A128443

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION FOUR

THE VILLA LOS ALAMOS HOMEOWNERS ASSOCIATION
Plaintiff and Appellant,

v.

STATE FARM GENERAL INSURANCE COMPANY,
Defendant and Respondent.

BRIEF OF *AMICUS CURIAE*, UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF AND APPELLANT THE VILLA LOS ALAMOS HOMEOWNERS ASSOCIATION, and all others similarly situated

From the Superior Court of Sonoma County
Case No. SCV243013
The Honorable Elaine Rushing

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Dated: March 16, 2011

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

MISCELLANEOUS

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Attorneys for *Amicus Curiae* United Policyholders respectfully move for permission to file an *amicus* brief in support of The Villa Los Alamos Homeowners Association, individually and on behalf of all others similarly situated. The amicus party will file its brief on March 16, 2011.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

In support of this Motion, *amicus curiae* United Policyholders states the following facts: United Policyholders is a non-profit 501(c) (3) consumer organization founded in 1991 that has nineteen years of experience helping solve insurance problems and advocating for fairness in insurance transactions. Donations, foundation grants and volunteer labor fuel the organization. United Policyholders' Board of Directors includes the former Chief Justice of the Arizona Supreme Court and the former Washington State Insurance Commissioner.

United Policyholders' work is divided into three program areas: *Roadmap to Recovery* provides tools and resources that help individuals and businesses solve insurance problems that can arise after an accident, illness, disaster, or other adverse event; the *Roadmap to Preparedness* program promotes insurance and financial literacy as well as disaster preparedness; and the *Advocacy and Action* program advances policyholders' interests in courts of law, legislative and public policy forums, and in the media. The organization's Executive Director was

recently re-appointed to a two-year term as an official consumer representative to the National Association of Insurance Commissioners (NAIC). United Policyholders offers an extensive library of publications, legal briefs, sample policies, forms and articles on commercial and personal lines insurance products, coverage and the claims process at www.unitedpolicyholders.org.

In addition to serving as a resource on insurance claims for individuals and commercial policyholders in California and elsewhere, United Policyholders monitors legal and marketplace developments affecting the interests of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory oversight proceedings.

Since 1992, United Policyholders has filed more than 280 *amicus curiae* briefs on behalf of policyholders in courts throughout the United States,[1] with approximately 100 in California courts alone. Most recently, United Policyholders has filed *amicus curiae* briefs in *Nieto, Julie v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60 in

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[1] *See e.g., Pincheira v. Allstate Ins. Co., Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London* (2007) 449 Mass. 621; *Vandenberg v. Superior Court* 88 Cal. Rptr. 2d 366 (Cal. 1999); *Knotts v. Zurich Ins. Co.* (Ky. 2006) 197 S.W.3d 512; *Advance Watch Co., v. Kemper Nat'l Ins. Co.* (6th Cir. 1996) 99 F.3d 795; *Aircraft Holdings, LLC v. XL Specialty Ins. Co.* (Fla. 2006) 935 So.2d 1219; *SCI Liquidating Corp. v. Hartford Ins. Co.* (2000) 272 Ga. 293; *Pilkington N. Am. v. Travelers* (Ohio 2005) 106 Ohio. St. 3d 1451; *Excess Underwriters Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.* (Tex. 2004) 246 S.W.3d 42.

California Supreme Court, *L.A. Checker Cab Coop, Inc. vs. First Specialty Insurance Co.*, (2010) 186 Cal.App.4th 767 in California Court of Appeal, and *Hyundai Motor America vs. National Union Fire Insurance Co.*, (9th Cir. 2009) 600 F.3d 1092 in California federal court. Arguments for our amicus curiae were cited with approval in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (Cal. 2006) 145 P.3d 472, *Vandenberg v. Superior Court* (Cal. 1999) 982 P.2d 229, *Watts Industries, Inc. v. Zurich American Insurance Co.* (2004) 18 Cal. Rptr.3d 61, and *Julian v. Hartford* (2005) 35 Cal.4th 747. Moreover, United Policyholders has filed *amicus curiae* briefs in numerous cases before United States Supreme Court.[2] The U.S. Supreme Court cited United Policyholders' *amicus curiae* in *Humana, Inc. v. Forsyth* (1999) 525 U.S. 299. Indeed, United Policyholders was the only national consumer organization to submit an amicus curiae brief in the landmark case of *State Farm v. Campbell* (2003) 538 U.S. 408.

United Policyholders has a vital interest in ensuring that insurance companies fulfill the promises they make to their California and nationwide policyholders. While insurance companies are in business to earn profit through risk assumption, businesses and individuals rely on insurance to

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[2] *See, e.g., Fuller-Austin Insulation Co., v. Highlands Ins. Co.* (2006) 549 U.S. 946; *Philip Morris USA v. Mayola Williams* (2006) 547 U.S. 1162; *Aetna Health, Inc. v. Juan Davila* (2004) 542 U.S. 200; *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408; *Rush Prudential HMO v. Debra Moran* (2001) 533 U.S. 948; *Humana Inc. v. Forsyth* (1999) 525 U.S. 299.

protect property and livelihoods. United Policyholders seeks to prevent insurance companies from shifting risk back to policyholders through schemes that are not authorized by insurance contracts or public policy. The organization works to counterbalance the widely-represented interests of insurance companies by serving as an advocate for large and small policyholders in forums throughout the country.

In the case at bar, United Policyholders seeks to appear as *amicus curiae* to address certain questions before the Court that are of significance well beyond the application of California law to the specific facts of this litigation. These important issues will affect policyholders nationwide. All of the legal research and writing in this brief has been performed by unpaid volunteer counsel, and no party to this appeal participated in the drafting of this brief or funded this work.

NATURE OF THE CASE AND STATEMENT OF FACTS

I. UNITED POLICYHOLDERS ADOPTS THE STATEMENT OF FACTS AND PROCEDURAL HISTORY AS SET FORTH BY THE POLICYHOLDER, THE VILLA LOS ALAMOS HOMEOWNERS ASSOCIATION AND ALL OTHERS SIMILARLY SITUATED

United Policyholders adopts the Statement of Facts of the policyholder, The Villa Los Alamos Homeowners Association, individually and all others similarly situated, as set forth in their brief submitted to the Court of Appeal of the State of California, First Appellate District, Division Four. *See Appellant's Brief*, dated September 10, 2010, at 4-10.

ARGUMENT

I. RECENT DEVELOPMENTS IN THE LAW REGARDING THE "ABSOLUTE" OR "TOTAL" POLLUTION EXCLUSIONS

Insurance transfers risk, and a policyholder pays a premium in order to transfer "the risk of a loss or the responsibility for certain costs and expenses" to an insurance company. Keeton & Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Documents, and Commercial Practices* 11 (West Publishing Co. 1988).

Yet, according to the insurance industry, virtually no insurance coverage exists for any claim involving property damage or personal injuries connected in any way to the environment or any substance that could conceivably be labeled a "pollutant." In fact, litigation between policyholders and insurance companies concerning coverage for environmental liabilities under all types of insurance policies has continued unabated from the time such liabilities were first imposed. The reason is the potential liabilities are so great. In particular, reports issued in the 1990s estimate the insurance companies' potential liability for environmental and asbestos-related damage at $40 billion[3] to over $100 billion.[4] When faced

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[3] Scism, *Insurer Planning To Boost Reserves By Over $1 Billion,* Wall St. J., Dec. 12, 1995, at A4. More recent data suggest that a range between $40 and $100 billion may have been accurate. For example, approximately $30 billion was incurred between 2000 and 2006 on asbestos liabilities. However, asbestos liabilities, at least, appear to be dropping. "Incurred asbestos losses dropped to $1.6 billion in 2006, the lowest level since

(footnote continued)

with "environmental" or asbestos claims, particularly large claims, insurance companies routinely refuse to provide coverage and seek to litigate. Indeed, insurance companies spend over $1 billion annually to fund the litigation battle against their policyholders.[5] As the chairman of Dow Corning wrote, "It has become standard operating procedure for some insurance companies to procrastinate and dispute rather than honor policies

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2000 when they totaled $1.5 billion." Insurance Info. Inst., The Insurance Fact Book 2008, at 147 (2008).

[4] Estimates vary. Standard & Poor's Rating Services estimated that total liability might reach $125 billion. Levick, *Insurer's Environmental Toll Put at $125 Billion; Cases May Cut Profits Deeply S & P Says*, Hartford Courant, Oct. 30, 1995, at 3. However, A.M. Best Co. lowered its estimate of potential liability resulting from environmental claims. *See A.M. Best Lowers Worst-Case Estimates, Greenwire*, Jan. 31, 1996, available in LEXIS, News Library, Wire file. A.M. Best revised the mid-range and worst-case estimates for unfunded asbestos and environmental liabilities down to $57 billion and $92 billion, respectively. *See also Banham, Industry Building Reserves for A & E Liabilities; Pressure From Regulators and Raters is Spurring Insurers to Maintain Enough Funds for Asbestos, Environment Claims*, J. of Com., Feb. 13, 1997, at 7A. In a widely-cited 1994 study, A.M. Best had predicted a larger exposure. *See Environmental/Asbestos Liability Exposures: A P/C Industry Black Hole*, BestWeek Property/Casualty Supp., Mar. 28, 1994, at P/C 1. (The report estimated that over the next 25 years, the insurance "industry's most likely exposure to environmental and asbestos claims ... amounts to a net present value of $132 billion or 72% of the industry's current capital and surplus.") *Id.* A report by A.M. Best concluded that the insurance industry has not set aside adequate reserves for potential asbestos and pollution liabilities. More recently, A.M. Best stated that the insurance industry has either paid out or set aside reserves representing 68% of the $40 billion estimated liability for asbestos claims and reserves representing 52% of the $56 billion estimated liability for pollution claims. Scism & McDonald, *Insurers Haven't Finished Setting Up Reserves for Asbestos and Pollution, Report Suggests*, Wall St. J., June 11, 1998, at C2.

[5] *Miller v. Fluharty* (1997) 201 W. Va. 685, 693, 500 S.E.2d 310, 318 *(citing* Anderson & Gold, *Recoverability of Corporate Counsel Fees in Insurance Coverage Disputes,* 20 Am. J. Trial Advoc. 1 (1996)). *See Scism, Tight-Fisted Insurers Fight Their Customers to Limit Big Awards,* Wall St. J., Oct. 15, 1996, at 1.

with companies that become embroiled in litigation."[6] In fact, litigation expenses comprise almost 90 percent of the money spent on environmental insurance claims.[7] The insurance companies' approach to environmental claims has not changed significantly since then. In effect, this forces the policyholder intent on obtaining coverage benefits to fight a two-front war—one against its underlying claimant, and another against its insurance company(ies).

One of the policyholder's biggest battles is with the insurance industry's assertion that so-called "absolute" and "total" pollution exclusions – common in liability policies sold since 1985 – bar coverage for any claim which, however tangentially, involves any substance which conceivably could be labeled a "pollutant." Specifically, insurance companies have denied claims involving damages from:

> Bodily injury from carbon dioxide from human respiration;[8]
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> Property damage from lake water;
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> Burns to a child playing with a bottle of acid used in dyeing carpets;[9]

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[6] *See* Hazleton, *The Tort Monster That Ate Dow Corning,* Wall St. J., May 17, 1995, at A21.

[7] Mark R. Siwik, Lori L. Siwik, and Robert C. Mitchell, Environmental and Toxic Tort Claims: Are You Covered? (June, 2000), *available at* http://www.riskinternational.com/Articles/articles_acca.htm.

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

A back injury incurred by a claimant fleeing from an onrushing cloud of chlorine gas;[10]

A car accident caused by reduced visibility from smoke caused by a non-hostile fire;[11]

Bodily injury to a bulldozer operator accidentally sprayed with sulfuric acid;[12] and

Naturally-occurring chlorinated organic compounds arising when natural tannins in water combine with chlorine added by municipalities to protect human health.[13]

Indeed, to take the insurance industry's suggested application of these exclusions to their "ultimate conclusion could result in a person being 'polluted' by being struck in the face by a speeding bullet."[14]

The insurance industry can take such overreaching coverage positions because the language in the so-called absolute and total pollution exclusions is, on its face, without bound. Not surprisingly, at the time the insurance industry submitted these exclusions for approval; state insurance

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

[10] *Grow Group, Inc. v. North River Ins. Co.* (N.D. Cal. Aug. 14, 1992) No. C 92-2328 SC, slip op.

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

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

[13] *City of Chesapeake v. States Self-Insurers Risk Retention Grp., Inc.* (VA 2006) 271 Va. 574, 578, 628 S.E.2d 539 (trihalomethanes (THMs) in the municipal water system are by definition "contaminants" and therefore coverage is barred by the pollution exclusion).

[14] *Bodine v. Fireman's Fund Ins. Co.* (Cal. Super. Sept. 24, 1992) No. 150364, Slip op. at 2.

regulators expressed concern that their extreme breadth of language made them ripe for abuse by the insurance industry. In response, the insurance industry pled the purported difficulty of drafting an exclusion which would achieve its stated objective–barring coverage for government-mandated environmental cleanup of property damage from long-term, industrial pollution – without using broad terms that could, if applied unscrupulously, bar coverage for all manner of exposures. Admitting the over breadth of the language, the insurance industry essentially told regulators "trust us," and promised not to be overzealous in applying the exclusions.

In fact, the drafters of one form of the "absolute" pollution exclusion publicly represented that it was not intended to reduce prior insurance coverage.[15] For a detailed discussion on the insurance industry's unfulfilled

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[15] In 1985, the Insurance Services Office noted that:

> 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."
>
> 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) (emphasis added).

promise, please *see supra* Part IV: A: In Securing Approval for the "Absolute" or "Total" Pollution Exclusions, the Insurance Industry Promised State Regulators That It Would Not Be Overzealous in Applying the Exclusions.

As this case and the above and below cases demonstrate, the insurance industry has again broken its promise. Specifically, insurance company claims handlers, taking advantage of courts and policyholders ignorant of the insurance industry's representations to regulators, use "absolute" and "total" pollution exclusions to bar coverage for all manner of commonplace harms; *i.e.*, the exposures motivating business to buy liability insurance in the first place. Knowledgeable policyholders, however, have been increasingly successful in persuading courts to examine evidence of the industry's original, regulatory-accepted intent. As a result, about half of the cases nationwide to consider this issue – a vast majority of state supreme courts – have found that "absolute" and "total" pollution exclusions do not bar coverage for claims outside of the context of traditional industrial pollution.

This amicus brief focuses on the scope of the "absolute" and "total" pollution exclusions.

II. PRINCIPLES OF EXISTING COVERAGE UNDER THE "ABSOLUTE" OR "TOTAL" EXCLUSIONS

A. The "Absolute" And "Total" Pollution Exclusions Use CERCLA Terms and Were Intended to Apply Only to CERCLA-type of Industrial Pollution

Sorting through these decisions reveals a few general principles. Many courts have refused to apply "absolute" or "total" pollution exclusions in circumstances other than those involving industrial pollution of the natural environment, recognizing that these exclusions were drafted to address typical, industrial pollution of the type addressed under CERCLA.[16] A few cases that have enforced a broad reading of the

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[16] *See, e.g., Meridian Mut. Ins. Co. v. Kellman* (6th Cir. 1999) 197 F.3d 1178, 1181, (applying Michigan law); *Nautilus Ins. Co. v. Jabar* (1st Cir. 1999) 188 F.3d 27,30 (applying Maine law); *Bituminous Casualty Co. Advanced Adhesive Technology* (11th Cir. 1996) 73 F.3d 335, 339, (applying Georgia law); *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.* (2d Cir. 1995) 47 F.3d 34, 37 (applying New York law); *Regional Bank of Co. v. St. Paul Fire & Marine Ins. Co.* (10th Cir. 1994) 35 F.3d 494, 498 (applying Colorado law); *Sargent Constr. Co. v. State Auto Ins. Co.* (8th Cir. 1994) 23 F.3d 1324, 1327 (applying Missouri law); *Boise Cascade Corp. v. Reliance Nat'l Indem. Co.* (D. Me. 2000) 99 F. Supp. 2d 87, 102, (applying Maine law); *Garfield Slope Housing Corp. v. Public Serv. Mut. Ins. Co.* (E.D.N.Y. 1997) 973 F. Supp. 326, 336 (applying New York law); *Lefrak Organization, Inc. v. Chubb Custom Ins. Co.* (S.D.N.Y. 1996) 942 F. Supp. 949, 954, (applying New York law); *Calvert Ins. Co. v. S & L Realty Corp* (S.D.N.Y. 1996) 926 F. Supp. 44, 46-47, (applying New York law); *Island Assocs., Inc. v. Eric Group, Inc* (W.D. Pa. 1995) 894 F. Supp. 200, 202, (applying Pennsylvania law); *Center for Creative Studies v. Aetna Life & Casualty Co* (E.D. Mich. 1994) 871 F. Supp. 941, 944-45, 945 n.5, (applying Michigan law); *Regent Ins. Co. v. Holme* (D. Kan. 1993) 835 F. Supp. 579, 582 (applying Kansas law); *Regional Bank of Co. v. St. Paul Fire & Marine Ins. Co.* (10th Cir. 1994) 35 F.3d 494 (applying Colorado law); *Westchester Fire Ins. Co. v. City of Pittsburg, Kan.* (D. Kan. 1992) 794 F. Supp. 353, (applying Kansas law); *Keggi v. Northbrook Property & Casualty Insurance Co,* (Ariz. Ct. App. 2000) 13 P.3d 785, 790 (applying Arizona law); *Grow Group, Inc. v. North River Ins. Co.* (N.D. Cal. Aug. 14, 1992) No. C 92-2328 SC, slip o pat 11. (applying California law); *Minerva Enters., Inc. v. Bituminous Cas. Corp.* (Ark. 1993) 851 S.W.2d 403, 404, (applying Arkansas law); *Essex Ins. Co. v. Avondale Mills, Inc,* (Ala. 1994) 639 So. 2d 1339, 1341 (applying Alabama law); *Danbury Ins. Co. v. Novella* (Conn. Super. 1998) 727 A.2d 279; *American States Ins. Co. v. Koloms* (Ill. 1997) 687 N.E.2d 7, 79 (applying Illinois law);

(footnote continued)

"absolute" and "total" pollution exclusions have reached expressly contrary conclusions.[17] Many of the former decisions cite *West American Insurance Co. v. Tufco Flooring E., Inc.* (N.C. App. 1991), 409 S.E.2d 692, 699, *over-*

Insurance Co. of Ill. v. Stringfield (Ill. App. 1997) 685 N.E.2d 980, 984 (applying Illinois law); *Motorists Mut. Ins. Co. v. RSJ, Inc.* (Ky. App. 1996) 926 S.W.2d 679, 680 (applying Kentucky law); *Doerr v. Mobil Oil Corp.* (La. 2000) 774 So. 2d 119, 135, (applying Louisiana law); *Sandbom v. BASF Wyandotte, Corp.* (La. App. 1996) 674 So. 2d 349, 363 (applying Louisiana law); *Avery v. Commercial Union Ins. Co.* (La. App. 1993) 621 So. 2d 184, 189, (applying Louisiana law); *West v. Board of Commissioners of the Port of New Orleans* (La. App. 1991) 591 So. 2d 1358, 1360 (applying Louisiana law); *Thompson v. Temple* (La. App. 1991) 580 So. 2d 1133, 1134 (applying Louisiana law); *Western Alliance Ins. Co. v. Gill* (Mass. 1997) 686 N.E.2d 997, 999 (applying Massachusetts law); *Atlantic Mut. Ins. Co. v. McFadden* (Mass. 1992) 595 N.E.2d 762, 764 (applying Massachusetts law); *Weaver v. Royal Ins. Co.* (N.H. 1996) 674 A.2d 975, 977 (applying New Hampshire law); *Golden Estates, Inc. v. Continental Cas. Co.* (N.J. Super. 1996) 680 A.2d 1114, 1118,(applying New Jersey law); *Roofers' Joint Trading, Apprentice & Educ. Comm. v. General Acc. Ins. Co.* (N.Y. App. Div. 2000) 713 N.Y.S.2d 615, 617 (applying New York law); *Cepeda v. Varveris* (N.Y. App. Div. 1996) 651 N.Y.S.2d 185, 186 (applying New York law); *Kenyon v. Security Ins. Co.* (N.Y. Supr. 1993) 626 N.Y.S.2d 347, 350 (applying New York law); *Generali-U.S. v. Caribe Realty Corp* (N.Y. Supr. 1994) 612 N.Y.S.2d 296, 299 (applying New York law); *Karroll v. Atomergic Chemetals Corp.* (N.Y. App. Div. 1993) 600 N.Y.S.2d 101, 102 (applying New York law); *West American Insurance Co. v. Tufco Flooring E., Inc.* (N.C. App. 1991) 409 S.E.2d 692, 699, *over-ruled on other grounds, Gaston Cty. Dyeing Machinery Co. v. Northfield Insurance Co.* (N.C. 2000) 524 S.E.2d 558 (applying North Carolina law); *Gamble Farm Inn, Inc. v. Selective Ins. Co.* (Pa. Super. 1995) 656 A.2d 142, 146-147 (applying Pennsylvania law); *Kent Farms, Inc. v. Zurich Ins. Co.* (Wash. 2000) 998 P.2d 292, 295 (applying Washington law).

[17] *National Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co. ("NEMA")* (4th Cir. 1998) 162 F.3d 821, 825 (applying District of Columbia law); *Reliance Ins. Co. v. Moessner* (3d Cir. 1997) (applying Pennsylvania law) 121 F.3d 895; *Certain Underwriters at Lloyd's, London v. C.A. Turner Constr. Co.* (5th Cir. 1997) 112 F.3d 184, 188 (applying Texas law); *Park-Ohio Indus., Inc. v. Home Indem. Co.* (6th Cir. 1992) 975 F.2d 1215, 1219 (applying Ohio law); *Clarendon Am. Ins. Co. v. Bay, Inc.* (S.D. Tex. 1998) 10 F. Supp. 2d 736, 743 (applying Texas law); *West Am. Ins. Co. v. Band & Desenberg,* (M.D. Fla. 1996) 925 F. Supp. 758, 761-762 (applying Florida law); *Terramatrix, Inc. v. United States Fire Ins. Co.* (Colo. App. 1997) 939 P.2d 483, 488 (applying Colorado law); *Deni Assocs. v. State Farm & Cas. Ins. Co.* (Fla. 1998) 711 So. 2d 1135, 1137 (applying Florida law); *Bernhardt v. Hartford Fire Ins. Co.* (Md. App. 1994) 648 A.2d 1047, 1051-52 (applying Maryland law); *Madison Constr. Co. v. Harleysville Mut. Ins. Co.* (Pa. 1999) 735 A.2d 100, 109 (applying Pennsylvania law); *Cook v. Evanson* (Wash. App. 1996) 920 P.2d 1223, 1226 (applying Washington law).

ruled on other grounds, *Gaston Cty. Dyeing Machinery Co. v. Northfield Insurance Co.* (N.C. 2000), 524 S.E.2d 558, which, considering the release of styrene vapors from a flooring material which damaged claimant's inventory of chickens, held that the "polluters exclusion" applies only to a release into the environment:

> 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."[18]

Specifically, as discussed in this brief, a number of courts have held that the exclusions do not apply to common workplace exposures to toxic chemicals, or to "premises/operations" claims.

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[18] (emphasis added) (citations omitted) 409 S.E.2d at 699-700.

B. The "Absolute" and "Total" Pollution Exclusions Are "Virtually Boundless" Requiring Limitation

Similarly, many courts have found that the incredibly "virtually boundless" in the "absolute," and thus the "total," pollution exclusions must have a "limiting principle," so as to avoid absurd results, such as finding that an I-beam is an "irritant" when "released" upon a construction worker:

> I find that the definition of 'pollutant' as contained in the policy is so wide ranging as to include any material found on a farm including lukewarm coffee. The problem with the definition is that it does not take into account the effects of dilution or disposal or other treatments of potentially harmful materials that take them out of the category of an irritant or a contaminant. Moreover, the common meaning of 'pollutant' means something that taints or degrades the environment -- the air, water, or soil.[19]

Accordingly, a number of courts which have refused to apply a broad reading of the "absolute" and "total" pollution exclusions, have employed as a "limiting principle" either the expressed drafting and regulatory intent to support their holdings that these exclusions apply only to industrial pollution of the environment.[20]

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[19] (applying California law) *Bodine*, slip op. at 2.

[20] *MacKinnon v. Truck Ins. Exch (Cal. 2003) 73 P.3d 1205 (finding that absolute pollution exclusion did not apply to injuries from fumes from application of pesticide); See, e.g., Jabar*, (applying Maine law) 188 F.3d at 30; *Kellman*, (applying Michigan law) 197 F.3d at 1182; *Regional Bank*, (applying Colorado law) 35 F.3d at 498); *Island Assocs.*, (applying Pennsylvania law) 894 F. Supp. at 202; *Pittsburg*, (applying Kansas law); *Center for Creative Studies,* (applying Michigan law) 871 F. Supp. at 945; *Keggi*, 13 P.3d at (applying Arizona law) 790; *Danbury*, (applying Connecticut law) 727 A.2d at 281; *Koloms*, (applying Illinois law) 687 N.E.2d at 79; RSJ, (applying Kentucky law) 926 S.W.2d at 680; *Roofers' Joint Trading*, (applying New York law) 713 N.Y.S.2d at 617; *Donaldson*, (applying Wisconsin law) 564 N.W.2d at 732.

C. The Broad and Creative Improper Uses of the "Absolute" and "Total" Pollution Exclusions Are Inconsistent With Policyholders' Reasonable Expectations

Many courts have upheld the reasonable expectations of an ordinary commercial policyholder that, in return for its tens of thousands of dollars in premiums, it would have coverage for common home or workplace accidents.[21] Indeed, the "suitability" principle – finding that an insurance company must be deemed to have sold a policy suitable for the policyholder's operations and adopted by the United States Supreme Court in *Buck & Hedrick v. Chesapeake Ins. Co.* (1828) 26 U.S. (1 Pet.) 151 – requires that insurance companies be deemed to have sold insurance coverage sufficient to cover the policyholder's normal tort exposures.[22] The flipside of this principle also may be a factor in the various holdings

[21] *Jabar*, (applying Maine law) 188 F.3d at 30; *Kellman*, (applying Michigan law) 197 F.3d at 1183; *Boise Cascade*, (applying Maine law) 99 F. Supp. 2d at 102; *Regional Bank*, (applying Colorado law) 35 F.3d at 498); *Gill*, (applying Massachusetts law) 686 N.E.2d at 999; *Roofers' Joint Trading*, (applying New York law) 713 N.Y.S.2d at 617; *Tufco*, (applying North Carolina law) 409 S.E.2d at 697; *Donaldson*, (applying Wisconsin law) 564 N.W.2d at 732; *Kent Farms*, (applying Washington law) 998 P.2d at 295; contra *NEMA*, (applying District of Columbia law) 162 F.3d at 825; *American States Ins. Co. v. Nethery* (5th Cir. 1996) 79 F.3d 473, 477 (applying Mississippi law); *Park-Ohio*, (applying Ohio law) 975 F.2d at 1218; *Terramatrix*, 939 P.2d at 488; *Deni Assocs.* (applying Florida law) 711 So. 2d at 1140; *Cook*, (applying Washington law) 920 P.2d at 1227.

[22] *See, e.g., American States Ins. Co. v. Kiger* (Ind. 1996) 662 N.E.2d 945 (refusing 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); *Bentz v. Mutual Fire, Marine & Inland Ins. Co.* (Md. App. 1990) 575 A.2d 795 (finding that, where the policyholder's business was pesticide application and the insurer was aware of the nature of the business, the insurance policy was intended to cover the policyholder's "normal operations").

cited herein. In other words, courts abhor forfeiture of coverage rights where the claim interpretations applied are suggestive of negligence on the part of the insurance company in underwriting and selling the liability insurance at issue.

D. Some Materials and Substances Are Not "Pollutants" or "Irritants," But Almost Anything May Be Under Certain Circumstances

Some courts have found that the substance which was released or which escaped is not a "pollutant."[23] Virtually anything when consumed in

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[23] *See, e.g., Sargent*, (applying Missouri law) 23 F.3d at 1327 (finding that question of whether fumes from muriatic acid, used for leveling a steel troweled floor in a construction project and which caused property damage to other property on the project were a "pollutant" prevented summary judgment for insurance company under absolute pollution exclusion and noting the definition of pollutants was ambiguous: pollutants could encompass those substances which were "irritants or contaminants" in the case at issue or which were capable of causing physical irritation or contamination to the environment, regardless of the facts at issue); *Titan Holdings Syn., Inc. v. Keene* (1st Cir. 1990) 898 F.2d 265, 268-69, (applying New Hampshire law) (finding that excessive noise and light do not constitute "pollutants"); *Keggi*, (applying Arizona law) 13 P.3d at 789 (finding "[t]he water-borne bacteria alleged to have caused *Keggi's* injury do not fit neatly within this definition. To the extent that bacteria might be considered 'irritants' or 'contaminants' they are living, organic irritants or contaminants which defy description under the policy as 'solid,' 'liquid,' 'gaseous,' or 'thermal' pollutants."); *Stringfield*, (applying Massachusetts law) 685 N.E.2d at 983 (finding that lead paint was not a pollutant, as paint was not contaminated at the time that lead was added); *Cedarhurst v. Hanover Ins. Co.* (N.Y. 1996) 675 N.E.2d 822 (applying New York law) (finding that absolute pollution exclusion did not bar coverage for damages from overflow of municipal sewer system because claims did not allege damage from sewage as pollutant); *Roofers' Joint Trading*, (applying New York law) 713 N.Y.S.2d at 617 (finding that fumes from roofing adhesive used as intended were not pollutants); *Kleinke*, (applying New York law) slip op at 10 (finding that a question existed as to whether E Coli bacteria constituted a pollutant); *Kent Farms*, (applying Washington law) 998 P.2d at 295 (finding that damage to driver injured by diesel fuel was not caused by fuel acting as a pollutant any more than if a barrel of fuel had rolled over driver); contra *NEMA*, (applying District of Columbia law) 162 F.3d at 824-25 (finding that manganese fumes released during welding were a pollutant); *Perkins Hardwood Lumber Co. v. Bituminous Casualty Corp.* (Ga. App. 1989) 378 S.E.2d 407, 409 (applying Georgia law) (finding smoke from non-hostile fire meets definition of pollutant).

excess or otherwise improperly could be considered harmful and, therefore, a "pollutant".

E. The Materials or Substances at Issue Were Not Discharged, Released or Have Not Escaped, Etc.

Some courts have found that there has been no "release" of "pollutant."[24] At a minimum, in order to be a pollutant a material or substance would have to be distributed into the wider environment requiring some type of removal or response under CERCLA or similar environmental authority.

F. Universal Rules of Insurance Policy Construction Render the Pollution Exclusions Ambiguous Facially, Structurally, or As Applied

Many of the above cases posit all or a combination of the above five reasons for refusing to enforce "absolute" and "total" pollution exclusions

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[24] *See, e.g., Lefrak* (applying New York law) 942 F. Supp. at 954 (finding that there had been no release when child ate lead paint chips); *Island Assocs.*, (applying Pennsylvania law) 894 F. Supp. at 203 (finding that there had been no release of fumes from site at which policyholder had used asbestos abatement compound); *Center for Creative Studies*, (applying Michigan law) 871 F. Supp. at 946 (finding that there was no release in situation where student claimed damages from exposure to photographic chemicals); *Danbury*, (applying Connecticut law) 727 A.2d at 284 (finding that ambiguity as to whether a "release" of lead paint caused injury to child); *BASF*, (applying Louisiana law) 674 So. 2d at 364 (finding that absolute pollution exclusion did not apply to bodily injury to worker who was exposed to chemicals in a storage tank because there was no release of chemicals); *Weaver*, (applying New Hampshire law) 674 A.2d at 978 (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*, (applying New York law) 713 N.Y.S.2d at 617 (finding that there had been no "discharge, dispersal ... release or escape" of pollutants where claimant was exposed to fumes from demonstration); *Generali*, (applying New York law) 612 N.Y.S.2d at 299 (finding that the absolute pollution exclusion did not bar coverage for damage from lead paint chips as there had been no release).

in conjunction with the ambiguity doctrine. For example, a court may find the language of an "absolute" pollution exclusion to be, at a minimum, ambiguous as to whether it includes lead paint within its definition of "pollutants." Under universal rules of insurance policy construction, such ambiguities are construed against the drafting insurance companies and in favor of coverage.

1. The Pollution Exclusions Ambiguous Facially, Structurally, or As Applied Also Reargue the Pollution Exclusions To Be Clearer, Construed Narrowly, and Against the Drafter

In addition, there are other rules of interpretation that may be factors in some of the decisions cited herein. Some courts have applied, separately or in combination, the universal rules that exclusionary language must be clear, it must be applied narrowly, and it must be interpreted in favor of coverage to the extent a lack of clarity exists.

III. THE "TOTAL" OR ABSOLUTE POLLUTION EXCLUSION WAS NEVER INTENDED TO APPLY UNDER THE FACTS OF THIS CLAIM

The factual circumstances surrounding the Villa Los Alamos Homeowners Association's claim implicate many of the principles set out above and discussed in more detail below. The alleged negligence is, at most, tangential to the isolated asbestos encounter. No gradual industrial, CERCLA-type of pollution is at issue. The asbestos was used for its intended purpose and there is no evidence of any release into the wider

environment. This type of tangential and accidental work place incident was never intended to result in a forfeiture of all liability coverage. Such a result would give State Farm General Insurance Company a windfall. Such a result would be unreasonable. Such a result would cause the Homeowners Association to lore its liability coverage because of some tangential event just when coverage is needed most. State Farm should not be allowed to pull the rug from under its policyholder using an environmental pollution exclusion improperly to correct State Farm's apparent mistake in failing to expressly exclude asbestos. There is no legitimate support for State Farm's efforts in the policy language, the facts or under California coverage law. The "Absolute" or "Total" pollution exclusion was never intended to apply this way.

A. The Types of Claims Courts Have Found To Be Outside the Ambit of the "Absolute" and "Total" Pollution Exclusions

Even where a specific substance has been defined as a pollutant, this does not mean that the pollution exclusion will necessarily apply. *In Belt Painting Corp. v. TIG Ins. Co.* (N.Y. 2003) 100 N.Y.2d 377, the insurance company relied on the inclusion of the word "fumes" as a defined pollutant to preclude coverage for injuries caused by inhalation of paint and solvent fumes. The court disagreed with this argument, saying that even if the word "fumes" fell within the definition, the exclusion would only apply if the injury was "caused by 'discharge, dispersal, seepage, migration, release or

escape' of the fumes." The court held that this language did not unambiguously apply to the injuries caused to a bystander when the paint fumes drifted from the area where the policyholder was working.[25]

In addition to plumbing the types of reasons that courts have given for refusing to apply the "absolute" and "total" pollution exclusions, one can examine the types of claims that courts have found to be outside the parameters of those exclusions. These claims can generally be grouped into 10 categories:

1. Fumes When Products Are Used For Their Intended Purpose Are Not Pollutants. Perhaps the biggest category of claims found to be outside the ambit of the "absolute" and "total" pollution exclusions are claims for injury from fumes, typically from roofing materials, floor resurfacing materials, paint, solvents or other household or workplace volatile chemicals.[26] These cases – which are similar to the carbon monoxide cases and the accidental exposure cases

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[25] *100 N.Y.2d at 388. See also Roofers' Joint Training, Apprentice & Educ. Comm. v. Gen. Accident Ins. Co. of Am.* (N.Y. App. Div. 2000) 275 A.D.2d 90, 92, 713 N.Y.S.2d 615 (pollution exclusion did not apply to injuries sustained "from the use of a product for its intended use" where the injury-causing fumes were released from a hot air gun during a demonstration).

[26] *Jabar* (applying Maine law) (fumes from roofing products from repair of roof); *Advanced Adhesive Technology* (applying Georgia law) (fumes from policyholder's adhesive); *Sargent* (applying Missouri law) (fumes form muriatic acid used to level steel-trowelled floor); *Garfield* (applying New York law) (fumes from carpet); *Calvert* (applying New York law) (fumes from glue applied to cement floor prior to wood floor installation); *Island Assoc.*(applying Pennsylvania law) (fumes from chemical used in asbestos abatement); *Center for Creative Studies* (applying Michigan law) (fumes from photographic chemicals); *Koloms* (applying Illinois law) (fumes from defective household heater); *Freidline* (applying Indiana law) (fumes from installation of carpet); *Roofers'* (applying New York law) (fumes from roofing materials); *Tufco* (applying North Carolina law) (fumes from floor resurfacing).

cited below – closely resemble the examples of claims that insurance industry spokespeople said these exclusions would not bar. Moreover, these claims implicate all five of the above common justifications for refusing to apply the "absolute" and "total" pollution exclusions.

2. Asbestos/Products Used for Their Intended Purpose. A number of courts have refused to find that the "absolute" and "total" pollution exclusions apply to injuries claimed to have been caused by products or substances which were used for their intended purpose.[27] Such claims implicate most of reasons discussed above, for refusing to apply the "absolute" and "total" pollution exclusions.

3. Chronic Workplace Exposure Where the Insurer Understood the Business. Generally, courts refuse to apply the "absolute" and "total" pollution exclusions to claims for injuries which occurred as a matter of course during the more or less routine operations of the policyholder. These operations were well known and, presumably, understood by the underwriter when selling the coverage and calculating the premiums.[28]

4. Limited Accidental Workplace or Home Exposure Incidents Should Not Work a Forfeiture of Coverage.

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[27] *Kellman* (applying Michigan law) (floor sealing materials); *Northfield Ins. Co. v. George E. Buisson Realty Co.* No. Civ. A. 99-151 (E.D. La. Aug. 26, 1999) (applying Louisiana law) (claims for emotional distress from exposure to asbestos); *Essex* (applying Alabama law) (indoor release of asbestos fibers); *Roofers' Joint Trading* (applying New York law) (roofing materials); *West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.* (Iowa 1993) 503 N.W.2d 596 (applying Iowa law) (sand).

[28] *Minkoff v. Action Remediation* (N.Y. Sup. Ct. July 1, 2010) (Index No. 559/06), 2010 WL 3960603 (mold remediation business reasonably would expect fumes from bleach and chemicals to be covered); *Bay* (applying Texas law) (workplace exposure to cement when in intended container); *Island Assoc.* (applying Pennsylvania law) (fumes from chemical used in asbestos abatement); *Center for Creative Studies* (applying Michigan law) (fumes from photographic chemicals); *Sandbom* (applying Louisiana law) (injury from cleaning storage tank); *West* (applying Louisiana law) (workplace exposure to chemicals).

These claims perhaps most closely fit the insurance industry's example of claims not excluded by the "absolute" and "total" pollution exclusions; *i.e.*, the child burned by accidental or improper use of Drano, to which the Liberty Mutual representative stated that he did not "know anybody that's reading the policy" to exclude such a claim.[29]

5. Lead Paint Is a Useful Product Not a Pollutant. A number of courts have refused to apply the "absolute" and "total" pollution exclusions to claims of injury from exposure to lead paint.[30] Typically, these claims involve ingestion of lead paint chips by children, claims which implicate at least the three of the reasons listed here for refusing to apply these exclusions, and which should implicate: *i.e.*, the flaking off of a useful product applied as intended should not constitute a "release" of a "pollutant" whatever it means in this context.

6. Carbon Monoxide Is a Common Was. Carbon monoxide poisoning claims are simply the most frequent example of the "fumes" claims that courts have found are not barred by the "absolute" and "total" pollution exclusions.[31] These claims typically involve

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[29] *Boise Cascade* (applying Maine law) (accidental workplace release of chlorine gas); *Holmes* (applying Kansas law) (exposure of chemicals to one child); *Pittsburg* (applying Kansas law) (exposure of drivers to insecticide); *Bodine* (applying California law) (exposure to sprayed material); *Great Lakes* (applying Indiana law) (exposure to pesticide); *Karroll* (bulldozer operator sprayed with sulfuric acid); *Kent Farms* (diesel fuel splashed on driver).

[30] *Lititz Mut. Ins. Co. v. Steely* (Pa. 2001) 785 A.2d 975 (applying Pennsylvania law); *Lefrak* (applying New York law); *Danbury* (applying Connecticut law); *Stringfield* (applying Illinois law); *McFadden* (applying Massachusetts law); *Weaver* (applying New Hampshire law); *Byrd* (applying New Jersey law); *Cepeda* (applying New York law); *Idbar* (applying New York law); *Generali* (applying New York law).

[31] *Barrett v. National Union Fire Insurance Co. of Pittsburgh* (Ga. Ct. App. 2010) 696 S.E.2d (carbon monoxide did not "poison" but mere release led to injury because of negligence so pollution exclusion held not to apply); *Stoney Run* (applying New York law) (fumes from defective heater); *Regional Bank* (applying Colorado law) (fumes from defective wall heater); *Koloms* (applying Illinois law) (fumes from defective household heater); *RSJ* (applying Kentucky law) (fumes from defective boiler); *Thompson* (applying

(footnote continued)

injury caused by defective combustion-based energy sources such as Public Water Supplies, household or commercial ovens, heaters, or hot-water tanks.

7. Sewage, Sewers, Wastewater Treatment Plants, Septic Tanks, Bacteria Were Never Meant To Be Excluded. These claims typically involve exposure to backed-up sewage or to contaminated water. They implicate an array of the above common justifications. Water itself has been known to cause death when consumed in excess and therefore, could conceivably be classified as an irritant.[32]

8. Attenuated Causation Where Pollution Is Tangential. These cases are of the variety that make one wonder why the insurance company chose to litigate them and why, after the insurance company lost, it did not pay the policyholder a premium to decertify the opinion.[33] In short, they all involve injury which only tangentially involved a pollutant.

9. Substances Obviously Not Pollutants: Water, Sand, Air, etc.. If your claim involves lake water, sand, carbon dioxide or some other substance that is

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Louisiana law) (fumes from defective heater); *Gill* (applying Massachusetts law) (fumes from tandoori oven); *Kenyon* (fumes from furnace); *Gamble Farms* (applying Pennsylvania law) (fumes from blocked flue in water heater).

[32] *Builders Mutual Insurance Co. v. Half Court Press LLC* (W.D. Va. Aug. 3, 2010) (Civ. A. No. 6:09-cv-00046), 2010 WL 3033911 (sediment and water not clearly "pollution"); *see also Titan* (applying New Hampshire law) (particulates, noise and bright lights from sewage treatment plant); *Evanston Ins. Co. v. Treister* (D.V.I. 1992) 794 F. Supp. 560 (applying the law of the Virgin Islands) (defective sewer lines); *Keggi* (applying Arizona law) (fecal coliform bacteria); *Minerva* (applying Arkansas law) (back up of raw sewage); *Golden Estates* (applying New Jersey law) (defective septic systems); *Cederhurst* (applying New York law) (overflow of raw sewage from municipal sewer system); *Kleinke* (applying New York law) (E Coli bacteria).

[33] *Red Panther Chem. Co. v. Insurance Co. of the State of Pa.* [10th Cir. 1994] 43 F.3d 514 (applying Mississippi law) (insecticide in can falls off truck on highway, lodges in undercarriage of car, and falls on mechanic who raised up car); *Grow Group* (applying California law) (back injury incurred in fleeing cloud of gas); *Avery* (applying Louisiana law) (smoke from fire blinded motorists and caused accident).

obviously not a pollutant, it is not excluded by the "absolute" and "total" pollution exclusions.[34]

10. Hazardous Substance Remediation Is Not a Release and Negligence Generally Is the Issue – Not Pollution. Courts have recognized that injuries caused during the remediation of hazardous substances – such as exposure to chemicals in the course of cleaning a tank – should not be barred by the "absolute" and "total" pollution exclusions.[35] These cases are similar to those discussed immediately above and finding that injuries from chronic or accidental workplace exposure to hazardous substances are not excluded. The conclusion of these courts is obviously correct, as, first, there is typically no "release" of pollutants involved (rather, the release is what is being remediated), and second, the liability of the policyholder typically stems from negligent protection or supervision of its employees and not from long-term, industrial pollution of the environment.

IV. APPLICATION OF THE "ABSOLUTE" AND "TOTAL" POLLUTION EXCLUSIONS TO CLAIMS OTHER THAN THOSE FOR LONG-TERM INDUSTRIAL POLLUTION OF THE ENVIRONMENT

The insurance industry's ever expanding application of the "absolute" and "total" pollution exclusions – described above – has been met with very mixed results and increasing skepticism from many courts, including the majority of state supreme courts. The fact, however, that

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[34] *Hirschhorn v. Auto-Owners Insurance Co.* (Wis. Ct. App. Oct. 19, 2010) (No. 2009AP2768), 2010 Wisc. App. LEXIS 842 (bat guano was not, clearly and unambiguously, a "pollutant"); *Iowa Iron Works* (applying Iowa law) (sand); *Donaldson* (applying Wisconsin law) (carbon dioxide from breathing).

[35] *Island* (applying Pennsylvania law) (fumes from chemical used in asbestos abatement); *Sandbom* (applying Louisiana law) (injury from cleaning storage tank)

some courts have adopted the industry's broad interpretation of these exclusions to exclude coverage for injuries that have nothing to do with traditional "pollution", indicates that this will continue to be an area of controversy for years to come, and will continue to be heavily litigated. As shown in further detail below, in such litigation, policyholders should have the upper hand.

A. In Securing Approval for the "Absolute" or "Total" Pollution Exclusions, the Insurance Industry Promised State Regulators That It Would Not Be Overzealous in Applying the Exclusions

In the mid-1980's, as litigation surrounding the scope of the "sudden and accidental" pollution exclusion continued, the insurance industry, through the Insurance Services Office ("ISO"), an insurance industry trade organization which drafts and revises standard-form liability insurance policies and endorsements (the successor to IRB & MIRB), drafted another pollution exclusion: the "absolute" pollution exclusion. ISO specifically crafted this exclusion to exclude liability for government-directed cleanup of damage to the natural environment.

Courts generally have recognized that many of the key terms in the so-called absolute pollution exclusion – "release," "disposal," and "escape" – are environmental terms of art; indeed, many are key defining terms for

the imposition of liability under CERCLA (a/k/a to Superfund law).[36] For instance, the exclusion 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 and RCRA[37], but is foreign to common tort liability.[38] The incorporation of federal 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.[39]

Indeed, the insurance industry submitted a companion pollution liability insurance policy to the nation's state insurance regulators at the time it introduced the "absolute" pollution exclusion, representing it to be designed to restore the insurance coverage excluded by the exclusion. As stated by former Louisiana Insurance Commissioner James H. Brown in

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[36] *See, e.g.,* 42 U.S.C. 9607(a).

[37] *See, e.g.,* 42 U.S.C. 91.

[38] *See id.*

[39] *See also Porterfield v. Audubon Indem. Co.* (Ala. Nov. 22, 2002) (No. 1010894), 2002 WL 31630705, at *7 ("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, and Liability Act a.k.a. "Superfund," 41 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.'").

1996, this companion insurance policy only restored coverage for "environmental damage":

> When the Insurance Services Office submitted the APE [absolute pollution exclusion to state insurance regulators] in the mid-1980's, 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 insurance 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.[40]

Commissioner Brown aptly also noted that "[t]he exclusion should not be read more broadly than the policy which restores the deleted coverage," and suggested that the insurance industry should be estopped from asserting an interpretation of the "absolute" pollution exclusion that is contrary to the one given to the nation's insurance regulators:[41]

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[40] James H. Brown, La. Ins. Commissioner, Letter to the Editor, *National Underwriter Prop. & Casualty Ed.*, April 22, 1996 at 30 (emphasis added).

[41] *See Morton Int'l v. Aetna Cas. In. Svr. Co.* (recognizing regulatory estoppel as applied to the insurance industry with respect to the Sudden & Accidental Pollution exclusion); *see also* John A. MacDonald, *Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial*, Coverage, Nov./Dec., 1997, at 1.

> 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.[42]

As Commissioner Brown has noted, the "absolute" pollution exclusion was written in such broad terms that it is susceptible to abuse by insurance companies arguing that it applies in situations far removed from government environmental actions enforcing CERCLA: "the supposed definition [of the "absolute" pollution exclusion] has been expanded even further [by insurance companies] 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."[43] These interpretations come despite the fact that the insurance industry secured approval of the "absolute" pollution exclusion by representing to regulators that it would not read the exclusion to bar coverage in situations outside those cases of typical, industrial pollution.

For instance, at a 1985 hearing before the Texas State Board of Insurance, key representatives of the insurance industry stated that the "absolute" pollution exclusion, then being introduced for state-by-state

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[42] *Morton Int'l v. Aetna Cas. In. Svr. Co.*, at 30, 54.

[43] Letter to the Editor from Commissioner James H. "Jim" Brown, *Nat'l. Underwriter Prop. & Casualty Ed.*, (May 1996) at 16.

approval nationwide, was unavoidably ambiguous and was not intended to bar coverage in all instances. These representatives discussed several examples of passive pollution which were not intended to be barred from coverage, including leaking underground tanks. One of the Texas regulators, David Thornberry, said that he was concerned that the exclusion was overbroad and ambiguous. Wade Harrel, a representative of Liberty Mut. Ins. Co., responded that no one would read the exclusion literally:[44] Despite Mr. Harrel's assurances, and the insurance industry's assertion that courts would not read the exclusion literally, the Texas regulator continued to complain that the exclusion was ambiguous. The response of Ed Rinehimer, of Travelers, suggested that nothing could be done to eliminate ambiguity:

Mr. Rinehimer indicated that in order to make the "absolute" pollution exclusion effective, specific risk-by-risk exclusions would have to be included. The example that he provided was for a specific hazardous substances such as benzene (among other things, a component of gasoline

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[44] *See generally*, Ellison, et al., *Recent Developments in the Law Regarding the "Absolute" and "Total" Pollution Exclusions, the "Sudden and Accidental" Pollution Exclusion and Treatment of the "Occurrence" Definition*, SN050 ALI-ABA 1 (ALI-ABA May 8-9, 2008).

and cigarette smoke).[45] His testimony shows that the exclusion would be subject to selective enforcement.

The statements by representatives of the insurance industry show that the exclusion was "overdrafted," and said they did not intend it to be applied overbroadly.[46] Pleading the impossibility of drafting an exclusion narrowly tailored to address only long-term industrial pollution of the environment, the insurance industry essentially told regulators that they should trust them not to abuse an "overdrafted" exclusion.

B. The Subsequent "Total" Pollution Exclusion Is Also Limited: Coverage Still Exists

The "Total Pollution Exclusion," introduced in 1988, differs from the "absolute" pollution exclusion only in that it removes coverage for releases from products and for certain, off-site releases of pollutants. ISO, in setting forth the effect of the "Total Pollution Exclusion Endorsement," stated:

> [T]he endorsement eliminates the pollution coverage left in the policy by the [1985 pollution exclusion] — products/completed operations coverage and certain off-site discharges.[47]

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[45] *Id.*

[46] *Id.*

[47] *See generally*, Hall & Sahs, *A Project Of The Environmental & Natural Resources Law Section Of The State Bar Of Texas*, 46 Tex. Prac., Environmental Law § 33.11 (Texas Practice Serves 2010) (2d ed.).

C. Appellate Courts Nationwide Increasingly Are Enforcing the Promises the Insurance Industry Made to State Regulators In Securing Approval of the "Absolute" or "Total" Pollution Exclusions

Despite their promises to regulators that they could be trusted, and despite the foregoing drafting history and regulatory representations, members of the insurance industry have used the "absolute" and "total" pollution exclusions to deny coverage for all kinds of claims, including claims functionally identical to that, discussed by the Liberty Mutual representative, where a child is burned by the accidental exposure to acid. Fortunately, increasing numbers of courts have refused to give effect to "absolute" and "total" pollution exclusions in contexts that do not involve traditional, industrial pollution of the environment. Obviously, however, there have been a number of contrary decisions. These cases are broken down by jurisdiction in Appendix A. The overwhelming majority of cases construing "pollution" exclusions have done so in the liability context, with about half of the case nationwide finding that such pollution exclusions are limited to industrial pollution of the environment of the type that environmental statutes were passed to address.

For instance, the Louisiana Supreme Court found that the so-called total pollution exclusion "was designed to exclude coverage for environmental pollution only." *Doerr v. Mobil Oil Corp.* (La. 2000) 774 So. 2d 119. The *Doerr* Court explained that a literal reading of the "total"

pollution exclusion would lead to absurd results; accordingly, it gave the exclusion the interpretation that the insurance industry had put forth in seeking regulatory approval. In *Doerr*, plaintiffs, 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. That order was reversed by the Fourth Circuit Court of Appeal based on the Louisiana Supreme Court's ruling in *Ducote v. Koch Pipelines, Inc.* (La. 1999) 730 So.2d 432.[48]

Doerr, considering the same "total" pollution exclusion as that in *Ducote*, initially focused on the fact that the exclusion, as worded, had virtually unlimited application. The exclusion, as worded, could be used to justify denying coverage for virtually any type of damage.[49] Accordingly, the *Doerr* court engaged in an extensive analysis of the drafting and

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[48] *Ducote*, decided two years prior to *Doerr*, involved a claim against a pipeline operator for exposure to anhydrous ammonia caused when a contractor's tree-cutter accidentally severed an ammonia transmission line. The pipeline operator, an additional named insured under the contractor's liability policy, filed a cross-claim against the contractor's insurance company, which denied coverage on the basis of a "total" pollution exclusion. 730 So. 2d at 435. The *Ducote* court found the plain reading of the exclusion barred coverage for "releases" of "pollutants," and a "release" of a "pollutant" was involved. *Id.* at 436. In doing so, it explicitly rejected previous Louisiana holdings that "absolute" and "total" pollution exclusions were limited in application to long-term environmental polluters. *Id.* at 437. The *Ducote* court did not consider any of the drafting or regulatory history of the "absolute" and "total" pollution exclusions, in which insurance companies represented to regulators that they would only apply pollution exclusions to cases of typical, industrial pollution of the environment.

[49] *See, e.g.*, City of Chesapeake (denying coverage for harm alleged from chlorinating drinking water), cited above.

regulatory history of the exclusion. On the basis of this material, the *Doerr* court found that "absolute" and "total" pollution exclusions must essentially be limited in application to, long-term CERCLA-type environmental pollution:

> 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."[50]

In evaluating "absolute" and "total" pollution exclusions, the court indicated that the trier of fact should examine: (i) whether the policyholder is a "polluter" within the meaning of the exclusion (considering the nature of the policyholder's business, whether the policyholder has pollution coverage, etc); (2) whether the injury-causing substance is a "pollutant" within the meaning of the exclusion (considering the nature of the substance, its typical usage, the quantity of the discharge, and whether it was being used for its intended purpose at the time it spilled, etc.); and (3) whether there was a "discharge, dispersal, seepage, migration, release or escape" of a "pollutant" by the policyholder within the meaning of the

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[50] 774 So. 2d at 135.

insurance policy (considering whether the pollutant was intentionally discharged, whether the pollution was active or passive, etc.).[51] Applying the above factors and inquiries, the *Doerr* court reversed summary judgment in favor of the insurance company.

Doerr is not alone. In *Keggi v. Northbrook Property & Casualty Insurance Co.* (Ariz. Ct. App. 2000) 13 P.3d 785, the Arizona Court of Appeals ruled that the "absolute" pollution exclusion does not apply to injuries caused by bacteria-contaminated water. *Keggi*, a professional golfer, sued Desert Mountain for injuries suffered as a result of the ingestion of tap water which was contaminated by various bacteria. Desert Mountain *Keggi's* lawsuit to its insurance companies which denied any duty to defend based on the absolute pollution exclusion. Thereafter, Desert Mountain filed a declaratory judgment action against its insurance companies, and settled with *Keggi* and assigned its rights against those companies to her. Reviewing the trial court's grant of summary judgment based on the exclusion, the Arizona Court of Appeals reversed, finding that the bacteria which caused *Keggi's* injuries were not "pollutants." Specifically, noting that the "absolute" pollution exclusion limited the definition of pollutant to "irritants" and "contaminants" that are "solid,

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[51] *Id.* at 134-35.

liquid, gaseous or thermal," the court held that water-borne bacteria can not be considered a "pollutant."[52]

Similarly, the court reviewed the types of "contaminants" or "irritants" included within the definition of "pollutants" and held that the bacteria that caused the injuries to *Keggi* did not fall within the type of environmental examples of "contaminants" and "irritants" identified in the exclusion:

> The enumerated items, namely, "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste" are primarily inorganic in nature. Bacteria, as living organisms, are not similar to the exclusion's enumerated list.[53]

Singling out the term "waste," which the court hypothesized could arguably include bacteria, the court held that the definition of "waste," like that of "pollutant," did not include total or fecal coliform bacteria. The court held that the definition of the term "waste" implies industrial byproducts:

> "Waste" is defined under the policies to include "materials to be recycled, reconditioned or reclaimed." This definition of "waste" implies that the term refers to industrial byproducts, rather than to the organic matter which might have caused the contamination of the water with the total and fecal coliform bacteria.[54]

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[52] *Id.* at 789.

[53] *Id. at 790.*

[54] *Id.*

Addressing insurance company arguments that "pollutants" include "any …contaminant" and that bacteria could be considered a "contaminant" and therefore a "pollutant," the court, after reviewing numerous decisions to consider this issue, determined the exclusion was intended to preclude coverage for environmental pollution by hazardous industrial waste of the type addressed by CERCLA and other state and federal environmental statutes. The court concluded that the insurance industry did not intend for the exclusion to bar coverage for "all contact with substances that can be classified as pollutants"[55] Finally, the court recognized that the exclusion was written in such broad terms as to be essentially boundless, and, thus, that it must have a limiting principle: it bars coverage only for industrial pollution of the type addressed by federal and state environmental statutes.[56]

A common thread running through decisions refusing to apply the insurance industry's revamped interpretation of these pollution exclusions, as can be seen from *Doerr* and *Keggi*, is that, at a minimum, they are latently ambiguous when applied to claims other than those for the long-term, industrial pollution. For instance, in *Center for Creative Studies v. Aetna Life & Casualty Co.* (E.D. Mich. 1994) 871 F. Supp. 941, the

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[55] *Id.*

[56] *Id.*

underlying plaintiff brought action seeking damages for 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 environmental statutes, and that the removal of the terms "into or upon land, the atmosphere or any water course or body of water," was solely to remove redundancy.[57] Further, the court agreed that "'[t]he terms "irritant" and "contaminant," when viewed in isolation, are virtually boundless, because "there is virtually no substance or chemical in existence" that would not irritate or damage some person or property,'" and, therefore, that the so-called pollution exclusions required a limiting principle:

> [W]ithout some *limiting principle*, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.[58]

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[57] 871 F. Supp. at 944-45, 945 n.5.

[58] *Id.* at 945.

Keeping these considerations in mind, the court found that the pollution exclusion did not apply because there had been no "discharge, dispersal, release or escape" of chemicals, which the court agreed were pollutants:

> This Court adopts the reasoning of the Sixth Circuit in *Lumbermens* and the *Tufco* court. As was the case in *Lumbermens*, this Court believes that it would strain the plain meaning and obvious intent of the "discharge" language to suggest that the underlying state court plaintiff's exposure to a photo-developing chemical resulted from a "discharge, dispersal, release or escape."[59]

Similarly, in *Regional Bank of Colorado*, the policyholder sought coverage for damages to a resident who complained of carbon monoxide poisoning from a defective wall heater. Affirming summary judgment for the policyholder, the court first noted that the state of Colorado recognizes the doctrine of reasonable expectations.[60] Citing *Pipefitters*, the court agreed that "[w]ithout some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to absurd results."[61] Citing *Pittsburg*,[62] the court agreed that the exclusion applied only to "substances generally recognized as polluting the environment" and

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[59] *Id.* at 946.

[60] 35 F.3d at 497.

[61] *Id.* at 498.

[62] *Westchester Fire Ins. Co. v. City of Pittsburg, Kan.* (D. Kan. 1992) 794 F. Supp. 353.

"recognized as a toxic of particularly harmful substance in industry or by government regulators."[63] Accordingly, the court held:

> While a reasonable person of ordinary intelligence might well understand carbon monoxide is a pollutant when it is emitted in an industrial or environmental setting, an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as "pollution." It seems far more reasonable that a policyholder would understand the exclusion as being limited to irritants and contaminants commonly thought of as pollution and not as applying to every possible irritant or contaminant imaginable.[64]

D. Under Their Own Terms, the "Absolute" and "Total" Pollution Exclusions Should Not Apply to Claims Alleging Injury from Exposure to, or Inhalation of, Toxic Substances

Pollution exclusions are written in quite specific terms, which typically have a poor fit with claims alleging injuries other than those claims about which environmental statutes are concerned. For instance, pollution exclusions bar coverage for "bodily injury" from "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." Plaintiffs pressing claims from exposure to, or inhalation of, toxic substances frequently allege they were negligently exposed to or inhaled toxic chemicals, not that toxic chemicals were discharged, were

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[63] *Id.*

[64] *Id.*

emitted, were dispersed, migrated, were released or escaped from barrels, insulation or, in this case, paint cans onto their bodies or into their lungs:

> "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.[65]

Put another way, toxic exposure plaintiffs allege they were injured, not "polluted."

Accordingly, a number of courts have recognized that ISO's pollution exclusions, by their very terms, do not apply in situations where injury is caused merely by exposure to toxic chemicals. For instance, in *Roofers' Joint Training Apprentice & Education Committee of Western New York v. General Accident Insurance Co.* (4th Dep't 2000) 713 N.Y.S.2d 615, the claimant sought recovery from a training committee for injuries resulting from exposure to toxic fumes, released when a roofing membrane was applied with a hot air gun during a classroom construction

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

safety course. In an insurance coverage action filed after the training committee's insurance company denied coverage based on a pollution exclusion, the court found "[t]he terms used in the exclusion – such as "discharge" and "dispersal" – are terms of art in environmental law used with reference to damage or injury caused by dispersal or containment of hazardous waste."[66] Accordingly, the court found that it would strain the plain meaning of those terms to apply them to the claimant's exposure to the harmful fumes:

> [F]or the exclusion to apply there must be a "discharge, dispersal ... release or escape of pollutants". The fumes that injured [the claimant] were part of the normal roofing process and confined to the area where the demonstration was conducted. [The claimant] was in the immediate vicinity when he inhaled them. "It strains the plain meaning, and obvious intent, of the language to suggest that these fumes ... had somehow been 'discharged, dispersed, released or escaped.'"[67]

Similarly, in *Sphere Drake Insurance Co. v. Y.L. Realty Co.* (S.D.N.Y. 1997) 990 F. Supp. 240, the insurance company argued coverage was barred for claims of lead poisoning from ingestion of flaked paint

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[66] 713 N.Y.S.2d at 617 *(citing Continental Cas. Co. v. Rapid-Am. Corp.* (N.Y. 1993) 609 N.E.2d 506).

[67] *Id.* (*citing Lumbermens Mut. Cas. Co. v. S-W Indus., Inc.* (6th Cir. 1994) 39 F.3d 1324, 1336 (emphasis added)); *see also Vigilant Ins. Co. v. V.I. Techs., Inc.* (1st Dep't 1998) 253 A.D.2d 401, 403, 676 N.Y.S.2d 596, 597 ("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.").

chips. After noting that "pollution exclusion clauses refer only to industrial and environmental pollution," the court further noted that this holding was supported by the terms in the exclusion, which did not fit the lead chips reached into the system of the injured child:

> The language of the exclusion clause supports this interpretation. The clause discusses injuries caused by "discharge, dispersal, release or escape of pollutants." These are terms of art in environmental law, generally used to describe the improper disposal or containment of hazardous waste.... These terms do not ordinarily encompass the type of "movement" associated with lead paint poisoning. Lead paint poisoning is not caused by "discharge, dispersal, release or escape;" rather, lead poisoning results from ingestion or inhalation of paint that has flaked over time. To extend the meaning of the clause to cover lead paint poisoning would require an overly broad interpretation of the above-quoted language inconsistent with accepted usage and the expectations of contracting parties.[68]

Again, the "terms [in the pollution exclusion] do not ordinarily encompass the type of 'movement' associated with" toxic substances from barrels or insulation or paint cans to the bodies or lungs of workers or claimants.

Decisions rendered elsewhere in the United States, are in accord that claims of injury from exposure to toxic elements do not fit within pollution exclusions using terms like "discharge." For instance, in *S-W Industries*,BETTER CITE IN FN! a claimant sought recovery from his

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[68] 990 F. Supp. at 243 *(emphasis added); see also Generali-U.S. Branch v. Caribe Realty Corp.* (Sup. Ct. New York County 1994) 612 N.Y.S.2d 296, 299 ("Finally, to the extent that [the claimant] suffered lead poisoning from eating paint chips, this court is not convinced that his injuries arise out of the discharge, disposal, seepage, migration, release or escape of a pollutant.").

employer for alleged injuries from exposure to "fumes from highly-volatile, toxic cements and solvents as well as various congestive dusts created by the plant's rubber fabricating business."[69] In a subsequent insurance coverage dispute, the rubber fabricator's insurance company denied coverage on the basis of a pollution exclusion, on the ground that "it is undisputed that [the claimant's] injuries were caused by his exposure to highly-volatile, toxic cements and solvents as well as various congestive dusts."[70] The court, reversing summary judgment for the insurance company, rejected the argument that, for instance, there had been a "discharge" of pollutants to the claimant's lungs:

> For the exclusion to apply, its terms require that a "discharge, dispersal, release or escape" of the offending substances to occur. A "discharge" is defined as "a flowing or issuing out." To "disperse" is defined as "to cause to breakup and go in different ways"; "to cause to become spread widely." A "release" is defined as "the act of liberating or freeing: discharge from restraint." An "escape" is defined as an "evasion of or deliverance from what confines, limits, or holds." *Webster's Third New International Dictionary*, (1986) 644, 63, 1917, 774.
>
> The fumes and dust that injured [the claimant], it is undisputed, were confined inside [the policyholder's] plant and, in fact, were confined to that portion of the plant involved in the gluing process in which [the claimant] worked. It strains the plain meaning, and obvious intent, of the language to suggest that these fumes, as they went from

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[69] 39 F.3d at 1326.

[70] *Id.* at 1336.

> the container to [the policyholder's] lungs, had somehow been "discharged, dispersed, released or escaped."[71]

Likewise, in *Lititz*, Pennsylvania's Supreme Court reversed a lower court decision finding that lead-pigmented paint is a pollutant which falls under the "absolute" pollution exclusion. The Court considered whether the exclusion's requirement that the alleged injury arise from a "discharge, dispersal, release or escape" of pollutants was ambiguous when evaluating the physical process by which lead-pigmented paint becomes available for human ingestion or inhalation. On this issue, the court assessed the "specific form of movement in question" and considered the language used to describe the movement of lead-pigmented paint instructive. In finding that the process of degrading the surface of lead-pigmented paint does not take place quickly, the court held that "the exclusionary language does not clearly include or exclude the physical process here at issue, but is, as to that process, ambiguous."[72] Accordingly, because the exclusionary language was found to be ambiguous, the court held that the language of the exclusion must be construed in the policyholder's favor:

> Any such inconsistency in meaning simply indicates, however, that the exclusionary language does not clearly include or exclude the physical process here at issue, but is, as to that process, ambiguous. Such ambiguity requires that the

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[71] *Id. (emphasis added).*

[72] 785 A.2d at 982.

> language be interpreted in favor of the insured. We conclude, therefore, that the pollution exclusion clause does not preclude coverage for the injuries alleged to have occurred in this case.[73]

The *Lititz* court also expressed frustration that the issue of insurance coverage turns upon distinctions that could well have been avoided by clearer drafting of the policy language by the insurance company. The court observed that "it is the drafters of the policy who are in the best position to introduce greater clarity into the process, as, for example, by including in their policies an explicit exclusion for lead-paint poisoning."[74]

E. Exclusionary Language Involving Pollution Does Not Bar Coverage for Premises/Operations Claims Alleging Negligent Exposure

Courts throughout the United States have recognized that claims under specific and separate categories of liability insurance known as premises/operations coverage allege that negligent exposure to toxic substances, are not barred by pollution exclusions. For instance, in *Schumann v. State* (Ct. Cl. 1994) 610 N.Y.S.2d 987, an employee of a contractor hired by the State brought suit alleging:

> [The claimant's] work included pre-cutting steel, which had been painted with lead based paint, with acetylene torches. [The claimant] was not provided with a respirator or any other means of protection from the toxic fumes which were a

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[73] *Id. (emphasis added).*

[74] *Id.* at 982 n. 11.

> by-product of cutting the steel with the torches and, consequently, he suffered prolonged, direct exposure to these toxic fumes. As a result, [the claimant] developed lead poisoning.[75]

The State sought coverage, including a defense, from its insurance company, which denied coverage based on a pollution exclusion.[76] The court rejected the insurance company's argument, finding that the claimant alleged injury not from pollution, but from negligence in failing to provide adequate protective devices in the workplace premises:

> Here the claim clearly defines the negligence of the insured to have been its failure to supply claimant with the necessary protective mask that was required when claimant was performing the operation which allegedly caused his injury. Even if we accept the argument that an injury caused by the discharge of noxious fumes resulting from cutting steel beams coated with lead-based paint is excluded from coverage, [the insurance company] must still defend as the "reasonably possibility [exists] that the insured may be held liable for some act or omission covered by the policy." Here, the failure to provide claimant with an appropriate protective device gives rise to exposure – covered by the policy and not excluded by the pollution exclusion clause.[77]

Accordingly, the court found that, because the insurance company would be obligated to cover claims alleging negligent failure to provide protective equipment, and because such claims would not be excluded by the pollution

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[75] 610 N.Y.S.2d at 988.

[76] *Id.* at 988-89.

[77] *Id.* at 989 *(citations omitted, emphasis added)*.

exclusion, the insurance company, at a minimum had a duty to defend the State.[78]

Similarly, in *Calvert Insurance Co. v. S & L Realty Corp.* (S.D.N.Y. 1996) 926 F. Supp. 44, the policyholder, a building manager, was sued by an employee of a tenant who alleged bodily injury from exposure to fumes. Specifically, the claimant alleged that a contractor was negligent in falling to ventilate the work area causing her to be exposed to fumes when gluing new tiles to the building's floor.[79] The building manager's insurance company denied coverage, citing a pollution exclusion, brought action against its policyholder, and moved for summary judgment. In that motion, the insurance company argued that "the questions of how an injury occurred and whether the acts causing an injury were intentional, reckless, or negligent are not relevant to the scope of a pollution exclusion clause," which "focus[sed] solely on the agent causing the harm."[80]

Citing *Schumann*, the court first found that the pollution exclusion was subject to the interpretation that it only applied to instances of environmental pollution.[81] Further, the court held that, even assuming that

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[78] *Id.* at 991.

[79] 926 F. Supp. at 45.

[80] *Id.* at 46.

[81] *Id.*

the pollution exclusion applied to situations beyond CERCLA-type environmental pollution, it could not apply to the claimant's allegations of negligence in exposing her to fumes:

> The underlying complaint alleges, *inter alia*, negligence, failure to inspect, and failure to remedy a dangerous condition which was initially created by the chemical fumes or vapors from the floor cement. Where, as here, the underlying action is based not only on an alleged pollutant, but on various allegedly negligent acts and omissions of the insured, the injuries complained of may reasonably be found to have arisen from improper ventilation or the failure to provide proper protective devices.[82]

Accordingly, because allegations such as these involving pollutants where the alleged liability is incidental to business operations would not be within the ambit of the pollution exclusion, the court denied the insurance company's motion for summary judgment.

SUMMARY

History is critical to a policyholder's efforts to obtain coverage. As the foregoing makes clear, history is squarely on the side of policyholders fighting against overreaching and unreasonable attempted applications of "absolute" and "total" pollution exclusions. In virtually every circumstance where courts around the nation have considered the historical context of the exclusions' drafting and incorporation into insurance policies, these courts have refused to apply the "absolute" pollution exclusion outside the context

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[82] *Id.* at 47 *(emphasis added).*

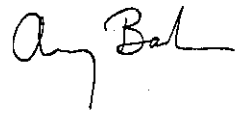
of traditional CERCLA-type environmental pollution claims. To the contrary, they have looked to the reasonable expectations of policyholders, among other reasons, and have concluded that accidental damage or injuries caused by various exposures will not be excluded if the underlying activity cannot be fairly characterized as, or related to "pollution." Policyholders must continue to make sure that representations by the insurance industry as to what these provisions mean at the time they are adopted and approved remain the standard by which later application of those provisions are measured. This is imperative to be fair to policyholders, to fulfill the intent of the insurance policy coverage, to preserve the rights of policyholders and to respect/uphold public policy.

CONCLUSION

For the reasons stated herein, *amicus curiae* United Policyholders respectfully requests that this Court reverse the lower court's decision and grant its' motion for leave to submit an *amicus curiae* brief.

Dated: New York, New York
March 16, 2011

Respectfully submitted,

By: 

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Appendix A

California (Mixed)

Pro-Policyholder

MacKinnon v. Truck Ins. Exch. (Cal. 2003) 73 P.3d 1205 (finding that absolute pollution exclusion did not apply to injuries from fumes from application of pesticide).

Gonzales v. Western Mut. Ins. Co. (Cal. Ct. App. Dec. 30, 2004) (No. D044000), 2004 WL 3019113 (holding that costs to remove asbestos from house damaged by fire were covered despite total pollution exclusion contained in homeowners policy).

C.O.D. Gas & Oil Co., Inc. v. Ace Am. Ins. Co. (Cal. Ct. App. June 8, 2004) (No. D042245) 2004 WL 1245759, at *4 (holding that loss of sales relating to leak in underground storage tanks were not excluded under absolute pollution exclusion; "purpose of the absolute pollution exclusion is to protect insurers against environmental losses and not to exclude coverage for insured's ordinary negligence").

Manus v. Ranger Ins. Co. (9th Cir. 2005), 142 Fed. App'x 280 (holding that dumping of waste materials at illegal dump site, which included "dirt, brush, weeds, grapevines, leaves, tree stumps, tree branches, ice plants, sold, concrete, and tires," was not unambiguously excluded by pollution exclusion).

Cooper v. Travelers Indem. Co. of Ill (9th Cir. 2004), 113 Fed. App'x 198 (holding that pollution exclusion did not bar coverage for losses sustained after health officials closed policyholder's restaurant because its well water tested positive for E. Coli contamination).

SEMX Corp. v. Federal Ins. Co. (S.D. Cal. 2005), 398 F. Supp. 2d 1103 (holding that insurance company had duty to defend third-party claims arising from one-time release of ammonia into the atmosphere and "not a long term, or repeated, release of an item into the environment").

Anti-Policyholder

Cold Creek Compost, Inc. v. State Farm Fire and Cas. Co., 68 Cal. Rptr. 3d 216 (Cal. Ct. App. 2007) (holding that composting company's neighbors' nuisance claims based on dust emanating from facility involve "pollutant").

Garamendi v. Golden Eagle Ins. Co. (Cal. Ct. App. 2005), 25 Cal. Rptr. 3d 642 (finding that silica constituted "pollutant" under absolute pollution exclusion, giving weight to federal regulations listing silica as "irritant," and rejecting assertion that separate asbestos exclusion limited scope of pollution exclusion).

Bechtel Petro. Operations, Inc. v. Continental Ins. Co. (Cal. Ct. App. Mar. 6, 2006) , (Nos. B176561, B1769969), 2006 WL 531277 (holding that claims of workplace exposure to toxic substances, as well as claims based on unsanitary and dangerous work conditions, were barred from coverage by total pollution exclusion, and that claims based on non-excluded torts also were not covered because those acts could not have caused the alleged harms, such as "cancer, internal injuries, neurological disease and even death.").

Insurance Comm'r v. Golden Eagle Ins. Co. (Cal. Ct. App. May 8, 2000) (No. A087172), 2000 WL 968215 ((finding that total pollution exclusion barred coverage for bodily injury to employees caused by carbon monoxide from gas engine not properly vented and used inside by contractor).

Panda Mgt. Co. v. Wausau Underwriters Ins. Co. (Cal. Ct. App. 1998), 73 Cal. Rptr. 2d 160 (finding that total pollution exclusion barred coverage for property damage caused by discharge of grease and cooking oils into sewer system of shopping center).

Employers Cas. Co. v. St. Paul Fire & Marine Ins. Co. (Cal. Ct. App. 1996), 52 Cal. Rptr. 2d 17 (finding that absolute pollution exclusion barred coverage for fumes caused by application of acetylene torch to chemical coating on desks).

Lewis v. Hartford Cas. Ins. Co. (N.D. Cal. Jan. 31, 2006) (No. C 05-2969 MHP), 2006 WL 249516 (holding that absolute pollution exclusion precluded coverage for discharge of perchloroethylene from dry-cleaning operation into soil and groundwater because such discharges constituted "pollution 'commonly thought of as environmental pollution').

East Quincy Servs. Dist. v. Continental Ins. Co. (E.D. Cal. 1994), 864 F. Supp. 976 (finding that injuries caused by ingestion of water containing

fecal coliform and other sewage-borne bacteria were barred by absolute pollution exclusion).

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[Cal. Rules Ct. 8.204(c)(1)]

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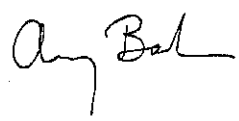
By: 

Attorney for *Amicus Curiae*
United Policyholders

PROOF OF SERVICE

STATE OF NEW YORK)
) SS
COUNTY OF NEW YORK)

I, Vianny Pichardo, am employed in the aforesaid County, State of New York. I am over the age of 18 years and not a party to the within action. I am employed by Anderson Kill & Olick, P.C., whose business address is 1251 Avenue of the Americas, Floor 42, New York, New York 10020.

On March 15, 2011, I caused the foregoing DECLARATION OF AMY BACH, ESQ., APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF THE LOS ALAMOS HOMEOWNERS ASSOCIATION to be served on each of the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed to the below as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on March 15, 2011, at New York, New York.

Vianny Pichardo
Signature of Declarant