) 938 F.2d 919; *see also Addrisi v. Equitable Life Assur. Soc. of the United States* (9th Cir.1974) 503 F.2d 725, 728 (holding that California's insurance regulations satisfy McCarran Act). Among other things, California's Insurance Commissioner is empowered to act against excessive, inadequate or unfairly discriminatory insurance rates, under the McBride-Grunsky Insurance Regulatory Act, Cal. Ins. Code sections 1850 *et seq.* *See generally Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1258 [48 Cal.Rptr.2d 12, 21].

In addition, the Insurance Commissioner regulates unfair insurance practices in California, under the Unfair Insurance Practices Act set forth in Insurance Code sections 790 *et seq.* Notably, the Unfair Insurance Practices Act prohibits "unfair claims settlement practices" including:

- Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue;

- Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;

- Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.

Id. §§ 790.03(h)(1), (5), (13). While courts now recognize that violations of the Unfair Insurance Practices Act may evidence bad faith by an insurance company in handling a policyholder's claim, *see, e.g., Rattan v. United Services Auto. Ass'n* (4th Dist. 2000) 84 Cal.App.4th 715, 724 [101 Cal.Rptr.2d 6, 12], direct enforcement of the Unfair Insurance Practices Act remains the province of the Insurance Commissioner. *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988), 46 Cal.3d 287 [250 Cal.Rptr. 116].

Thus, representations to state insurance commissioners and to the public by insurance companies, through ratings organizations such as the Insurance Services Office ("ISO")[1] are of considerable importance. Individual policyholders rarely if ever can negotiate their insurance policy

[1] In 1960, two insurance industry rating organizations, the Mutual Insurance Rating Bureau ("MIRB") (representing mutual companies) and the National Bureau of Casualty Underwriters ("NBCU") (representing stock companies and later known as the IRB) established several committees to develop what would become the 1966 "occurrence" CGL insurance policy. The IRB and MIRB merged in 1971 and formed the Insurance Services Office, Inc. ("ISO"). *See* Appellant's Brief at 16 n.5.

language; California courts have long recognized that standard insurance policy language is a contract of adhesion, which individual policyholders cannot negotiate. *See Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 269-270 [54 Cal.Rptr. 104, 107]. And although the State's insurance program may not have been typical of individual or small business insurance consumers, the "sudden and accidental" exception to its pollution exclusions was standardized industry-wide language, as is clear from the "multitude of cases … on both sides" of the issue. *Textron, Inc. v. Aetna Cas. and Sur. Co.* (R.I. 2000) 754 A.2d 742, 749.[2]

The importance of drafting history, including representations by ratings organizations to state regulators, is recognized in *Montrose Chem. Corp. v. Admiral Ins. Co.* (1995) 10 Cal. 4th 645 [42 Cal.Rptr.2d 324]. In that case, the California Supreme Court observed that "[m]ost courts and commentators have recognized … that the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues." *Id*. at 670-671. The *Montrose* decision in turn relied upon this Court's decision in *Maryland Casualty Co. v. Reeder* (4th Dist. 1990) 221

---

[2] *See also id.* at 748 (" 'The [pollution exclusion] cases swim [in] the reporters like fish in a lake. The Defendants would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too.' ") (*quoting Pepper's Steel & Alloys, Inc. v. U.S. Fid. & Guar. Co.* (S.D.Fla.1987) 668 F.Supp. 1541, 1549-50).

Cal.App.3d 961 [270 Cal.Rptr. 719], which looked to ISO drafting history in interpreting exclusionary language in a liability insurance policy:

> We also note that in drafting its policy and endorsement Maryland utilized standard form provisions prepared by the Insurance Services Organization (ISO). In addition to drafting standard form provisions, the ISO publishes circulars which describe the intent and effect of its standard provisions. As we shall explain in greater detail below, the ISO's standard provisions are also the subject of interpretation and comment by other insurance industry organizations and publications. The presence of the standard provisions in the [defendant's] policy and the concomitant availability of interpretative literature is of considerable assistance in determining precisely what risks the [defendant's] policies cover.

Id. at 968. The *Reeder* court accepted the policyholder's interpretation of the exclusion, which was drafted by ISO, because it was "supported by the insurance industry's own construction of the … endorsement," based on circulars published by ISO and on a Fire Casualty & Surety ("FC&S") Bulletin which explained the intent, purpose and effect of the standard form provisions.

Just as in *Montrose* and *Reeder*, this Court should consider the representations which the insurance industry made, through ratings organizations and FC&S bulletins, concerning the standard exclusionary language at issue in the present appeal.

B. There Is No Meaningful Opportunity For Most Policyholders To Negotiate The Language Of Standard Form Insurance Policy Terms Submitted To State Insurance Commissioners.

Because a standard-form insurance policy is drafted by the insurance industry for nationwide use, policyholders are powerless to influence the drafting of specific exclusions like the pollution exclusion. Indeed, the only influence that policyholders have is indirect, through the regulation of insurance policy language performed by state insurance departments and by state regulators. *See Morton International, Inc. v. General Acc. Ins. Co.* (N.J. 1993) 629 A.2d 831, 848.

"Insurance contracts are usually adhesive in nature, since their terms are generally contained in form language dictated by the insurer." *Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 397 [82 Cal.Rptr.2d 594] (Zebrowski, J.). As one observer has explained:

> The average person (or at least the average person with assets worth insuring and the wherewithal to purchase insurance for them) may be covered by up to a dozen policies: life insurance, a health plan, travel insurance, workers' compensation, disability insurance, homeowners' or tenants' coverage, automobile insurance, and, perhaps, an umbrella policy, among others. It is virtually unheard of for the terms of any of these types of policies to have been the subject of bargaining between the insured and the carrier. An individual wishing to insure a car, for example, will contact an agent and order an 'auto policy,' specifying coverage (and then, only in response to questions from the agent) merely with respect to the policy's limits of liability, named insureds, and coverage for collision damage. The agent will neither discuss the actual

> wording of the policy with the prospective insured nor show the insured a sample policy before the insured decides to buy. Instead, after the policy is ordered, the carrier will send the insured a document consisting of a declarations page listing the named insureds and policy limits, followed by a lengthy printed contract containing the insuring agreement, exclusions from coverage, policy conditions, and endorsements. That printed contract will be the same one--or virtually the same one--issued to every other purchaser of automobile insurance by that carrier, and often, the same one issued by many other insurers as well, because most common insurance policies are drafted by industry organizations such as the Insurance Services Office.
>
> Insurance carriers prefer and consistently use such standard forms for several obvious reasons. First, the carrier can avoid the immense transaction costs of separately negotiating the terms of individual insurance policies. Second, standard forms allow insurance carriers to pool loss information. Even though claims are made against different carriers, carriers all insure the same risks. The more information about past claims that is pooled, the more accurately carriers can calculate the premiums to charge for future risks. Finally, the process of drafting standard forms by committee allows insurance carriers, at least in theory, to apply their collective wisdom to the task of selecting policy language that unambiguously describes the risks to be insured and the ones to be excluded.

David Goodwin, *Review Essay, Disputing Insurance Coverage Disputes*, 43 Stanford Law Review 779, 782-783 (1991) (*citing, inter alia*, Robert E. Keeton & Alan I. Widiss, Insurance Law § 2.8 (1988); *American Home Prods. Corp. v. Liberty Mut. Ins. Co.* (S.D.N.Y. 1983) 565 F. Supp. 1485, 1500-03, *aff'd as modified* (2d Cir. 1984) 748 F.2d 760 (discussing history of the use of standard form policies); *Broadwell Realty Serv., Inc. v. Fidelity & Cas. Co.* (N.J. Super. App. Div. 1987) 528 A.2d 76, 84-85 (same)). Representatives of the insurance industry testified in detail on the

need for policy standardization and the benefits it provides. *See* Wondie Russell, Barry S. Levin & Celia M. Jackson, *Insurance Policy Construction and the Non Sequiter of the "Sophisticated Insured"*, 3 Envtl. Claims J. 3, No. 1, 9-19 (1990) (summarizing testimony from Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. Ct. Jan. 24, 1990)).

There is, of course, no doubt that the qualified pollution exclusion, with the exception allowing coverage if the "discharge, dispersal, release or escape" of pollutants is "sudden and accidental," is standard-form policy language. The exclusion was written by the insurance industry, with no negotiation involving individual policyholders. *See generally MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal. 4th 635, 643-644 [3 Cal.Rptr.3d 228, 235] (reviewing historical background of pollution exclusion) (*citing American States Ins. Co. v. Koloms* (Ill. 1997) 687 N.E.2d 72); *see also* Appellant's Brief at 17-28; *see generally Construction of Qualified Pollution Exclusion Clause in Liability Insurance Policy*, 88 A.L.R.5th 493; *Application of Qualified Pollution Exclusion Clause in Liability Insurance Policy*, 89 A.L.R.5th 1.

In these circumstances, California courts have long recognized the "disparate bargaining status of the parties." *Gray v. Zurich*, *supra*, 65 Cal.2d at 270. Insurance companies occasionally urge that rules of policy interpretation such as *contra proferentem* should not apply for

large or “sophisticated” policyholders shown to have negotiated their coverage in some fashion. Yet such arguments rarely succeed, because the “negotiation” simply involves selecting between standard provisions, with the wording of such provisions remaining a take-it-or-leave-it proposition.

For example, in *AIU Ins. Co. v. Superior Ct.* (1990) 51 Cal.3d 807 [274 Cal.Rptr.820], the policyholder was a large chemical company holding more than 60 insurance policies and seeking coverage for liabilities at 79 different waste sites. The insurance companies submitted evidence that the chemical company had obtained specific policy language "on a line-per-line basis through continuing negotiation with the insurance carrier." *Id.* at 823 n.9. But the California Supreme Court found “no evidence suggesting that the provisions in question were actually negotiated or jointly drafted,” reasoning:

> This evidence does not, however, shed light on the meaning to be ascribed to the coverage provisions at issue here. These provisions, as we have noted above, are adopted verbatim from standard form policies used throughout the country. For this reason, even if the policies were ‘negotiated’ in a broad sense, this fact has little bearing on construction of the specific policy language in question here.

Id. at 823 n.9.

Thus, only examination of the insurance industry’s own internal drafting history documents and the documents and testimony that it submitted to regulators, which the State has presented in Appellant’s Brief, can evidence whether a particular insurance policy provision is what the

insurance company purports it to be. *See Montrose, supra*, 10 Cal.4th at 670-671 (recognizing that "the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues"); *see also, e.g., Red Panther Chemical Co. v. Ins. Co. of the State of PA* (10th Cir. 1994) 43 F.3d 514, 519 (reversing district court finding that if "absolute" pollution exclusion was unambiguous in one context it is unambiguous in all contexts; remanding with direction that district court "conduct a factual inquiry into the proper scope of the exclusion, based on the common understandings of the insurance industry, and the purposes of the exclusion").

C. It Is Important That Representations Made By Insurance Companies To State Insurance Commissioners Regarding The Meaning Of An Insurance Policy Provision Be Enforced.

1. Enforcing Regulatory Representations Is The Only Way Policyholders Can Be Protected.

In 1946 the United States Congress passed the McCarran-Ferguson Act, giving the States plenary power over insurance law. *See* 15 U.S.C. § 1012(b). The United States Supreme Court recognized long ago that the insurance consumer cannot engage in any real bargaining with insurance companies over terms or prices of standard insurance policies:

> We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of underwriters, promulgated in schedules of practically controlling constancy which the applicant for

> insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.'

German Alliance Ins. Co. v. Lewis (1913) 233 U.S. 389, 416-417. In *German Alliance*, the Supreme Court affirmed the right of states to regulate insurance rates on public policy grounds to ensure that they are reasonable and non-discriminatory.[3] *Id.* In reviewing the Kansas insurance statute before it, the Supreme Court noted that the "inducement" for the regulation of insurance rates "is the alternative presented [to the policyholder] of accepting the rates of insurance companies or refraining from insurance. . . ."

2. The Integrity Of The Insurance System Depends On Enforcing Regulatory Representations.

The integrity of the insurance system clearly depends on enforcing representations made by insurance companies concerning the scope and effect of policy language and precluding contrary interpretations through judicial estoppel. Such estoppel is consistent with the well-settled principles of good faith and fair dealing in the insurance context. It also is consistent with the long-standing application of estoppel principles in analogous regulatory contexts, such as patent prosecution.

---

[3] The public policy of ensuring that insurance policy rates are reasonable and non-discriminatory is the common principle that underlies modern insurance regulation.

It is well-settled under California insurance law that "[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Communale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198, 200]. Under the *Restatement (Second) of Contracts* (1981) (the "*Restatement*") it is a violation of that covenant of good faith and fair dealing to assert a position in litigation contrary to that taken internally prior to litigation; in other words, parties to a contract that assert a contrary pre-enforcement interpretation violate the implied covenant of good faith and fair dealing. *See Restatement* § 205. The *Restatement* notes:

> The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. . . . The obligation is violated by dishonest conduct such as conjuring up a pretended dispute *asserting an interpretation contrary to one's own understanding*, or falsification of facts.

Id. comment e (emphasis added). Thus, the *Restatement* recognizes the doctrine of quasi-estoppel, which "precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him." *See* 31 C.J.S. § 107.

Consistent with these principles, *amici curiae* submit that the integrity of the insurance regulatory system requires application of regulatory estoppel. The regulatory representations that insurance coverage

for pollution was being clarified and not reduced was made in order to secure regulatory approval of the exclusion. This representation was successful in states throughout the United States, as commissioners approved the pollution exclusion. Application of regulatory estoppel is particularly warranted under these circumstances.

Regulatory estoppel, because it is intended to prevent a party from asserting one thing in a regulatory tribunal and the opposite in a judicial tribunal, does not require reliance. *See Morton*, *supra*, 629 A.2d at 875 (imputing the "reasonable expectations" of insurance regulators to policyholders). Furthermore, because regulatory estoppel is like judicial estoppel in that its function is to protect the integrity of the regulatory process from intentional inconsistency, *cf. Vennerberg Farms, Inc. v. IGF Ins. Co.* (Iowa 1987) 405 N.W.2d 810, 814, regulatory estoppel, like judicial estoppel, does not require reliance by the party asserting it. *See Sunbeam Corp. v. Liberty Mut. Ins. Co.* (Pa. 2001) 781 A.2d 1189 (noting that estoppel may be found "even without pleading or proving reliance by the insurance department") (emphasis added).

The case for the application of regulatory estoppel in the circumstances of this case is the same as in *Morton*:

> The critical issue is whether the courts of this state should give effect to the literal meaning of an exclusionary clause that materially and dramatically reduces the coverage previously available for property damage caused by pollution, under circumstances in which the approval of the

> exclusionary clause by state regulatory authorities was induced by the insurance industry's representation that the clause merely "clarified" the scope of the prior coverage.
>
> * * *
>
> This Court is now asked to construe CGL policies containing the pollution-exclusion clause in a manner consistent with the clause's literal language, ignoring the industry's misleading presentation to state regulators over twenty years ago, and overlooking the apparent unfairness that such an interpretation would impose on policyholders who were charged rates that did not reflect the radical diminution in coverage contemplated by the insurance industry. So to construe the pollution-exclusion clause would, in this Court's view, violate this State's strong public policy requiring regulation of the insurance business in the public interest, and would reward the industry for its misrepresentation and nondisclosure to state regulatory authorities.
>
> * * *
>
> 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." [citation omitted] In misrepresenting the effect of the pollution-exclusion clause to the Department of Insurance, the IRB 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 872-74.

Although regulatory estoppel has applied in the insurance contest only in recent decades, it is hardly a novel doctrine. Federal courts

have been applying regulatory estoppel for more than one hundred years in private patent disputes. *See, e.g., Graham v. John Deere Co.* (1966) 383 U.S. 1*; Corbin Cabinet Lock Co. v. Eagle Lock Co.* (1893) 150 U.S. 38; *Builders Concrete, Inc. v. Bremerton Concrete Prod. Co.* (Fed. Cir. 1985) 757 F.2d 255, 260.

Federal courts routinely bar a litigant from seeking in a patent infringement prosecution to give a patent broader scope than the litigant represented, to regulatory authorities, that the patent would have. This regulatory estoppel doctrine is known as "prosecution history estoppel" or "file wrapper estoppel":

> [One] method [of determining the legal scope of a patent] is by inspection of the file wrapper [the history of claimant's prosecution of the patent]. This is so because such inspection may reveal that the invention claimed in the patent has been limited in the Patent Office and such limitation is accepted by the patentee in order to procure the patent. To allow the language of a patent to include any of such excluded portion would be to extend the contract and grant in the patent beyond the true intendment of the parties thereto. This is really an application of the doctrine of estoppel.

Smith v. Mid-Continent Inv. Co. (8th Cir. 1939) 106 F.2d 622, 624. In other words, "[t]he essence of prosecution history estoppel is that a patentee should not be able to obtain, through litigation, coverage of subject matter relinquished during [regulatory] prosecution [of the patent]." *Zenith Labs., Inc. v. Bristol-Myers Squibb Co.* (Fed. Cir. 1994) 19 F.3d 1418, 1424 (citations omitted); *accord, International Envt'l Dynamics, Inc. v. Fraser*

(9th Cir. 1981) 647 F.2d 77, 79 ("A patentee cannot recapture claims he has deliberately surrendered in order to secure a patent.").

In short, courts recognize that failure to consider the limitations that a regulated party asserted or agreed to reduces the entire regulatory scheme to a nullity or sham. For example, in *Pennwalt Corp. v. Durand-Wayland, Inc.* (Fed. Cir. 1987) 833 F.2d 931, the lower court had failed to consider limitations placed on the patent by the patent holder during the regulatory process and merely analyzed the meaning of the words in the patent claim itself, finding for the holder. The Federal Circuit reversed on this point, stating:

> 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 any 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.

For similar reasons, a*mici curiae* urge this Court to examine the regulatory history of the pollution exclusion. To ignore it effectively would reduce the entire insurance regulatory scheme to a nullity. Because the integrity of the judicial and insurance regularity scheme is truly at stake in this matter, United Policyholders and CFA respectfully urge that this

Court must preclude any temporally restrictive interpretation of the pollution exclusion, based on principles of regulatory estoppel.

III. CONCLUSION

For the reasons set forth above, and as set forth more fully in Appellant's Brief, *amici curiae* respectfully urge this Court to conclude that the defendant insurance companies are estopped from arguing any temporally restrictive interpretation of the qualified pollution exclusion, as it is contrary to the representations previously made to state insurance regulators. The insurance industry should be bound by the historical record reflecting that the pollution exclusion was drafted to continue providing coverage for gradual pollution damage, so long as it was "unexpected" or "unintended."

Dated: October ___, 2005

David A. Gauntlett (SBN 96399)
Eric R. Little (SBN 169021)
GAUNTLETT & ASSOCIATES
18400 Von Karman, Suite 300
Irvine, California 92612
Phone: (949) 553-1010

Attorneys for *Amici Curiae*
United Policyholders, Consumer Federation of America, and The Center for Community Action and Environmental Justice

CERTIFICATE OF WORD COUNT

[California Rules of Court, Rule 14(c)(1)]

Pursuant to rule 14(c) of the California Rules of Court, I hereby certify that this brief contains 4,337 words, including footnotes. In making this certification, I have relied on the word count of the Microsoft Word word-processing program used to generate the brief.

_____

David A. Gauntlett