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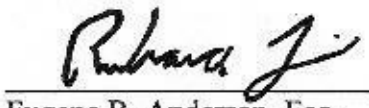
AFFILIATION STATEMENT OF UNITED POLICYHOLDERS PURSUANT TO RULE 500.5

Pursuant to Rule 500.5(d), *amicus curiae* United Policyholders states that it has no corporate parents, subsidiaries, or affiliates.

Dated: New York, New York
March 18, 2003

Respectfully submitted,

ANDERSON KILL & OLICK, P.C.

By: 

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STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders, a not-for-profit educational organization granted tax exempt status under § 501(c)(3) of the Internal Revenue Code, is dedicated to educating policyholders about their rights and duties under their insurance policies. Specifically, United Policyholders engages in educational activities by promoting greater public understanding of insurance issues and consumer rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus Curiae has a vital interest in seeing that the standard-form liability insurance policies sold to countless policyholders are interpreted properly by insurance companies and the courts. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced throughout the country.

NATURE OF THE CASE AND STATEMENT OF THE FACTS

A. United Policyholders Adopts the Statement of Facts as Set Forth by the Policyholder, Belt Painting.

As to the operative facts, United Policyholders will adopt the Statement of Facts of the policyholder, Belt Painting Corp. ("Belt Painting").

B. The Drafting History of ISO's Pollution Exclusions Demonstrates that the Insurance Industry Intended the Exclusions To Be Limited in Application to Losses Caused by Industrial Pollution of the Environment of the Type Addressed by Environmental Statutes and Authorities.

1. TIG and CICLA Agree That This Court Should Consider Extrinsic – Albeit Undocumented – Evidence of the Intent of the Insurance Industry for the ISO Pollution Exclusions.

TIG[1] and CICLA[2] lace their briefs with assertions about the intent of the insurance industry drafters and sellers of insurance policies containing standard-form ISO pollution exclusions such as that at issue. Specifically, TIG and CICLA assert that insurance industry drafters and sellers did not intend to place any reasonable limit on the pollution exclusions they sold, but instead intended them to bar any claim in any way connected to anything that could conceivably be called a "pollutant." Further, TIG and CICLA assert that, because of the universal inclusion of standard-form pollution exclusions, the insurance industry kept premium rates low. For instance, in its conclusion, TIG states:

> If the decision below is allowed to stand, it will have far-reaching and negative implications for the insurance, real estate and business communities of New York. In today's litigious society, the availability of liability insurance at a fair and affordable price is an absolute necessity for every landlord, contractor and other owner of a business or real property. No prudent business can risk being without it.
>
> If, by judicial fiat, liability insurers are compelled to assume substantial risks *for which they receive no premium* (because their underwriters thought such risks had been clearly and unambiguously excluded), it must, of necessity, either result in a substantial increase in everyone's premiums commensurate with the expanded risk, or pose a serious threat to the solvency of liability insurers writing business in New York. Neither is a desirable result.[3]

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[1] Defendant-Appellant TIG Insurance Company. This brief will refer to the Brief of Defendant-Appellant as "TIG Brief."

[2] Complex Insurance Claims Litigation Association, formerly known as the Insurance Environmental Litigation Association ("CICLA"). This brief will refer to the Brief of *Amicus Curiae*, the Complex Insurance Claims Litigation Association, in Support of Appellant, as the "CICLA Brief."

[3] TIG Br. at 12-13; see also CICLA Br. at 8 ("Expanding the risk assumed by the insurer beyond that upon which the premium calculation was based necessarily undermines this process. To disregard

TIG and CICLA present these putative extrinsic facts on the insurance industry's drafting intent and pricing mechanisms without the support of any extrinsic evidence; they include no testimony of underwriters, no underwriting manuals, nor any statements of company spokespeople.

In contrast, United Policyholders offers below the actual statements of insurance company representatives at the time that the Insurance Services Office, Inc. ("ISO") standard-form pollution exclusion language was introduced to regulators and the market.[4] These statements, made before regulators which approved the standard-form ISO pollution exclusions in New York and other states, represent – along with subsequent case law discussed infra – what brokers, and policyholders knew about the scope of those pollution exclusions, and thus guided policyholders like Belt Painting in how they protected themselves. As shown below, these insurance industry representations not only demonstrate that the insurance industry drafters intended to cover losses other than those caused by typical environmental pollution, but that such representations allowed the insurance industry to avoid a drastic rate cut. TIG, thus, did collect premium to cover the losses in this case.[5]

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unambiguous provisions defining the risks that insurers have agreed to cover would create excessive uncertainty and confound insurers' actuarial projections and their expected loss exposure.").

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

[5] TIG refers to what the underwriters believed and what Belt Painting should have known. TIG Br. at 2 ("This is *not* to suggest that there are any equitable considerations in this case that might justify expanding coverage beyond that for which the underwriters charged what they reasonably believed to be an appropriate premium in view of the broad exclusion. There are none. Belt Painting should have understood that the exclusion's reference to 'fumes' covered situtations where paint or paint solvent fumes allegedly cause injury.") (emphasis in original). With respect, the following statements by senior insurance industry representatives constitute what insurance regulators and the insurance buying market actually knew about ISO's pollution exclusions. Of course, this information was bolstered by decisions construing the pollution exclusion, in New York and elsewhere, in the early and mid-1990s, prior to the sale of the policy at issue in 1997, which limited the exclusion to environmental pollution, in conformity with the insurance industry's representations.

2. The Insurance Industry Represented That ISO's Pollution Exclusions Would Be Limited in Scope to Losses of the Type Addressed by Environmental Statutes and Authorities.

As an initial matter, TIG admits that "[t]he exclusion at issue herein is an ISO standard endorsement."[6] There was, thus, no bargain,[7] and no "negotiation"[8] of the pollution exclusion, and neither TIG nor CICLA can point to any. Rather, Belt Painting purchased a liability policy with the same standard-form pollution exclusion that was included word-for-word in tens of thousands of liability insurance policies sold in New York and nationwide. A history of the development of this exclusion follows.

During the early to mid-1980s, the federal government of the United States became increasingly aware that severe environmental damage was being caused by long-term, systematic, industrial pollution. In response to mounting concerns regarding this problem, the government passed a series of laws, including the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"),[9] the Resource Conservation and Recovery Act,[10] the Clean Water Act[11] and the Clean Air Act.[12] These laws, enacted in the wake of notorious and serious environmental disasters such as Love Canal in this State and Times Beach in Missouri, impose strict liability for damage caused to the environment by the improper disposal of waste by-products. They also impose the costs of remediation on parties allegedly

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6 TIG Br. at 1; see also CICLA Brief at 1 ("CICLA's member companies write a substantial amount of liability insurance in New York. They also have entered into numerous liability insurance contracts in New York and throughout the nation that contain provisions similar or identical to the exclusion at issue in this case.").

7 CICLA Br. at 2 ("In so doing, it disregarded the bargain made by the parties, which carved out of the insurance policy's coverage pollution risks like those at issue here....") (emphasis added).

8 CICLA Br. at 4 ("In its decision below, the lower court ignored these basic principles of New York law and revised the total pollution exclusion negotiated by the parties.") (emphasis added).

9 42 U.S.C.A. §§ 96001 et seq.

10 42 U.S.C.A. § 6901 et seq.

11 42 U.S.C.A. §121 et seq.

12 42 U.S.C. §1857 et seq., as amended.

responsible for the pollution which are often extremely significant due to the expense of cleaning polluted water and disposing of contaminated soil.

In the wake of these statutes, insurance companies became increasingly concerned that the massive cost of these government–mandated Superfund clean-ups would ultimately be borne by them. In response to these concerns, in 1985, ISO, on behalf of the insurance industry, made a nationwide filing of a new CGL form, which contained the provision that the insurance industry called the "absolute" pollution exclusion. In an attempt to gain approval for its "absolute" pollution exclusion, ISO represented that it was not intended to effect any reduction in coverage but was simply a clarification in the scope of coverage already available under the existing "sudden and accidental" pollution exclusion, a clarification which ISO argued was necessary in light of judicial decisions granting coverage for Superfund-type liability. Because there would be no decrease in coverage, the industry argued, there was no need for a corresponding rate reduction.[13]

In 1985, the Texas State Board of Insurance conducted a hearing, during which the Board told representatives of the insurance industry that the wording of ISO's new pollution exclusion was ambiguous. The insurance company representatives agreed, but said that no one would apply the exclusion as written:

> Mr. Thornberry [of the Texas Insurance Board]: Let me ask the next question . . . [T]he definition of pollutants [in the pollution exclusion] is, 'pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.' Waste includes certain other things.
>
> My reading of that language is so broad that the example I have been given in the past[,] the grocery store where the alkali or acid spills on the floor, either through negligent failure to clean it up or negligence, the child walks in and falls in it, is

[13] John A. MacDonald, "Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems," Coverage, 6 (Nov./Dec. 1997). Copies of the MacDonald article, and any other article cited herein, are available upon the request of the Court or the parties.

disfigured. My reading of that exclusion is that's pollution excluded from the policy and there is no coverage. And that I guess is the correct reading.

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

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

Mr. Harrell: Nobody would read it that way.

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

Mr. Rinehimer [representing Travelers Insurance]: Would you like to volunteer to be on the next drafting committee?

Mr. Thornberry: That's what I thought you would say. What I have heard is that everybody has thought about it but nobody knows how to—

Mr. Harrell: That little crack that you want to talk about could turn into Boulder Dam. We have overdrafted the exclusion. We'll tell you, we'll tell anybody else, we overdrafted it. But anything else puts us back where we are today [covering gradual environmental pollution].

Mr. Rinehimer: My claims people have talked about some of these claim scenarios you're talking about and they have no intention of trying to enforce the exclusion against smoke from a hostile fire, for instance.[14]

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

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[14] Texas Board of Insurance, Transcript of Proceedings: Hearing to Consider, Discuss, and Act on Commercial Liability Forms Filed by the Insurance Services Office, Inc., Board Docket No. 1472 (Oct. 30, 1985), Vol. I at 6-10, quoted in Jeffrey W. Stempel, Reason and Pollution: Correctly Construing the

That same year, the State of New Jersey Department of Insurance conducted a hearing on the "absolute" pollution exclusion, because it was concerned that it "sought to sweep too many potential non-environmental liabilities within its reach."[15] This hearing consisted of testimony from various members of the insurance industry, including Michael A. Averill, the manager of the Commercial Casualty Division of ISO, who stated that the new pollution exclusion was not intended to operate as an absolute bar to coverage:

> [The purpose of the change in policy language] is to introduce a complete on-site emission and partial off-site exclusion for some operations. For some operations. It is not an absolute exclusion.[16]

Significantly, in 1986, New Jersey rejected a proposed new exclusion from Aetna, because the "submission indicated no reduction of rates to reflect the proposed decrease in coverage."[17] As one commentator notes, "[w]hen New Jersey finally approved the 1986 exclusion for use in the State, it was approved without a reduction of rates, based on insurance-industry representations that the exclusion would not be applied as drafted."[18]

Moreover, ISO confirmed its position that the "absolute" pollution exclusion did not preclude coverage for the accidental discharge of "pollutants" like those at issue in this case:

> The insured would be covered for bodily injury and property damage liability arising out of the following situations, whether the emission of pollutants is sudden and gradual:

"Absolute" Exclusion in Context and in Accord with Its Purpose and Party Expectations, 34 Tort & Ins. L.J. 1, 37 (1999) (emphasis added).

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

[16] Masters, Square Pegs, at 127.

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

[18] Masters, Square Pegs, at 128-29.

* * *

> The insured's chemical products are sold to a manufacturer and escape while being used in the manufacturer's operations.
>
> The insured installs a tank on someone else's premises (other than a waste disposal or treatment site) and the tank leaks resulting in the release of pollutants.
>
> The insured or a subcontractor, while working at a jobsite, ruptures an oil pipe by accidentally ramming it with a bulldozer.[19]

Further, at the time the insurance industry introduced the "absolute" pollution exclusion, the insurance industry submitted a companion pollution liability insurance policy to the nation's insurance regulators, which was designed to provide separately the excluded insurance coverage. As noted by former Louisiana Insurance Commissioner James H. Brown, this companion policy only covered "environmental damage" from a "pollution incident":

> *"Pollution incident" means emission, discharge, release or escape of pollutants into or upon land, the atmosphere, or any watercourse or body of water, provided that such emission, discharge, release or escape results in "environmental damage."
>
> *"Environmental damage" means the injurious presence (injurious to the environment, not just the claimant) in or upon land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants or pollutants.[20]

Commissioner Brown aptly noted that ISO represented that this coverage would mirror the coverage excluded by the absolute pollution exclusion.[21]

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

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[19] Workbook: Policy Forms and Endorsements; Policywriting Rules, Insurance Services Office, Inc., 1985, at 4, quoted in Masters, Square Pegs, at 126-27 (emphasis added).

[20] James H. Brown, Louisiana Ins. Commissioner, Letter to the Editor, National Underwriter Property & Casualty Ed., Apr. 22, 1996, at 30 (emphasis added).

[21] Id. at 30, 54.

to these exact proceedings it its brief.[22] In these proceedings, the insurance industry neither proposed nor discussed using the "absolute" pollution exclusion to address ordinary, industrial accidents.[23]

The insurance industry initially expressed its concern to the NAIC over "pollution liability" when the federal Superfund statute was first considered by Congress. The American Insurance Association ("AIA") and other industry representatives voiced to the NAIC their concern that "the member companies of AIA will be asked to be the principal domestic source of post-closure liability insurance for hazardous waste disposal sites."[24] AIA's counsel pointed out to the NAIC that "[t]he extent of coverage for toxic substances pollution and hazardous waste disposal is limited by a restrictive endorsement [the "sudden and accidental" exclusion]. . . ."[25] He reported that the insurance industry's major concerns about liability insurance coverage for pollution were that "[t]he dissimilarities between the current liability theories for toxic substances discharges and disposal and the liability theories preferred in 'superfund' legislation will impede the development of an insurance market."[26]

The industry also filed with the NAIC a letter from the AIA to Mark G. Bender, a Senior Economist with the U.S. Treasury, on the subject of "Superfund Insurance Studies."[27] This submission again made clear that the insurance industry was concerned with the strict environmental cleanup liability imposed under the Superfund Statute:

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22 CICLA Br. at 12-13.

23 See generally NAIC Proceedings (1981 through 1989). The Proceedings of the NAIC, 1981-1989, are to be found on LEXIS, in the "NAIC" file, located in the "INSURE" library. The citations utilized herein locate the pertinent portions of the Proceedings within that LEXIS file and library.

24 Kimble, Counsel, AIA, The Need For A Post-Closure Liability Fund For Waste Disposal Sites (July 25, 1980), 1982-1 NAIC Proc. 596 at *633. The AIA is a trade association of 152 publicly-owned property and casualty insurance companies. Id.

25 Id. at *634.

26 Id. at *635.

> The American common law which has been relied upon in other environmental issues to determine the rules of liability has tended to be more than adequate to redress the harms which may befall individuals or groups of claimants. It would have been wiser to have the compensation system which is sought under Superfund rely on this historical background of tort law development.[28]

The AIA was concerned with the Superfund statute because, in its view, it imposed a "revolutionary statutory liability system."[29] The AIA wrote that "[t]he imposition of a brand new and hitherto unanticipated retroactive liability on both insurer and insured is unjust, counterproductive, and should be deleted. Joint and several liability for the sweeping damages contemplated under Superfund is neither philosophically nor financially desirable."[30]

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

> The dynamic combination in this law of new strict liability, limitation of defenses, and joint and several liability, all retroactively applied, will disrupt both past and future insurance arrangements."[31]

Kimble's comments to the NAIC made clear that the heart of the AIA's concern was Superfund's "imposition on insurers of new obligations beyond those contemplated by the parties to the insurance contracts can be devastating to the entire insurance industry."[32] Insurance "obligations" for ordinary premises/operations accidents such as that in this case can hardly be described as being new obligations.

The NAIC ultimately appointed an Advisory Committee to study the issue of CGL and other insurance coverage for "pollution," while it reviewed the proposed "absolute" pollution

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27 Correspondence from Dennis R. Connolly, Senior Counsel, AIA to Bender, NAIC Proceedings, 1982 Vol. II at *641.

28 Id. at *642.

29 Id.

30 Id. at *643.

31 Letter from James L. Kimble, Senior Counsel, American Insurance Association to the Office of the General Counsel of the Environmental Protection Agency, quoted in id., 1982 Vol. II at *647.

32 Id. at *648 (emphasis added).

exclusion Report of the Advisory Committee on Environmental Liability Insurance (Dec. 9, 1986), 1987-1 NAIC Proc. 867 at *869. The Advisory Committee's charge was to address Superfund-type environmental liability:

> The study will address the availability [of insurance coverage] issue from the perspective of generators and transporters of hazardous substances, owners/operators of sites involving the handling of toxic wastes, contractors engaged in the removal of asbestos and in hazardous waste site cleanups, municipalities and others.[33]

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

> Experience with the federal EPA has indicated that the following definitions and concepts are acceptable:
>
> * * *
>
> 3. "hazardous substances" means smoke, vapors, soot, fumes, acid, alkalis, toxic chemicals, liquids or gases, waste materials, waste constituents or other irritants, contaminants and pollutants.[34]

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

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

[34] 1982 NAIC Proc. 596 at *685.

threatened release" of pollutants, which appears directly in the Superfund statute, creating liability for "a release or threatened release."[35]

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 only that "the endorsement eliminates the pollution coverage left in the policy by the [1985 pollution exclusion] – products/completed operations coverage and certain off-site discharges."[36] Further, the NAIC working group described the "total" pollution exclusion as "an option to delete the pollution coverage from the products and completed operations coverage. . . ."[37] Courts have, with the exceptions of products and off-site releases, treated ISO's "absolute" and "total" pollution exclusions as interchangeable; indeed, the handful of anti-policyholder decisions cited by CICLA in its brief at 14-15 all construed the "absolute," and not the "total," pollution exclusion.

Thus, the insurance industry's public, regulatory documents show that ISO's pollution exclusions were intended to address strict liability imposed by environmental statutes. TIG writes that "[l]iability insurers, entering into private contracts, are free to *refuse to assume*

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[35] See, e.g., 42 U.S.C. 9607(a)(4)(A); see also Porterfield v. Audubon Indmen. Co., No. 1010894, 2002 WL 31630705, at *7 (Ala. Nov. 22, 2002) ("Also, the absolute pollution-exclusion clause "incorporates the concept of a 'threatened discharge, disposal, release or a surge of pollutants.' 'Liability for a mere threat of an injury is a concept that is fundamental to modern environmental statutes, including CERCLA [Comprehensive Environmental Response Compensation Liability Act a.k.a. "Superfund," 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.'") (citing John N. Ellison et al., *Recent Developments in the Law Regarding the "Absolute" and "Total" Pollution Exclusion, and Treatment of the "Occurrence" Definition*, (ALI-ABA Course of Study Materials, Environmental Insurance: Past, Present, and Future, June 14-15, 2000) ("Ellison, Recent Developments")).

[36] Total Pollution Exclusion Explanatory Memorandum at 2 (emphasis added) (cited in Ellison, Recent Developments, at 29).

pollution risks when there is no public policy prohibition against such an underwriting decision (and there is none here)."[38] What TIG is not permitted to do, however, is (i) include an ambiguous, potentially overbroad exclusion; (ii) describe it to regulatory officials and the market as narrowly-tailored; (iii) thereby avoid rate increases; and then (iv) insist on the breadth of that exclusion when denying claims.[39]

SUMMARY OF ARGUMENT

POINT I: For more than a decade, New York courts, like courts throughout the country, have found that standard-form ISO pollution exclusions do not apply to situations other than that which prompted the insurance industry to draft them: pollution of the environment with industrial by-products, of the type addressed by environmental statute. Specifically, New York courts and courts nationwide have resisted insurance company efforts to have their exclusions

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[37] NAIC, Report of the ISO/CGL Working Group of the Commercial Lines -- Property and Casualty (D) Committee (New Orleans, La., Dec. 12, 1988), at 3.

[38] TIG Br. at 7.

[39] Obviously, if, like a number of the New York courts to consider this issue, this Court finds that ISO's pollution exclusion is ambiguous, it may examine this extrinsic evidence. Under New York law, however, courts look to drafting history to supplement the meaning even of policy language found to be unambiguous. See, e.g., American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500 (S.D.N.Y. 1983), aff'd in relevant part, modified in part, 748 F.2d 760 (2d Cir. 1984) (exhaustively examining the drafting history of occurrence-based CGL insurance policies, finding "[t]he background of the CGL, and the relationship that existed between these parties, are relevant in supplementing the policy's plain meaning"); see also Champion Int'l Corp. v. Liberty Mut. Ins. Co., 129 F.R.D. 63, 65 (S.D.N.Y. 1990) (finding "drafting history documents" "germane to the interpretation" of the policies). Further, under New York law, evidence of a party's positions and statements on insurance policy interpretation issues before the forum may be introduced as admissions of that party, regardless of whether the insurance policy language upon which the admissions were made is first deemed to be ambiguous. Board of Educ. v. CNA Ins. Co., 647 F. Supp. 1495, 1506-07 (S.D.N.Y. 1986) (examining an insurance company's internal and external correspondence, in which the insurance company took positions contrary to those it took in litigation, which involved defense coverage for a complaint alleging district-wide segregation by a board of education, and noting: "The court need not reach the issue of estoppel, based on the same conduct giving rise to a practical construction of the insurance contract, in finding coverage for defense costs.... To the extent that the Court has reviewed the letters and related submissions on this motion, it was solely to ascertain evidence of the parties' practical construction of the insurance contract. Such evidence, in the form of [the insurance company's] own records and correspondence, is in the nature of an admission."). Thus, this information is properly before this Court no matter how it views the language of the ISO exclusions.

read so broadly that they swallow up liability coverage for all exposures which involve, however tangentially, a substance that can be considered a "pollutant." In rejecting such broad constructions of the ISO pollution exclusions, New York courts have found: (1) the language of the ISO pollution exclusions, written in terms found in environmental statutes, has a poor fit with the manner in which in routine workplace accident plaintiffs claim injury; (2) such exclusions do not bar coverage for routine premises/operations claims; and (3) the ISO pollution exclusions must have a limiting principle, to avoid absurd results, and that principle is that they exclude liability only for traditional industrial pollution.

POINT II: The insurance industry, which intended the ISO pollution exclusions to apply only to industrial pollution of the environment, has not attempted to redraft its exclusion and secure regulatory approval for the redrafted exclusion in the decade since New York courts began enforcing that intent. Accepting TIG and CICLA's overbroad construction of the ISO exclusions, retroactively, would impose a massive contraction of coverage upon New York policyholders, without any premium reduction, and without any opportunity for policyholders like Belt Painting to buy replacement coverage. In future, it would also force the insurance industry to develop, and policyholders to purchase, separate gap-filling liability policies covering workplace exposures which incidentally involve substances which can be considered "pollutants." Indeed, Mr. Cinquemani's claim was a routine premises/operations claim, which the insurance industry has historically covered and which Belt Painting undoubtedly assumed was covered under the TIG Policy. Such claims are by no means uninsurable catastrophes, and confirming that they are covered will cause no wrenching change to the New York insurance market.

I. POINT I: FOR NEARLY A DECADE, THE COURTS OF NEW YORK AND STATES NATIONWIDE HAVE LIMTIED THE APPLICATION OF ISO'S STANDARD-FORM POLLUTION EXCLUSIONS TO INDUSTRIAL POLLUTION OF THE ENVIRONMENT.

In their briefs, TIG and CICLA cite a number of cases from the early and middle part of last century which do not address ISO's pollution exclusions; TIG and CICLA improperly fail to cite the score of New York decisions which address the scope of these exclusions, nor cases from other states addressing the same exclusions. These cases are discussed below.

A. Under Their Own Terms, ISO's Pollution Exclusions Should Not Apply to Claims Alleging Injury from Exposure to or Inhalation of Toxic Substances Such as Those in the Underlying Action.

Pollution exclusions are written in quite specific terms, which typically have a poor fit with claims alleging injuries other than those about which environmental statutes are concerned. For instance, the ISO pollution exclusion at issue bars 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 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.[40]

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

Put another way, toxic exposure plaintiffs such as Mr. Cinquemani allege they were injured, not "polluted."

Accordingly, a number of courts in New York have recognized that ISO's pollution exclusions, by their very terms, do not apply in situations like those where injury is caused by exposure to toxic chemicals. For instance, in Roofers' Joint Training Apprentice & Education Committee of Western New York v. General Accident Insurance Co., 713 N.Y.S.2d 615 (4th Dep't 2000), 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 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."[41] 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.'"[42]

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[41] 713 N.Y.S.2d at 617 (citing Continental Cas. Co. v. Rapid-Am. Corp., 609 N.E.2d 506 (N.Y. 1993)).

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

Similarly, in Sphere Drake Insurance Co. v. Y.L. Realty Co., 990 F. Supp. 240 (S.D.N.Y. 1997), the insurance company argued coverage for claims of lead poisoning from ingestion of flaked paint chips was barred by a pollution exclusion. After noting that "pollution exclusion clauses refer only to industrial and environmental pollution," the court further observed that this conclusion was supported by the terms in the exclusion, which did not fit the manner in which the lead chips reached 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.[43]

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, cited by New York courts, agree 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, cited in Roofers' Joint Training, a claimant sought recovery from his employer for injuries from exposure to "fumes from highly-volatile, toxic cements and solvents as well as various congestive dusts created by the plant's

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[43] 990 F. Supp. at 243 (emphasis added); see also Generali-U.S. Branch v. Caribe Realty Corp., 612 N.Y.S.2d 296, 299 (Sup. Ct. New York County 1994) ("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.").

rubber fabricating business."[44] 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."[45] The court, reversing a grant of summary judgment to 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*, 644, 63, 1917, 774 (1986).
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> 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 the container to [the policyholder's] lungs, had somehow been "discharged, dispersed, released or escaped."[46]

Indeed, as discussed in depth in § 1(c), New York courts have gone further, and have recognized that the terms used in pollution exclusions are terms of art in environmental law, and thus that application of those terms must be limited to that sphere. For instance, in Kenyon v. Security Insurance Co., 626 N.Y.S.2d 347, 350 (Sup. Ct. Monroe County 1993), the policyholder sought coverage for claims of personal injury from carbon monoxide exposure caused by negligent design and installation of a heater, which was denied by the insurance company on the ground of a ISO pollution exclusion. The court first recognized that "[t]he terms used by [the insurance company] to describe the manner in which harm may occur, 'discharge, dispersal,

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44 39 F.3d at 1326.

45 Id. at 1336.

46 Id. (emphasis added).

release or escape', are words recognized in this State as terms of art in environmental law."[47]

Accordingly, the court found that ISO's exclusion should be limited in application to industrial and commercial polluters:

> The historical purpose of pollution exclusion clauses has been to insure that industrial or commercial polluters would be compelled to bear the cost of their wrongdoing. This interpretation of the purpose of the clause, and therefore its impact, has led courts of most jurisdictions to limit its application accordingly.[48]

Because the claim at issue did not stem from traditional pollution, the court granted summary judgment in favor of coverage:

> Here ... there are few elements of a typical pollution claim. [The claimant's] injury was occasioned by the confinement of a gas, the "discharge, dispersal, release or escape" of which from the condominium would have eliminated the possibility of injury to this plaintiff.
>
> Although the carbon monoxide gas alleged to have been negligently confined because of an improperly installed water heater would, if released, fall within the policy definition of a "pollutant," such an occurrence does not fall within the public understanding of pollution. It is not implicated by the insurance company's use of terms of art common in environmental law.[49]

As in these cases, claims of injury from exposure to, or inhalation of, toxic substances, should be found to be outside the scope of the specific, limited language of pollution exclusions.

B. Under New York Law, ISO's Pollution Exclusions Do Not Bar Coverage for Premises/Operations Claims, Alleging Negligent Exposure.

Further, New York courts, like courts throughout the United States, have recognized that premises/operations claims alleging negligent exposure – like Mr. Cinquemani's claim, alleging

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47 626 N.Y.S.2d at 350.

48 Id.

49 Id. at 351; see also Stoney Run Co. v. Prudential-LMI Comm. Ins. Co., 47 F.3d 34, 37 (2d Cir. 1995) ("[T]erms such as 'discharge' and 'dispersal' were terms of art of environmental law used in reference to injuries caused by 'disposal or containment of hazardous waste.'") (quoting Rapid-Am., 609 N.E.2d at 513); Lefrak, 942 F. Supp. at 954 (noting "the ordinary person could read the words of that policy as the argot of environmental law that applies to environmental claims only"); Rapid-Am., 609 N.E.2d at 513 (noting that the "purpose of the clause" is "to exclude coverage for environmental pollution," and that "[t]he terms used in the exclusion to describe the method of pollution – such as

injury from Belt Painting's operations – are not barred by pollution exclusions. For instance, in Schumann v. State, 610 N.Y.S.2d 987 (Ct. Cl. 1994), 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 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.[50]

The State sought coverage, including a defense, from its insurance company, which denied coverage based on a pollution exclusion.[51] 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.[52]

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

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'discharge' and 'dispersal' – are terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous waste").

50 610 N.Y.S.2d at 988.

51 Id. at 988-89.

52 Id. at 989 (citations omitted, emphasis added; citing and quoting Connor v. Farmer, 382 So. 2d 1069, 1069-70 (La. Ct. App. 1980)).

would not be excluded by the pollution exclusion, the insurance company had a duty to defend the State.[53]

Similarly, in Calvert Insurance Co. v. S & L Realty Corp., 926 F. Supp. 44 (S.D.N.Y. 1996) 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 failing to ventilate the work area when gluing new tiles to the floor in the building, thereby causing her to be exposed to fumes.[54] The building manager's insurance company denied coverage for the claim, 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."[55]

Citing Schumann, the court first found that the pollution exclusion was subject to the interpretation that it only applied to instances of environmental pollution.[56] Further, the court found that, even assuming that the pollution exclusion applied to situations beyond environmental pollution, it would 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

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53 Id. at 991.
54 926 F. Supp. at 45.
55 Id. at 46.
56 Id.

> found to have arisen from improper ventilation or the failure to provide proper protective devices.[57]

Accordingly, because such allegations would not be within the ambit of the pollution exclusion, the court denied the insurance company's motion for summary judgment.[58]

Indeed, all of the numerous cases in New York finding that personal injuries from ingestion of lead paint are not barred by pollution exclusions are, essentially, cases in which the underlying claimant alleges the policyholder was negligent in allowing the claimant to be exposed to a harmful condition. For instance, in Cepeda v. Varveris, 651 N.Y.S.2d 185 (2nd Dep't 1996), the claimant alleged that the negligence of his landlord had caused the claimant to suffer injuries from ingestion of lead-based paint. The court found that the pollution exclusion "has been construed to be limited to environmental and industrial pollution," and, thus, did not

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[57] Id. at 47 (emphasis added).

[58] In Connor, cited in Schumann, a claimant brought suit against his employer's executive officers for silicosis developed after several years of sandblasting. The insurance company for the executive officers denied coverage on the basis of a pollution exclusion. 382 So.2d at 1069. In the subsequent insurance coverage litigation, the court rejected this defense. On appeal, the Court of Appeal refused to modify this holding, finding that the claimant did not allege injury "arising out" of pollution, but out of negligent failure to provide protective equipment:

> Construing that exclusion strictly, as we must, we would not apply it to an officer's liability arising out of failure to provide appropriate protective apparel when sending workmen into an area known to be affected by the discharge of irritants. We view the worker's injury in such case as arising not from the discharge of sandblasting matter into the atmosphere but from the failure to provide appropriate protective masks and other apparel. Liability (if any) for the injury arises not from polluting the atmosphere but from obliging others to work with inadequate protection in an atmosphere known to be polluted.

Id. at 1069-70 (emphasis added). The Supreme Court of Louisiana recently affirmed the reasoning in this case, recognizing "that the exclusion did not apply because the injury resulted from the failure to give proper equipment to [the underlying plaintiff], not because of the discharge or escape of pollutants." Doerr v. Mobil Oil Corp., 774 So. 2d 119, 129 (La. 2000); see also Western Alliance Ins. Co. v. Gill, 686 N.E.2d 997, 999 (Mass. 1997) ("The exclusion should not reflexively be applied to accidents arising during the course of normal business activities simply because they involve a 'discharge, dispersal, release or escape' of an 'irritant or contaminant.'").

apply.[59] Other New York cases, dealing with personal injuries stemming from fumes, also focus on the policyholder's negligence in permitting the claimant to be exposed to harmful fumes.[60] Still other New York cases, dealing with claims of injury from contractor's negligence in removing asbestos without adequate protection,[61] and negligent spraying of machinery operators with sulfuric acid,[62] also have found that the pollution exclusion did not apply.[63]

Accordingly, New York courts recognize that claims akin to historic premises/operations claims, like that in the underlying action, are not excluded by ISO's pollution exclusions.

C. Under New York Law, the Application of ISO's Pollution Exclusions Is Limited to Claims of the Type Addressed by Environmental Statute.

As indicated by those New York courts which have construed the terms used to in pollution exclusions to be terms of environmental art, New York courts have limited application of ISO's standard-form pollution exclusions to losses of the type addressed by environmental statutes. For instance, in Stoney Run, the policyholder, a real estate manager, sought coverage

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[59] Id. at 186; see also Sphere Drake, 990 F. Supp. 240 (finding claims that building owners negligently allowed claimant to suffer lead poisoning from ingestion of paint chips were not excluded by pollution exclusion); Lefrak, 942 F. Supp. 949 (finding the pollution exclusion did not bar claims of injury from "failure ... to properly, adequately, and reasonably operate, maintain, and control" a building, causing the claimant injury from ingestion of lead paint); GA Ins. Co. v. Naimberg Realty Assocs., 650 N.Y.S.2d 246 (2nd Dep't 1996) (finding pollution exclusion did not apply to claims that landlord's negligence permitted claimant to be exposed to lead paint).

[60] See, e.g., Garfield Slope Housing Corp. v. Public Serv. Mut. Ins. Co., 973 F. Supp. 326 (E.D.N.Y. 1997) (finding pollution exclusion did not apply to claims that building owner was negligent in permitting tenant to be exposed to fumes from new hallway carpet); Kenyon, 626 N.Y.S.2d at 347.

[61] See, e.g., Miano v. Hehn, 614 N.Y.S.2d 829 (4th Dep't. 1994) (finding that pollution exclusion did not apply to claims of personal injury from carbon monoxide due to policyholder's negligence in design and installation of heater).

[62] Karroll v. Atomergic Chemetels Corp., 600 N.Y.S.2d 101, 102 (2nd Dep't 1993).

[63] See also Niagara Cty. v. Utica Mut. Ins. Co., 439 N.Y.S.2d 538 (Sup. Ct. Niagra County 1981) ("The complaints in the underlying actions, besides charging the various defendants collectively with dumping and abandoning chemicals, waste products, etc., further allege that [the policyholder county] was negligent in failing to warn and safeguard its citizens or enforce its health regulations, failing to remove chemicals and the plaintiffs from the Love Canal area and negligently and wrongly conveying property in the area without notice of the infirmities contained and in violation of ordinances and regulations. Clearly, these allegations fall outside the disputed pollution exclusion provision of the policy.").

for claims alleging that, through negligent maintenance of the heating and ventilation system, the underlying plaintiffs had been killed or injured by inhalation of carbon monoxide. The insurance company denied coverage on the basis of a pollution exclusion. "As a threshold matter," the court observed that, under New York law, "it is appropriate to construe the standard pollution exclusion clause in light of its general purpose, which is to exclude coverage for environmental pollution."[64] Further, and more explicitly, the court found that the pollution exclusion dealt with "disposal and containment of hazardous waste":

> [Rapid] stated that the terms such as "discharge" and "dispersal" were terms of art of environmental law used in reference to injuries caused by "disposal or containment of hazardous waste."[65]

Thereafter, the court observed that, at a minimum, "a reasonable interpretation of the pollution exclusion clause is that it applies only to environmental pollution, and not all contact with substances that can be classified as pollutants," and "[a] reasonable policyholder might not characterize the escape of carbon monoxide from a faulty residential heating and ventilation system as environmental pollution."[66] Accordingly, the court reversed judgments dismissing the policyholder's claims for coverage.[67]

Other New York cases finding that pollution exclusions must be limited to industrial pollution of the environment of the type addressed by environmental statutes are legion. See Appendix A, attached hereto.

These New York decisions are consistent with decisions throughout the United States. For instance, the Louisiana Supreme Court found that the "total" pollution exclusion "was

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64 47 F.3d at 37.
65 Id. (quoting Rapid-Am., 609 N.E.2d at 513).
66 Id. at 38-39.
67 Id. at 39.

designed to exclude coverage for environmental pollution only."[68] 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, citizens of the St. Bernard Parish, brought an action against a number of industrial corporations, as well as the Parish and the Parish's insurance company, for damages caused by releases of hydrocarbons from an oil company's wastewater facility into the Mississippi River. Plaintiffs alleged that the hydrocarbons were drawn into the water system of the Parish, causing plaintiffs to suffer personal injuries following the consumption of the contaminated water. The Parish's insurance company filed a motion for summary judgment on the basis of a "total" pollution exclusion in its policy, a motion which was denied by order of the trial court, which was reversed on appeal.

Doerr, initially focussed on the fact that the exclusion, as worded, had virtually unlimited application, could be used to justify denying coverage for virtually any type of damage. Then, the Doerr court engaged in an extensive analysis of the drafting and 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 typical, long-term 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."[69]

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68 Doerr, 774 So. 2d at 127.

69 774 So. 2d at 135.

In evaluating "absolute" and "total" pollution exclusions, the court indicated that the trier of fact should examine: (i) whether the insured 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 insured within the meaning of the policy (considering whether the pollutant was intentionally discharged, whether the pollution was active or passive, etc.).[70] Applying those factors and inquiries to the case before it, the Doerr court reversed the grant of summary judgment in favor of the insurance company.

As in Doerr, courts nationwide have refused to apply the insurance industry's new interpretation of ISO's pollution exclusions because, at a minimum, they are latently ambiguous when applied to claims other than those for the long-term, industrial pollution. Recently, in a case factually indistinguishable to this one, Nav-Its Inc. v. Selective Insurance Group, Inc., No. L-661-01, slip op. (N.J. Super. Ct. Law Div., Oct. 4, 2002) (attached as App. D hereto), the court addressed coverage for underlying injuries stemming from inhalation of paint fumes, which the insurance company argued were barred by an "absolute" pollution exclusion. The policyholder asserted such a construction of the pollution exclusion would be contrary to its reasonable expectations, that the exclusion was ambiguous, and that the pollution exclusion clause applied only to environmental claims. As an initial matter, the court agreed with the policyholder that

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[70] Id. at 134-35.

the pollution exclusion clause was ambiguous and that an interpretation of the pollution exclusion clause denying coverage would violate the reasonable expectations doctrine:

> [The insurance company] certainly knew or should have known that the operations of a general contractor may extend to painting or sealants, and that the emission of odors or fumes is part and parcel of commercial painting or sealant applications. Nothing in the [the insurance company's] policy would lead a reasonable insured to conclude that coverage was not provided for liability arising out of the application of paint or sealant to interior surfaces in the ordinary course of construction work.[71]

Further, the court agreed with the policyholder that the application of pollution exclusion clauses is limited to environmental claims, and not to personal injury stemming from indoor exposure to substances like paint:

> The pollution exclusion clause was intended to insulate insurance companies from liability for environmental claims and not to insulate them from all claims involving substances which could be classified as pollutants. . . . The ordinary policyholder would read the wording of the clause as applying to environmental pollution only. Pollution occurring indoors [is] not deemed to be environmental.[72]

Similarly, in Center for Creative Studies v. Aetna Life & Casualty Co., 871 F. Supp. 941 (E.D. Mich. 1994), the 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 government 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.[73] Further, the court agreed that "[t]he terms "irritant" and "contaminant,"

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[71] Slip op. at 7.

[72] Nav-Its Inc. v. Selective Ins. Group, Inc., No. L-661-01, slip op. (N.J. Super. Law Div. Jan. 4, 2002) (attached as App. E. hereto).

[73] 871 F. Supp. at 944-45, 945 n.5 (noting further that the "absolute" pollution exclusion was specifically tailored to match government statutes and that "'[there] is no indication that the change in language was meant to expand the scope of the clause to environmental damage.'") (citing West-Am. Ins.

when viewed in isolation, are virtually boundless, for "there is virtually no substance or chemical in existence" that would not irritate or damage some person or property," and, therefore, that the exclusion 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.[74]

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."[75]

Similarly, in Regional Bank of Co. v. St. Paul Fire & Marine Insurance Co., 35 F.3d 494 (10th Cir. 1994), 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 Colorado recognizes the doctrine of reasonable expectations.[76] The court stated that "[w]ithout some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to absurd results."[77] The court then

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Co. v. Tufco Flooring E., Inc., 409 S.E.2d 692, 699 (N.C. App. 1991) (finding that "absolute pollution exclusion did not bar coverage for damage to chicken from fumes created during resurfacing of floor).

74 Id. at 945.

75 Id. at 946.

76 35 F.3d at 497.

77 Id. at 498.

stated that the exclusion applied only to "substances generally recognized as polluting the environment" and "recognized as a toxic of particularly harmful substance in industry or by government regulators."[78] 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 reasonable 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.[79]

In short, courts nationwide 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 by CERCLA. See also Appendix B, attached hereto.[80]

Many of the decisions collected in Appendix B cite West American Insurance Co. v. Tufco Flooring E., Inc., 409 S.E.2d 692 (N.C. App. 1991), over-ruled on other grounds, Gaston Cty. Dyeing Machinery Co. v. Northfield Insurance Co., 524 S.E.2d 558 (N.C. 2000) (over-ruling Tufco's adoption of a manifestation trigger), which, considering the release of styrene vapors from a flooring material which damaged the claimant's inventory of chickens, held that the pollution 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.
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> * * *

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78 Id.

79 Id.

80 All of the cases in Appendix A and B base their holdings in part on the fact that the ISO pollution exclusions were intended to bar coverage for individual pollution of the environment of the type addressed by environmental statutes. A slew of other cases reject application of ISO's pollution exclusions – in factual situations similar to that below – without express emphasis on this point. See Appendix C, attached hereto.

> When the pollution exclusion was first instituted in the early 1970's, it applied, by its own terms, only to discharge of pollutants "into or upon land, the atmosphere or any water course of 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."[81]

Further, like New York courts, many courts have found that the incredibly broad language 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 luke warm 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. Here, Guinn did not claim he was "polluted" by the spray material, he claimed he was struck in the face by it and was thereby caused harm. To take the company's suggested definition to its ultimate conclusion could result in a person being "polluted" by being struck in the face by a speeding bullet.[82]

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" the conclusion, discussed above, that these exclusions apply only to industrial pollution of the environment.[83]

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81 409 S.E.2d 699-700 (citations omitted) (emphasis added).

82 Bodine v. Fireman's Fund Ins. Co., No. 150364, Slip op. at 2 (Cal. Super. Sept. 24, 1992) (finding that "absolute" pollution exclusion did not bar the a duty to defend an action alleging injury from sprayed material) (emphasis added).

83 See, e.g., Nautilus Ins. Co. v. Jabar, 188 F.3d 27, 30 (1st Cir. 1999); Meridan Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1182 (6th Cir. 1999); Regional Bank, 35 E.2d at 498; Island Assoc., Inc. v. Eric Group, Inc., 894 F. Supp. 200, 202 (W.D. Pa. 1995); Westchester Fire Ins. Co. v. City of Pittsburgh, Kan., 794 F. Supp. at 1469 n. 9 (D. Kan. 1992); Center for Creative Studies, 871 F. Supp. at 945; Keggi v. Northbrook Prep. & Cas. Ins. Co., 13 P.3d 785, 790 (Ariz. Ct. App. 2000); Danbury Ins. Co. v. Novella,

Finally, many of the above cases, in New York and nationwide, posit these reasons for refusing to enforce "absolute and "total" pollution exclusions in conjunction with the ambiguity doctrine,[84] or in conjunction with the doctrine of reasonable expectations.[85] It is, at a minimum, reasonable to construe the ISO pollution exclusions to be limited to true environmental claims of the type addressed by environmental statutes. Resort to the drafting history of those exclusions demonstrates that, in fact, this was the reading the insurance industry promised regulators it would adopt; accordingly, at one time, members of the insurance industry agreed it was a reasonable reading. Under universal rules of insurance policy construction, such ambiguities are construed against the drafting insurance companies and in favor of coverage.

II. POINT II: REVERSING THE APPELLATE DIVISION WOULD NOT UPHOLD THE STABILITY OF CONTRACT, BUT WOULD INSTEAD CAUSE INSTABILITY.

CICLA refers to the "stability of contract interpretation," as well as "the stability and predictability of the insurance market,"[86] stating that both are imperiled by the decision of the Appellate Division. In fact, as shown above, adopting TIG and CICLA's overbroad interpretation of ISO's pollution exclusions would dramatically change the law of New York as it has existed for a decade, and would fly in the face of nationwide authority. New York courts, quite sensibly, have recognized that there must be a limiting principle to ISO's pollution exclusions, and have found that limiting principle to be that the exclusions do not bar coverage

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727 A.2d 279, 283 (Conn. Super. 1998); American States Ins. Co. v. Koloms, 687 N.E.2d 72, 79 (Ill. 1997); Motorist Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 680 (Ky. App. 1996).

[84] Stoney Run; 47 F.3d at 38; Lefrak, 942 F. Supp. at 957; Sphere Drake, 990 F. Supp. at 244; Garfield Slope, 973 F. Supp. at 337; Rapid-Am., 609 N.E.2d at 513; Westview Assocs. v. Guaranty Nat. Ins. Co., 717 N.Y.S.2d 75, 78 (N.Y. 2000); Miano, 614 N.Y.S.2d at 830; Niagara County, 439 N.Y.S.2d at 541; Roofers' Joint Training, 713 N.Y.S.2d at 617; Vigilant Ins. Co., 676 N.Y.S.2d at 598.

[85] Stoney Run; 47 F.3d at 38; Garfield Slope, 973 F. Supp. at 337; Karroll, 600 N.Y.S.2d at 102; General Accident Ins. Co. v. Idbar Realty Corp., 646 N.Y.S.2d 138, 140 (2nd Dep't 1996); Kenyon, 626 N.Y.S.2 at 350; Niagara County, 439 N.Y.S.2d at 541; Schumann, 610 N.Y.S.2d at 990; Vigilant Ins. Co., 676 N.Y.S.2d at 598.

for losses other than those stemming from industrial pollution of the environment. TIG, CICLA and ISO have known of these decisions for ten years, but the insurance industry has not drafted a new standard-form exclusion, sought regulatory approval for it, and introduced it to the marketplace. Further, policyholders like Belt Painting, guided by these decisions, have purchased comprehensive general liability insurance policies with the aim of securing broad liability protection, including protection for all manner of premises/operations exposures. If a large portion of that coverage is arbitrarily stripped from their policies, New York policyholders cannot purchase replacement policies providing retroactive coverage for this exposure.

TIG and CICLA further characterize the holding of the Appellate Division, as unworkable. As an initial matter, it was the insurance industry itself which created this standard, in promising regulators that it would not over-apply the ISO exclusions it did not deny were ambiguous. In practice, the score of New York decisions cited above demonstrates that this standard has, in fact, not proved difficult to apply. Moreover, TIG's and CICLA's expansive view of the ISO pollution exclusions would lead to such ridiculous results that it would require some limiting principle. In other words, under TIG and CICLA's proposed literal reading, the following losses would be excluded:

- A back injury arising out of slipping in the aisle of a supermarket on cleaning chemicals which escaped from a bucket.
- A crushed leg from the escape of a barrel of PCBs falling on a worker from a flatbed truck.
- Injuries to one worker hit by another worker collapsing from a ladder after being overcome by fumes.

Presumably, even TIG and CICLA would not claim that these losses would be excluded by the ISO pollution exclusions. Neither TIG nor CICLA, however, have articulated any limiting

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[86] CICLA Br. at 3-4.

principle, let alone a test under which these claims are covered and the present claim is not. Accordingly, it is TIG's and CICLA's proposed construction, with some as yet unarticulated limiting principle, that would prove unworkable.

Finally, as noted above, TIG and CICLA both hint darkly that, if this Court does not reverse the Appellate Division, premiums will skyrocket and policyholders and businesses will go without insurance. CICLA states as follows:

> The modern insurance underwriting process, which relies heavily on contract predictability, would suffer if the terms of insurance contracts are not enforced. Insurers assume certain contractually defined risks in return for premiums, which are calculated through actuarial science. Insurers are able to respond to random catastrophes because, on a large scale, the frequency of such events is reasonably predictable. Be evaluating and distributing risks in this fashion, insurance allows individuals and businesses to engage in socially useful activities that would be impossible to undertake if the associated risks had to be borne alone.[87]

Thus, essentially, TIG and CICLA assert – without citing any evidence whatsoever – that insurance industry underwriters intended to cover premises/operations claims, but not this type of premises/operations claim, and that for this Court to affirm coverage for this type of claim would bankrupt the industry, or force huge premium increases and decrease the amount of coverage available to ordinary policyholders.

In response, United Policyholders first observes that the insurance industry has already collected premiums for premises/operations exposures of the type causing Mr. Cinquemani's claim. Specifically, the insurance industry avoided huge rate reductions by representing to regulators that the new ISO pollution exclusions had limited effect.

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[87] CICLA Br. at 7-8.; see also TIG Br. at 13 ("If, by judicial fiat, liability insurers are compelled to assume substantial risks *for which they receive no premium* (because their underwriters thought such risks had been clearly and unambiguously excluded), it must, of necessity, either result in a substantial increase in everyone's premiums commensurate with the expanded risk, or pose a serious threat to the solvency of liability insurers writing business in New York. Neither is a desirable result."); CICLA Br. at 4 (referring to potential harm to "the stability and predictability of the insurance market" and noting "[s]uch

Second, the insurance industry has always collected premiums for, and covered, routine premises/operations claims such as that in this case. This exposure, involving periodic small claims like that of Mr. Cinquemani, can easily be, and historically has been, underwritten at a profit. Premises/operations claims such as that in this case are hardly equivalent to the liability catastrophes which the insurance industry has deemed uninsurable, like asbestos, DES, or CERCLA. Finding that a limited number of premises/operations claims, which somehow involve substances which can be classified as "pollutants," is not arbitrarily excluded cannot possibly affect the pricing or availability of liability coverage. In contrast, upholding TIG and CICLA's new reading of the ISO exclusions would rend a wholly arbitrary gap in existing policies, which gap policyholders could not fill retroactively. Further, in future, such a ruling would require policyholders to purchase – and the insurance industry to draft, submit to regulators, and sell – a new liability insurance policy providing coverage for premises/operations claims which somehow involve substances which could be considered "pollutants."

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uncertainty adversely affects underwriters' efforts to generate meaningful actuarial estimates, and could hinder insurers' efforts to provide consumers with affordable insurance coverage").

CONCLUSION

For the foregoing reasons, amicus curiae United Policyholders respectfully requests this Court to affirm the decision of the Appellate Division.

Dated: New York, New York
March 18, 2003

Respectfully submitted,

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APPENDIX A

APPENDIX A

Additional Cases Decided Under New York Law Holding That the Scope of ISO's Absolute and Total Pollution Exclusions Is Limited to Losses of the Type Addressed by Environmental Statutes and Authorities.

• Maryland Cas. Co. v. W.R. Grace & Co., No. 88 Civ. 2613, 1998 WL 729648 (S.D.N.Y. Oct. 15, 1998) (finding that pollution exclusions do not apply to claims of injury from asbestos) (citing Stoney Run);

• Sphere Drake Ins. Co. v. Y.L. Realty Co., 990 F. Supp. 240 (S.D.N.Y. 1997) (finding pollution exclusion did not bar coverage for claims of lead poisoning from ingestion of paint chips and noting "pollution exclusion clauses refer only to industrial and environmental pollution");

• Garfield Slope Housing Corp. v. Public Serv. Mut. Ins. Co., 973 F. Supp. 326, 337 (E.D.N.Y. 1997) (finding absolute pollution exclusion did not apply to claims of personal injury from indoor fumes released from new hallway carpeting as the exclusion "may be construed to bar recovery only for those bodily injuries caused by environmental pollution");

• Westview Assocs. v. Guaranty Nat. Ins. Co., 740 N.E.2d 220, 223 (N.Y. 2000) (finding that pollution exclusion in umbrella policy did not relieve umbrella insurance company of duty to defend policyholder in action alleging injury from lead paint);

• Republic Franklin Ins. Co. v. L&J Realty Corp., 720 N.Y.S.2d 473, 473 (1st Dep't 2001) (finding that pollution exclusion did not bar coverage for underlying claims of personal injury from fumes in a building);

• Roofers' Joint Training Apprentice & Educ. Comm. of W.N.Y. v. General Acc. Ins. Co., 713 N.Y.S.2d 615, 617-18 (4th Dep't 2000) (finding "an average insured could reasonably interpret that endorsement as applying to environmental pollution only," because "the purpose of the pollution exclusion historically has been to exclude coverage for environmental pollution." and "the Second Circuit has held that this type of endorsement 'applies only to environmental pollution, and not to all contract with substances that can be classified as pollutant.'") (citing Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34, 38 (2d Cir. 1995);

• Cepeda v. Varveris, 651 N.Y.S.2d 185, 186 (2nd Dep't 1996) (finding pollution exclusion, "which has been construed to be limited to environmental and industrial pollution," did not bar defense coverage for claims of injury from lead paint);

• GA Ins. Co. v. Naimberg Realty Assocs., 650 N.Y.S.2d 246 (2nd Dep't 1996) (finding that pollution exclusion, which has "been construed to be limited to environmental and industrial pollution," did not apply to claims of injury from exposure to lead paint);

• General Accident Ins. Co. v. Idbar Realty Corp., 646 N.Y.S.2d 138 (2nd Dep't 1996) (finding that insurance company had not borne its burden of proof to demonstrate that the pollution exclusion, "which has been construed to be limited to environmental and industrial pollution," barred coverage for claims of injury from ingestion of lead paint);

• Miano v. Hehn, 614 N.Y.S.2d 829 (4th Dep't 1994) (finding that pollution exclusion did not bar coverage for claims of negligence in failing to protect persons from bodily injury during removal of asbestos);

• Karroll v. Atomergic Chematels Corp., 600 N.Y.S.2d 101 (2nd Dep't 1993) (finding that pollution exclusion, which "may be reasonably be interpreted to apply only to instances of environmental pollution," did not apply to claim for accidental exposure to sulfuric acid);

• Giampiccolo v. Allstate Insurance Co., N.Y.L.J. 23 (Sup. Ct. West. County July 23, 2002) (finding, in case involving contamination of home with mercury from broken manometer, that a "total pollution exclusion" did not apply, as "[t]he subject incident is not alleged to be anything which would normally be described as pollution" and that "a common sense construction of the terms of the subject absolute pollution exclusion wit the facts of the instant action does not reveal damages that are truly environmental");

• Generali-U.S. Branch v. Caribe Realty Corp., 612 N.Y.S.2d 296, 298 (Sup Ct. New York County 1994) (examining history of pollution exclusions and finding "to hold that any injury arising from contract with a chemical falls within the pollution clause is contrary to the legislative intent and case law where environmental pollution is a triggering event to the application of the pollution exclusion clause"); and

• Kenyon v. Security Ins. Co., 626 N.Y.S.2d 347, 350 (Sup. Ct. Monroe County 1993) (holding "[t]he terms used [by the insurance company] to describe the manner in which harm may occur, 'discharge, dispersal, release or escape,' are words recognized in this State as terms of art in environmental law. Further, the context in which the terms are used . . . compels the conclusion that a reasonable businessman could reasonably believe that the broad coverage the Agreement included would not be defeated under the facts of this case," and "[t]he historical purpose of pollution exclusion clauses has been to insure that industrial or commercial polluters would be compelled to bear the cost of their wrongdoing. This interpretation of the purpose of the clause, and therefore its impact, has led courts of most jurisdictions to limit its application accordingly.").

APPENDIX B

APPENDIX B

Additional Cases Holding That the Scope of ISO's Absolute and Total Pollution Exclusions Is Limited to Losses of the Type Addressed by Environmental Statutes and Authorities.

• Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1181 (6th Cir. 1999) (finding that total pollution exclusion did not bar coverage for bodily injury to classroom teacher from fumes from chemicals used to seal floor prior to beginning of class)

• Nautilus Ins. Co. v. Jabar, 188 F.3d 27, 30 (1st Cir. 1999) (finding that total pollution exclusion did not bar coverage for bodily injury from inhalation of hazardous fumes at place of employment released from roofing products during repair of the roof)

• Bituminous Casualty Co. Advanced Adhesive Technology, 73 F.3d 335, 339 (11th Cir. 1996) (finding that absolute pollution exclusion did not bar coverage for claims for bodily injury from inhaling fumes from policyholder's adhesive)

• Sargent Constr. Co. v. State Auto Ins. Co., 23 F.3d 1324, 1327 (8th Cir. 1994) (applying Missouri law) (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)

• Boise Cascade Corp. v. Reliance Nat'l Indem. Co., 99 F. Supp. 2d 87, 102 (D. Me. 2000) (finding that total pollution exclusion did not bar coverage for claims by workers exposed at workplace to accidental release of chlorine gas)

• Island Assocs., Inc. v. Eric Group, Inc., 894 F. Supp. 200, 202 (W.D. Pa. 1995) (finding that absolute pollution exclusion did not bar coverage for damages from fumes from chemical used in asbestos abatement)

• Regent Ins. Co. v. Holmes, 835 F. Supp. 579, 582 (D. Kan. 1993) (finding that absolute pollution exclusion did not bar coverage for bodily injury to one child from bottle of chemicals where there was no discernable injury to the environment)

• Westchester Fire Ins. Co. v. City of Pittsburg, Kan., 794 F. Supp. 1469 n.9, 1471 (D. Kan. 1992) (finding absolute pollution exclusion did not bar coverage to city for damages from city's use of insecticide to drivers accidentally sprayed on road)

• Keggi v. Northbrook Prop. & Cas. Ins. Co., 13 P.3d 785, 790 (Ariz. Ct. App. 2000) (reviewing numerous decisions to consider this issue, determining the

exclusion was intended to preclude coverage for traditional environmental pollution by hazardous industrial waste of the type addr'essed by CERCLA and other state and federal environmental statutes, and finding the exclusion did not bar claims from ingestion of water containing bacterial).

• Minerva Enters., Inc. v. Bituminous Cas. Corp., 851 S.W.2d 403, 404 (Ark. 1993) (finding that absolute pollution exclusion did not bar coverage for damage to mobile home caused by back up of raw sewage)

• Essex Ins. Co. v. Avondale Mills, Inc., 639 So. 2d 1339, 1341 (Ala. 1994) (finding that absolute pollution exclusion did not bar coverage for bodily injury from indoor release of asbestos fibers)

• Danbury Ins. Co. v. Novella, 727 A.2d 279, 283 (Conn. Super. 1998) (finding that absolute pollution exclusion did not bar coverage for bodily injury claimed by tenant from exposure to lead paint)

• American States Ins. Co. v. Koloms, 687 N.E.2d 72, 79 (Ill. 1997) (finding that absolute pollution exclusion was ambiguous as to whether it applied to release of carbon monoxide from defective household heater)

• Insurance Co. of Ill. v. Stringfield, 685 N.E.2d 980, 984 (Ill. App. 1997) (finding that absolute pollution exclusion did not bar coverage for claims for injury from exposure to lead paint)

• Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 680 (Ky. App. 1996) (finding that absolute pollution exclusion does not bar coverage for claims from an adjoining business from damages caused by carbon monoxide fumes that leaked from defective boiler)

• Sandbom v. BASF Wyandotte, Corp., 674 So.2d 349, 363 (La. App. 1996) (finding absolute pollution exclusion did not apply to bodily injury to worker exposed to chemicals when cleaning a storage tank)

• Avery v. Commercial Union Ins. Co., 621 So. 2d 184, 189 (La. App. 1993) (finding that absolute pollution exclusion did not bar coverage for claim that smoke from policyholder's fire blinded motorist and caused accident)

• West v. Board of Commissioners of the Port of New Orleans, 591 So. 2d 1358, 1360 (La. App. 1991) (finding that genuine issues of material fact existed as to whether absolute pollution exclusion barred coverage for workplace exposure to chemicals of inspector because the exclusion is directed at "those who indifferently pollute our environment and not those who incidentally possesses the pollutant in the course of their other business")

• Thompson v. Temple, 580 So.2d 1133, 1134 (La. App. 1991) (finding absolute pollution exclusion did not bar coverage for damages from carbon monoxide gas from leaking gas heater)

• Western Alliance Ins. Co. v. Gill, 686 N.E.2d 997, 999 (Mass. 1997) (finding that absolute pollution exclusion did not bar coverage for injuries to restaurant patron from carbon monoxide from defective tandoori oven)

• Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762, 764 (Mass. 1992) (finding that damages from lead poisoning to children were not excluded by absolute pollution exclusion)

• Weaver v. Royal Ins. Co., 674 A.2d 975, 977 (N.H. 1996) (finding that absolute pollution exclusion did not bar coverage for claims by child injured by lead paint transported home in father's work clothes)

• Golden Estates, Inc. v. Continental Cas. Co., 680 A.2d 1114, 1118 (N.J. Super. 1996) (finding that absolute pollution exclusion did not bar coverage for property damage caused by defective septic systems)

• Gamble Farm Inn, Inc. v. Selective Ins. Co., 656 A.2d 142, 146-47 (Pa. Super. 1995) (finding that absolute pollution exclusion did not apply to carbon monoxide fumes caused by squirrels stowing nuts in flue of water heater because release inside hotel and restaurant was not release into atmosphere)

• Kent Farms, Inc. v. Zurich Ins. Co., 998 P.2d 292, 295 (Wash. 2000) (finding that absolute pollution exclusion did not bar coverage to delivery driver who suffered significant injury when diesel fuel back-flowed over him because of faulty intake valve on fuel storage tank).

APPENDIX C

APPENDIX C

Additional Cases Rejecting Application of Absolute and Total Pollution Exclusions In Factual Circumstances Such as These In the Underlying Case.

• Amerada Hess Corp. v. Zurich Ins. Co., 2002 WL 356162 (3d Cir. 2002) (applying Virgin Islands law) (finding that absolute pollution exclusion was ambiguous and, thus, coverage was not barred for claims for exposure to sprayed chemicals);

• Red Panther Chem. Co. v. Insurance Co. of the State of Pa., 43 F.3d 514 (10th Cir. 1994) (finding Total Pollution Exclusion did not necessarily bar coverage for bodily injury to a mechanic caused when exposed to insecticide in a can which, after falling off a truck on the highway, had lodged in the undercarriage of the car upon which he eventually worked);

• Titan Holdings Syn., Inc. v. Keene, 898 F.2d 265 (1st Cir. 1990) (finding that claims for damages for particulates, disturbing noise and bright light from sewage treatment plant were not barred by absolute pollution exclusion);

• Purity Spring Resort v. TIG Ins. Co., No. 99-295-JD, slip op. (D.N.H. July 18, 2000) (finding that absolute pollution exclusion did not bar coverage for damages to manufacturer of bottled water from neighboring property owner's release of lake water, which was alleged to have increased the level of bacteria in claimant's water);

• Northfield Ins. Co. v. George E. Buisson Realty Co., No. Civ. A. 99-151 (E.D. La. Aug. 26, 1999) (finding that absolute pollution exclusion did not bar coverage for claims of emotional distress from fact that employees of company paid to restore hotel who were exposed to asbestos during renovation of hotel);

• Grow Group, Inc. v. North River Ins. Co., No. C 92-2328 SC, slip op. (N.D. Cal. Aug. 14, 1992) (finding that absolute pollution exclusion did not bar coverage for back injury suffered by claimant attempting to escape cloud of chlorine gas released by policyholder);

• Evanston Ins. Co. v. Treister, 794 F. Supp. 560 (D.V.I. 1992) (finding that absolute pollution exclusion did not bar coverage for claims that defective design of sewer lines caused bodily injury);

• Porterfield v. Audubon Indem. Co., No. 1010894, 2002 WL 31630705 (Ala. Nov. 22, 2002) (finding lead poisoning injuries from flaking and peeling lead paint in residential apartment were not barred by absolute pollution exclusion);

• Camp Delaware, Inc. v. Markel Ins. Co., No. CV990080225S, 2001 WL 541451, at *5 (Conn. Super. May 4, 2001) (finding that total pollution exclusion did not bar coverage for damages from back up of sewage);

• Friedline v. Shelby Ins. Co., 774 N.E.2d 37, 40 (Ind. 2002) (finding that pollution exclusion did not bar claims of injury from toxic fumes from substances used to install carpet in an office building);

• American States Insurance Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996) (finding "sudden" to be ambiguous, construing policy in favor of policyholder so that definition of "sudden" did not include temporal component, such that damage arising from a leak in policyholder's underground storage tank was covered by insurance company);

• Great Lakes Chem. Corp. v. International Surplus Lines Ins. Co., 638 N.E.2d 847 (Ind. App. 1994) (finding that claims for damage from policyholder's pesticide were not barred by the absolute pollution exclusion);

• West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc., 503 N.W.2d 596 (Iowa 1993) (finding that absolute pollution exclusion did not bar coverage for sand disposed of off site);

• Associated Wholesale Grocers, Inc. v. Americold Corp., 934 P.2d 65 (Kan. 1997) (finding that absolute pollution exclusion which included coverage for hostile fire did not bar coverage for damage from smoke from hostile fire);

• Smith v. Reliance Ins. Co., 807 So. 2d 1010, 1022 (La. App. 2002) (finding that total pollution exclusion did not bar claims for personal injuries from substances from its wastewater treatment facility that caused noxious odors);

• Minnesota Mining & Mfg. Co. v. Walbrook Ins. Co., No. C1-95-1775, 1996 WL 5787, at *2 (Minn. App. 1996) (finding that absolute pollution exclusion did not bar coverage for injuries caused by radioactive component escaping from its product);

• Hocker Oil Co. v. Barker-Phillips-Jackson, Inc., 997 S.W.2d 510, 518 (Mo. App. 1999) (finding that gasoline is not a pollutant under an absolute pollution exclusion);

• Enron Oil Trading & Transportation Co. v. Walbrook Ins. Co., Ltd., 132 F.3d 526 (9th Cir. 1997) (finding that total pollution exclusion did not bar coverage for claims of injury from injection of foreign materials into oil pipeline, concluding "[t]he insurers' argument demonstrates the ambiguity convincingly; under their interpretation, the exclusion would be virtually limitless, extending to claims for product liability (for example, a bottle manufactured with impure glass) or for negligence (for example, spoilt food served in a restaurant) that arguably involved an impurity resulting from contact with a foreign substance)");

• In re Hub Recycling, Inc., 106 B.R. 372, 376 (D.N.J. 1989) (finding injuries caused by dumped debris and recyclables were not barred by absolute pollution exclusion);

• Byrd v. Bumenreich, 722 A.2d 598 (N.J. Super. App. Div. 1999) (finding that absolute pollution exclusion did not bar coverage for injuries to child from ingestion of lead paint chips);

• Anderson v. Highland House Co., 757 N.E.2d 329 (Ohio 2001) (finding bodily injury from carbon monoxide fumes emitted by defective heating unit within an apartment were not barred by absolute pollution exclusion, because policy language did not clearly and unambiguously state that coverage for residential carbon monoxide poisoning is excluded);

• Lititz Mut. Ins. Co. v. Steely, 785 A.2d 975 (Pa. 2001) (finding absolute pollution exclusion did not bar coverage for damage to tenant from lead paint);

• Mistick, Inc. v. Northwestern Nat'l Cas. Co., 806 A.2d 39, 44 (Pa. Super. 2002) (finding that pollution exclusion did not bar coverage for injuries caused by ingestion of lead paint);

• Municipality of Mt. Lebanon v. Reliance Ins. Co., 778 A.2d 1228 (Pa. Super. 2001) (holding that natural gas was not unambiguously a "pollutant" under the absolute pollution exclusion);

• Donaldson v. Urban Land Interests, Inc., 564 N.W.2d 728 (Wis. 1997) (finding that injuries from carbon dioxide from breathing were not barred by absolute pollution exclusion);

• Guenther v. Onalaska, 588 N.W.2d 375, 379 (Wis. App. 1998) (finding that a total pollution exclusion did not bar coverage for damage resulting from the liquid, non-toxic nature of domestic sewage which backed up into basement);

• Vance v. Sukup, 558 N.W.2d 683 (Wis. App. 1996) (finding that absolute pollution exclusion barred coverage for liability for injuries suffered by child from ingesting paint chips that contained lead, but not from contact with lead in "intact accessible painted surfaces").

• Beahm v. Pautsch, 510 N.W.2d 702, 706-07 (Wis. App. 1993) (finding total pollution exclusion did not bar coverage for injuries in traffic accident caused by poor visibility due to fire to burn off winter grass);

• Gainsco Ins. Co. v. Amoco Prod. Co., 53 P.3d 1051, 1066 (Wyo. 2002) (finding total pollution exclusion did not bar coverage for injury caused by exposure of worker to poisonous hydrogen sulfide gas while emptying vacuum truck, because "[t]he purpose of the current version of the exclusion remains to exclude ... governmentally mandated cleanup costs" and "[t]o read the exclusion more

broadly ignores the insurers' objective in creating the exclusion and ignores the general coverage provisions of the policy").

APPENDIX D

Appendix
D

TRUE COPY
William J. Cook
William J. Cook, J.S.C.

NAV-ITS INC.,

Plaintiff,

-vs-

SELECTIVE INSURANCE COMPANY OF AMERICA,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-CAMDEN COUNTY

DOCKET NO. L-661-01

Civil Action

OPINION AND ORDER

INTRODUCTION

This matter is before the Court on motion of Selective Insurance Company of America ("Selective") for reconsideration of the Court's Orders of November 16, 2001 and January 4, 2002 Orders denying Selective's summary judgment motion, and granting plaintiff Nav-Its, Inc.'s ("Nav-Its") cross-motion for summary judgment against Selective on Counts 1 and 2 of the Amended Complaint. The issue addressed on the summary judgment and cross-summary judgment motions was the applicability of a pollution exclusion clause in a commercial general liability policy issued by Selective to Nav-Its, a general building contractor. The underlying claim giving rise to Nav-Its' claim

for liability coverage under the Selective policy is a personal injury action arising from an occurrence in Allentown, Pennsylvania. The claim, now pending in a Pennsylvania tribunal, is that of Dr. Scalia against Nav-Its, alleging he was injured from inhalation of paint fumes from painting being done in an Allentown office building by Nav-Its' painting subcontractor, T. A. Farikos Painting. Nav-Its subcontracted tenant "fit out" work in the building to Metro, and Nav-Its hired Farikos to paint and coat the floor. Selective has refused to defend Nav-Its in the underlying Pennsylvania tort action, asserting the pollution exclusion in the CGL policy. Nav-Its brings this action for a declaration that it has liability coverage under the Selective policy for the claim in the Pennsylvania action and that Selective must defend Nav-Its in that action.

Selective's present motion for reconsideration is premised on the opinion of the Appellate Division in Leo Haus, Inc. v. Selective Insurance, 353 N.J. Super. 67 (2002). There, the Appellate Division upheld the applicability of a pollution exclusion clause in a CGL policy issued by Selective to defeat liability insurance coverage for a homebuilder sued by the purchasers-residents of the home who were poisoned by carbon monoxide caused by and released from defective or malfunctioning heating units. According to Selective, the pollution exclusion clause in Haus is identical to that in the CGL

policy Selective issued to Nav-Its. Ergo, says Selective, the pollution exclusion clause operates to bar coverage for Nav-Its, and this Court is bound by the Haus decision in this regard. For the following reasons, Selective's motion for reconsideration and to vacate the orders of November 16, 2001 and January 4, 2002 must be denied.

THE AMBIGUITY ISSUE

Nav-Its asserts that the "pollution exclusion" language of the Selective policy is at least ambiguous, with respect to the factual pattern in this case. In Byrd v. Blumenreich, 317 N.J. Super. 496 (App. Div. 1999), a lead paint chips ingestion case, a pollution exclusion clause was found ambiguous, because of the absence of specific language dealing with residential exposure to lead paint. Haus involved the same pollution exclusion language as this case. The Haus court ruled that the substance there involved, carbon monoxide, was within the express definition of "pollutant" in the policy exclusion, namely a "gaseous ...contaminant" including "vapor, soot [and] fumes." 353 N.J. Super. at 72-3.

Nav-Its asserts in this case that paint fumes are part and parcel of, and a natural or normal by-product of painting operations, and are not within the pollutant category to which gaseous contaminants such as carbon monoxide belong.

Carbon monoxide is not a normal component of heating from home heating units. Carbon monoxide release occurs because of some leak in or malfunction of a heating unit. Heating units normally do not give off carbon monoxide. In sharp contrast, painting operations normally involve the release of paint fumes, just as the application of urethane or other coatings to hardwood floors does. Paint and paint fumes go hand in hand, while properly functioning heating units and releases of carbon monoxide poisoning are antithetical. Selective argues that paint fumes are "pollutants" because they are "gaseous contaminant[s]", within the meaning of the pollution exclusion clause. Nav-Its asserts that paint fumes are not a "pollutant", not a "gaseous contaminant", within the pollution exclusion clause; or that at best, the pollution exclusion language is ambiguous, as it was in Bryd.

The Haus court recognized that:

> Clear and unambiguous terms of an insurance policy, therefore, need no further source of construction to merit their enforcement. Insureds are entitled, however, "to the broad measure of protection necessary to fulfill their reasonable expectations." *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 482, 170 A.2d (1961). Coverage is thus afforded "to the full extent that any fair interpretation will allow." *Ibid.* (citations omitted). Therefore, in the event of an ambiguity in policy provisions that is reasonably susceptible to two interpretations, the construction resulting in coverage will be applied. *Linden Motor Freight Co. Inc. v. Travelers Ins. Co.*, 40 N.J. 511, 525, 193 A.2d 217 (1963). Exclusionary provisions, because they are designed to restrict coverage, will be interpreted strictly. *Butler v. Bonner & Barnewall, Inc.*, 56 N.J. 567, 576, 267 A.2d 527 (1970). Nevertheless, "exclusions are presumptively valid and will be

given effect if 'specific, plain, clear, prominent, and not contrary to public policy.'" *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 95, 698 A.2d 9 (1997) (citing *Doto v. Russo*, 140 N.J. 544, 659 A.2d 1371 (1995)).

[353 N.J. Super. at 71].

In the normal sense of the word, carbon monoxide is certainly a "pollutant", a "gaseous contaminant". By definition, a "pollutant" is something that pollutes, as e.g., a waste material that contaminants air, soil or water. Webster's II New College Dictionary (1995 ed.). However, it is at least problematic whether paint fumes are pollutants, contaminants. While the pollutant-gaseous contaminant language cannot be said to be ambiguous or open to doubt when it comes to carbon monoxide, Haus, supra, the same cannot be said for paint fumes from painting operations. Employment of the term "fumes" in the policy exclusion's definition of "pollutants" is not helpful, because the term must be read in the context of the "pollutant" – "contaminant" language. To view the term "fumes" in isolation would lead to absurd results, such as the inclusion of perfume fumes, which while some may find noxious, do not fit within the commonly understood meaning of pollutants or contaminants.

In sharp contrast to this case, in Haus there was no ambiguity problem because carbon monoxide clearly is a "gaseous contaminant" within the definition of "pollutant" in the Selective pollution exclusion clause. Webster's

defines carbon monoxide as an odorless, extremely poisonous gas. Paint fumes don't fit the odorless-extremely poisonous category. At best the Selective policy is ambiguous as to whether paints or sealants are to be considered as "pollutants", and as the Haus opinion notes, in the case of an ambiguity, the interpretation favoring coverage should be adopted. Also, besides the Selective pollution exclusion clause being ambiguous and reasonably susceptible to two interpretations with respect to the painting operations – paint fumes scenario that is involved in this case, the language of the exclusion clause is also not sufficiently specific, plain, clear and prominent, and should not be given effect to exclude or defeat coverage. Accordingly, the construction favoring coverage will be applied. See Kievet v. Loyal Protection Life Ins. Co., supra; Linden Motor Freight Co. Inc. v. Travelers Ins. Co., supra; Butler v. Bonner & Barnewell, Inc.; supra; Princeton Ins. Co. v. Chunmuang, supra (exclusion must be specific, plain, clear, prominent).

THE REASONABLE EXPECTATIONS DOCTRINE

Intertwined with the ambiguity problem that the pollution exclusion language raises, as applied to paint fumes from painting operations, is the application of the reasonable expectations doctrine to the facts of this case, and to the policy involved, including the declarations page. As noted, the fact pattern in this case is unlike that in Haus, where the contractor-insured

claimed coverage for carbon monoxide poisoning resulting from improper installation or defective operation of home heating units. Carbon monoxide release is not a normal by-product or consequence of the operation of home heating units. Instead, this case involves paint fumes that are inherent in or a normal consequence of painting operations performed as part of Nav-Its' general contractor business, through its painting subcontractor. On the declarations page, Selective listed Nav-Its' "business" as "GENERAL CONTRACTOR", and specifically covered Nav-Its for "SUBCONTRACTOR WORK". Thus, Selective knew the nature of Nav-Its' business. And, as observed in this Court's January 25, 2002 opinion, Selective certainly knew or should have known that the operations of a general contractor may extend to painting or sealants, and that the emission of odors or fumes is part and parcel of commercial painting or sealant applications. Nothing in the Selective policy would lead a reasonable insured to conclude that coverage was not provided for liability arising out of the application of paint or sealant to interior surfaces in the ordinary course of construction work. A reading of the "Pollution Exclusion (Limited Form)" endorsement does not create an objectively reasonable expectation that coverage for such liability would be excluded, for as noted above, the exclusion would convey, to a reasonable insured, that its purpose and intent was to preclude coverage for only those

claims involving contamination, and not painting operations.

This impression is strengthened by the language referring to the pollution exclusion as "arising out of the discharge, dispersal, seepage, migration, release or escape of pollutants...". These terms connote the act of contaminating. Nothing in this language suggests an intent to exclude coverage for liabilities arising from the application of paints or sealants to an interior surface in the ordinary course of construction work, as opposed to dumping, spilling, discarding or release of carbon monoxide or other contaminants.

Furthermore, a reasonable insured would not understand Selective's exclusion as having a broad scope, given its title of "Pollution Exclusion (Limited Form)." (emphasis added). Instead, a reasonable insured would expect Selective's "Limited" Pollution Exclusion to have only limited effect-to exclude coverage only for traditional pollution claims, i.e., claims arising out of contamination in the commonly understood sense.

Selective argues that paints and sealants qualify as "pollutants" as the term is defined by the policy. Selective also argues that by applying a paint or sealant to a surface, one is "dispersing," "discharging," or "releasing" the paint or sealant as well as its fumes. But this strained reading of the policy language by Selective is what the reasonable expectations doctrine was

designed to prevent. "Recognizing the position of laymen with respect to insurance policies prepared and marketed by the insurer, our courts have endorsed the principle of giving effect to the 'reasonable expectations' of the insured for the purpose of rendering a 'fair interpretation' of the boundaries of insurance coverage." DiOrio v. New Jersey Mfrs. Ins. Co., 79 N.J. 257, 269 (1979).

Also, there is nothing in the declarations page of the policy that conveys the impression that coverage for claims arising out of the application of paint or sealant would be excluded. In Zacarias v. Allstate Insurance Co., 168 N.J. 590 (2001), the Supreme Court endorsed the principle that the declaration page has "signal importance" to interpretation of the boundaries of coverage in an insurance policy. "We are, therefore, convinced that it is the declaration page, the one page of the policy tailored to the particular insured and not merely boilerplate, which must be deemed to define coverage and the insured's expectation of coverage." Zacarias, 168 N.J. at 602 (quoting Lehrhoff v. Aetna Cas. & Surety Co., 271 N.J. Super. 340, 347 (App. Div. 1994)). See also Araya v. Farm Family Casualty Ins. Co., 353 N.J. Super. 203, 209-210 (App. Div. 2002) (same). The declarations page issued by Selective specified that the policy provided "commercial general liability coverage", and as noted above, that Nav-Its was a general contractor. The declarations page conveyed the

impression that coverage existed for liability arising out of Nav-Its' activities as a general contractor, including painting operations of Nav-Its or its subcontractors. There is nothing in the Selective policy to convey any impression or alert Nav-Its that painting operations would not be covered, and paint fumes are a normal or inherent part of painting operations.

Accordingly, coverage of Nav-Its under the Selective CGL policy may also be found to exist through application of the reasonable expectations doctrine. Zacarias v. Allstate Ins. Co., supra; Gibson v. Callaghan, 158 N.J. 662, 669-71 (1999); American Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29 (1998). It is clear that the reasonable expectations doctrine applies to commercial liability policies, not just personal policies. See, e.g., American Motorists Ins. Co., supra, 155 N.J. at 41 (comprehensive general liability policy; the doctrine of the reasonable expectations of the insured will be applied in favor of coverage, even if there are no ambiguities, if the plain meaning of policy language conflicts with the reasonable expectations of the commercial insured); Werner Industries, Inc. v. First State Ins. Co., 112 N.J. 30, 35-6 (1988) (commercial excess insurance policy). In Zacarias, the Supreme Court noted in pertinent part:

> Broadly stated, we discern two rules from the above cases. First, in enforcing an insurance policy, courts will depart from the literal text and interpret it in accordance with the insured's understanding, even when that understanding contradicts the insurer's intent, if the text appears overly technical or contains

> hidden pitfalls, *Kievit, supra*, 34 N.J. at 482, 170 A.2d 22, cannot be understood without employing subtle or legalistic distinctions, *id.* at 488, 170 A.2d 22, is obscured by fine print, *Gerhardt, supra*, 48 N.J. at 293, 225 A.2d 328, or requires strenuous study to comprehend, *Sparks, supra*, 100 N.J. at 339, 495 A.2d 406. Second, the plain terms of the contract will be enforced if the "entangled and professional interpretation of an insurance underwriter is [not] pitted against that of an average purchaser of insurance," *DiOrio, supra*, 79 N.J. at 270, 398 A.2d 1274, or the provision is not so "confusing that the average policyholder cannot make out the boundaries of coverage," *Weedo, supra*, 81 N.J. at 247, 405 A.2d 788.
>
> . . .
>
> [168 N.J. at 601-04].

The Supreme Court in Werner discussed the application of the reasonable expectations doctrine in a commercial policy setting, stating:

> The fundamental principle of insurance law is to fulfill the objectively reasonable expectations of the parties. *See, e.g. Zuckerman v. National Union Fire Ins. Co.*, 100 N.J. 304 (1985). Nevertheless, "[t]he recognition that insurance policies are not readily understood has impelled courts to resolve ambiguities in such contracts against the insurance companies." *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 336 (1985) (citations omitted). At times even an unambiguous contract has been interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured:

> The interpretation of insurance contracts to accord with the reasonable expectations of the insured, regardless of the existence of any ambiguity in the policy, constitutes judicial recognition of the unique nature of contracts of insurance. By traditional standards of contract law, the consent of both parties, based on an informed understanding of the terms and conditions of the contract, is rarely present in insurance contracts. W.D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power," 84 *Harv. L. Rev.* 529, 539-41 (1971); *R. Keeton, Insurance Law* 350-52 (1971). Because understanding is lacking, the consent necessary to sustain traditional contracts cannot be presumed to exist in most contracts of insurance. Such consent can be inferred *only to the extent that the policy language conforms* to public expectations and commercially reasonable standards. *See* W.D. Slawson, *supra*, 84 *Harv. L. Rev.* at 566; *R. Keeton, supra*, at 350-52. In instances in which the insurance contract is inconsistent with public expectations and commercially accepted standards, judicial regulation of insurance contracts is essential in order to prevent overreaching and injustice. *R. Keeton, supra*, at 350-52; R. Keeton, "Insurance law Rights at Variance with Policy Provisions," 83 *Harv. L. Rev.* 961, 967 (1970). [*Sparks, supra*, 100 N.J. at 338.]
>
> [112 N.J. at 35-6].

The Supreme Court recently addressed the reasonable expectations of the insured doctrine again in Gibson, supra, citing the American Motorists and Werner decisions involving application of the doctrine to commercial policies. The Court said:

> Further, insurance policies must be construed to comport with the reasonable expectations of the insured. *American*

Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41, 713 A.2d 1007 (1998); *see also DiOrio v. New Jersey Mfrs. Ins. Co.*, 79 N.J. 257, 269, 398 A.2d 1274 (1979) ("Recognizing the position of laymen with respect to insurance policies prepared and marketed by the insurer, our courts have endorsed the principle of giving effect to the 'reasonable expectations' of the insured for the purpose of rendering a 'fair interpretation' of the boundaries of insurance coverage."); *Allen, supra*, 44 N.J. at 305, 208 A.2d 638 ("[An insured's] reasonable expectations in the transaction may not justly be frustrated and courts have properly molded their governing interpretative principles with that uppermost in mind."). That canon of interpretation is consistent with judicial recognition of the "unique nature" of insurance contracts. See *Sparks, supra*, 100 N.J. at 338, 495 A.2d 406. In exceptional circumstances, "even an unambiguous contract has been interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured." *Werner Indus., Inc. v. First State Ins. Co.*, 112 N.J. 30, 35-36, 548 A.2d 188 (1988); *see also* Robert E. Keeton, *Insurance law Rights at Variance with policy Provisions*, 38 *Harv. L.Rev.* 961, 967 1970) ("The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.").

Concerning exclusion clauses that proscribe or limit coverage, we have observed that "[i]n general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." *American Motorists, supra*, 155 N.J. at 41, 713 A.2d 1007 (quoting *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 95, 698 A.2d 9 (1997)). Conversely, clauses that extend coverage are to be viewed broadly and liberally. *Mazzilli, supra*, 35 N.J. at 8, 170 A.2d 800; *Cobra Prods., Inc. v. Federal Ins. Co.*, 317 N.J. Super. 392, 400, 722 A.2d 545 (App.Div. 1998).

[158 N.J. 662, 669-71 (1999)].

It is uncontroverted in this case that Nav-Its was a contractor, that its business was known to Selective, and that in during the course of that

business, painting operations would foreseeably be a part of the business. Nav-Its' business was listed in the declarations page of the Selective policy as a general contractor. Selective certainly knew or should have known that the operations of a general contractor may extend to painting or sealants. The emission of odors or fumes is part and parcel of commercial painting or sealant applications.

The "...declarations page, the one page of the policy tailored to [this] particular insured and not merely boilerplate... must be deemed to define coverage and [Nav-Its'] expectation of coverage." Zaciarias, supra, 168 N.J. at 602, quoting Lehrhoff, supra, 271 N.J. Super. at 347. Absent some warning in the declarations page or other conspicuous portion of the policy that coverage of such operations common to general contracting as painting or applying sealants is excluded, Nav-Its' reasonable expectation of such coverage raised by the declaration page is warranted.

Selective argues that Haus addressed and rejected the application of the reasonable expectations doctrine, referring to that portion of the Opinion dealing with the short term exposure occurring entirely within a building or structure limitation vs. the long term exposure exclusion. However, that is not the basis for application of the reasonable expectations doctrine in this case. In Haus, the event was release of carbon monoxide fumes from malfunctioning

heating units, which is not part and parcel of or a by-product of the normal functioning of a heating system. Normal operation of a heating unit is not supposed to release carbon monoxide into the air. In contrast, paint or sealant fumes are naturally released as usual or normal components of applying paints or sealants, not as a result of some malfunction or defect in the product or application. If the pollution exclusion were upheld in this situation, then a general contractor such as Nav-Its would have no liability coverage for painting operations that are part and parcel of building contracts or renovations. The distinction is important because a general contractor should have a reasonable expectation that it will have liability coverage for claims arising from its operations as a general contractor – the business of Nav-Its listed by Selective on the declarations page – including painting and sealing operations, and the natural release of fumes from those operations. If the pollution exclusion clause were held applicable in such situations, then a general contractor would have no liability coverage for incidents, involving paint fumes, which naturally recur in the normal painting operations that are part and parcel of the building business. In sum, the escape of carbon monoxide fumes from a heating unit is not a normal event; the release of paint fumes from painting is. Hence, the reasonable expectations doctrine should apply here to afford coverage. See, Meier v. N.J. Life Ins. Co., 101 N.J. 597, 671

(1986) (Courts are required to interpret an insurance contract to comport with the reasonable expectations of the insured, "even if a close reading of the written text reveals a contrary meaning").

"EXCEPTION B" OF THE POLLUTION EXCLUSION

Exception B of Selective's Pollution Exclusion (Limited Form)" endorsement provides as follows: [This exclusion does not apply to]:

> B. Injury or damage arising from the actual discharge or release of any "pollutants" that takes place entirely inside a building or structure if:
>
> (1) the injury or damage is the result of an exposure which takes place entirely within a building or structure; and
>
> (2) the injury or damage results from an actual discharge or release beginning and ending within a single forty-eight (48) hour period; and
>
> (3) the exposure occurs within the same forty-eight (48) hour period referred to in 2. above; and
>
> (4) within thirty (30) days of the actual discharge or release:
>
> a. the company or its agent is notified of the injury or damage in writing; or
>
> b. in the case of "bodily injury," the bodily injury" is treated by a physician, or death results, and within ten (10) additional days, written notice of such injury or death is received by the company or its agents.

Strict compliance with the time periods stated about is required for coverage to be provided.

In Haus, the court described this exception to coverage exclusion as applicable to "...a short term exposure occurring entirely within a building or structure". 353 N.J. Super. at 73-4. This exception did not apply in Haus because the discharge of carbon monoxide and the homeowners' exposure to it occurred over a one year period. Id. at 69. However, in this case, the allegations in the underlying complaint, and the discovery in that matter, demonstrate that the alleged exposures and resulting injuries took place entirely within a building and within a 24-hour time period. That satisfies the first three criteria of the exception. Nav-Its' sub-contractor's application of paint or sealant began each workday during the July 27, 1998 through August 5, 1998 period, and ended the same day. Plaintiff Scalia alleges that he was exposed to fumes and suffered injury therefrom, "while he was at work" each day. In answers to interrogatories, Scalia said he was exposed to fumes from July 27 through July 31, 1998, "while he was at work," and again from August 3 to August 5, 1998, "while he was at work."

Thus, plaintiff Scalia's exposures began and ended in less than 48-hour periods, he sustained injury within less than a 48-hour period, and each exposure and injury occurred within the confines of the building in which Nav-Its was performing its interior fit-out operations. Plaintiff Scalia's alleged

exposures to the paint fumes and his alleged injuries sustained as a result did not continue over a ten (10) day period but, rather, occurred within discrete periods of less than 24 hours.

Selective argues there must be "strict compliance" with the Exception B time limitations, including the requirement that within thirty (30) days of the discharge, the claimant be treated by a doctor, and that within ten (10) additional days, Selective be notified of the injury. However, it is uncontroverted that Nav-Its did not receive notice of Scalia's alleged injuries within ten (10) days of his first post-exposure visit to a doctor, in September, 1998. Hence, Nav-Its could not comply with the policy's notice requirement. In this regard, the general rule for occurrence-based policies, such as that issued by Selective to Nav-Its, is that the "carrier may not forfeit the bargained for protection unless there are both a breach of the notice provision and a likelihood of appreciable prejudice." Cooper v. Government Employees Ins. Co., 51 N.J. 86, 94 (1968). "Appreciable prejudice" requires a showing, by the carrier, that "substantial rights have been irretrievably lost by virtue of failure of the insured to notify the carrier in a timely fashion," and that this will impact the carrier's ability to successfully defend the suit. See, e.g., Sagendorf v. Selective Insurance Co. of America, 293 N.J. Super. 81, 93 (App. Div. 1996). Selective has not shown "appreciable prejudice". Indeed, it is uncontroverted

that Selective received notice of Scalia's claim within seven (7) days after plaintiff Scalia filed his Praecipe of Summons, and before a Complaint was even filed.

Accordingly, there being no genuine issue of material fact, Exception B to the pollution exclusion of the policy applies, as a matter of law.

CONCLUSION

For each of the reasons expressed herein, Selective's reconsideration motion must be denied. This opinion also incorporates the prior opinion of January 25, 2002, with this note. The Haus decision appears to be the first appellate decision in New Jersey applying a pollution exclusion clause to a non-environmental pollution claim, i.e., one for personal injury. In doing so, the court does not mention S.N. Golden Estates v. Continental, 293 N.J. Super. 395 (App. Div. 1996), which limited the application of such exclusions to environmental claims, and not personal injury or property damage claims, which can be separated from the substance's toxicity. Citing numerous decisions from other jurisdictions, the S.N. Golden Estates court noted that such clauses insulate insurance companies only from environmental claims, not from all claims that involve substances which could be classified as pollutants. The fact that the subject exclusion has a 48 hour exception, and is thus not "absolute", does not address the environmental – personal injury

distinction in S.N. Golden Estates, supra, which remains a viable precedential decision.

Selective's motion for reconsideration and vacation of the Order of November 16, 2001 is hereby denied.

SO ORDERED this 4th day of October, 2002.

William J. Cook

WILLIAM J. COOK, J.S.C.

APPENDIX E

TRUE COPY

William J. Cook

William J. Cook, J.S.C.

ORDER PREPARED BY THE COURT

NAV-ITS INC., Plaintiff, -vs- SELECTIVE INSURANCE GROUP, INC. Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION-CAMDEN COUNTY DOCKET NO. L-661-01 Civil Action OPINION AND ORDER

INTRODUCTION

This matter is before the Court on Selective Insurance Company's ("Selective") motion for reconsideration of the Court's November 16, 2001 Order denying Selective's summary judgement motion, and granting plaintiff Nav-Its, Inc.'s ("Nav-Its") cross-motion for summary judgement against Selective on Counts 1 and 2 of the Amended Complaint. The issue addressed on the summary judgement and cross-summary judgement motions was the applicability of a pollution

exclusion clause in a commercial general liability policy issued to Nav-Its by Selective.

CHOICE OF LAW

The insured, Nav-Its, is a New Jersey company. The contract was made and the policy was issued by Selective in New Jersey. The underlying claim giving rise to Nav-Its' claim for liability coverage under the Selective policy is a personal injury action arising from an occurrence in Allentown, Pennsylvania.

Unlike Pfizer v. Emp. Ins. of Nasau, 154 N.J. 198 (1998), this is not a multistate, environmental insurance case. Nor is it a hazardous waste - waste disposal contamination case, as were Pfizer and Spruance v. Pennsylvania Manufacturer's Ass'n Ins. Co., 134 N.J. 96 (1993). Rather the underlying claim pending in a Pennsylvania tribunal is a personal injury claim of Dr. Scalia against Nav-Its, alleging he was injured from inhalation of fumes from painting

being done in an Allentown office building by Nav-Its' painting subcontractor, T. A. Farikos Painting. Nav-Its subcontracted tenant "fit out" work in the building to Metro, and Nav-Its hired Farikos to paint and coat the floor. Selective has refused to defend Nav-Its in the underlying Pennsylvania tort action. Nav-Its brings this action for a declaration that it has liability coverage under the Selective policy for the claim in the Pennsylvania action and that Selective must defend Nav-Its in that action.

In its summary judgement brief, Selective relied on both Pennsylvania and New Jersey cases dealing with the applicability of pollution exclusion clauses in insurance policies. In the summary judgement proceeding, Selective asserted that the pollution exclusion clause in the policy was an "absolute" pollution exclusion clause, not a "limited" pollution exclusion clause. At the time of the summary judgment

proceeding there was an actual conflict between New Jersey and Pennsylvania regarding the interpretation of the absolute pollution exclusion. *Compare* S.N. Golden Estates v. Continental Cas. Co., 293 N.J. Super. 395 (App. Div. 1996) (refusing to apply absolute pollution exclusion to bar coverage for property damage caused by faulty installation of sewage system because this was not the type of damage claim that the insurance industry intended to be subject to the absolute exclusion clause) and Byrd ex rel. Byrd v. Blumenreich, 317 N.J. Super. 496 (App. Div. 1999), with Madison Const. v. Harleysville Mut. Ins., 678 A.2d 806, 806 (Pa. Super. 1996), *aff'd*, 735 A.3d 100 (Pa. 1999) (applying exclusion to bar coverage for injuries suffered by worker after fainting from inhaling fumes from commonly used concrete sealer).

In Pharmacia & Upjohn Co. v. American Ins. Co., 316 N.J. Super. 161 (App. Div. 1998), the Appellate

Division, applying the Restatement (Second) of Conflict of Laws, concluded that New Jersey law should apply in interpreting the pollution exclusion clause to a waste site located in Pennsylvania. Id. at 165-66. The Appellate Division found significant the policyholder's business presence and connection to New Jersey. Id at 166. The insured was incorporated in New Jersey, had its principal place in New Jersey and its premiums were billed and paid in New Jersey. Notably, the court did not find significant the fact that the waste was not generated in New Jersey, but rather, came from a manufacturing plant operated by the insured in Maryland. Ibid. As the Court stated:

> [M]ost important in the context of the analysis, is the undisputed fact that irrespective of where the waste was generated and dumped, the insured was a New Jersey corporation that negotiated its insurance coverage in New Jersey and was hence entitled to look to the law of this state, intended and designed to protect New Jersey policyholders.

[Ibid.]

In this case, whether or not any policy exclusion applied, and although the alleged injury to Dr. Scalia occurred in Allentown, Pennsylvania, New Jersey has the more significant and dominant relationship to the parties and transaction at issue. Nav-Its is a New Jersey corporation with its principal place of business located in New Jersey; Selective is a New Jersey corporation with its principal place of business also located in New Jersey; the CGL policy at issue was procured through Haas & Haas, Nav-Its' broker, which is also a New Jersey company located in Voorhees, New Jersey. Metro, who contracted with Nav-Its to perform the tenant "fit-out" work, is a New Jersey corporation with its principal place of business located in Mount Laurel. Fanikos, the subcontractor whom Nav-Its hired to paint and coat the floor as part of the "fit-out" work, is a New Jersey

corporation with its principal place of business in Bordentown, New Jersey. The policy was negotiated in New Jersey between Nav-Its and Selective, and Haas & Haas, all New Jersey companies. The premiums were billed and paid in New Jersey. Much of Nav-Its' construction work was performed in New Jersey and Selective knew that.

At the summary judgement hearing, Selective's counsel argued for application of Pennsylvania law, but said the court could apply New Jersey law, because, he believed it was the same as Pennsylvania law on the subject. However, as noted above, an actual conflict of law existed. Since New Jersey and Pennsylvania's law governing the interpretation of absolute pollution exclusions were in conflict, and since New Jersey obviously has the more significant and dominant relationship to the transaction and to the parties, the court determined that the law of New

Jersey applied. Thus, Selective's argument on its reconsideration motion that the court erred in making a choice-of-law analysis and applying New Jersey law is without merit. *See* J. Josephson v. Crum & Forster, 293 N.J. Super. 170, 183 (App. Div. 1996).

This does not mean, however that the court cannot look to decisions in other states, so long as they are not contrary to New Jersey law.[1]

CONSTRUCTION AND INTERPRETATION OF SELECTIVE'S "ABSOLUTE" POLLUTION EXCLUSION CLAUSE

The New Jersey Supreme Court has on several

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[1]In its opposition to Selective's reconsideration motion, Nav-Its points out that in an opinion released after the summary judgement motion hearing in this case, the Pennsylvania Supreme Court held in a lead-based paint ingestion claim, that a pollution exclusion does not apply because there is no discharge, dispersal, release, or escape of the lead, as required under a pollution exclusion clause. Instead, in the usual case, lead-based paint becomes available for ingestion from the continual deterioration or degeneration of the lead-based paint that occurs continually but at a slow rate over a considerable period of time. Lititz Mutual Ins. Co. v. Steely, __ Pa. Super. __, 2001 WL 1523849 (Nov. 30, 2001). The Lititz decision is consistent with Byrd ex rel. Byrd v. Blumenreich, 317 N.J. Super. 496 (App. Div. 1999). However, Byrd went further, noting that pollution exclusion clauses apply to environmental pollution claims only, not to personal policy claims.

occasions enunciated the rules for interpretation of insurance policies. The Supreme Court declared in Longobardi v. Chubb Ins. Co. of N.J.:

> We begin with an overview of the fundamental rules for interpreting insurance policies. As contracts of adhesion, such policies are subject to special rules of interpretation. Thus, we have said that "policies should be construed liberally in [the insured's] favor to the end that coverage is afforded 'to the full extent that any fair interpretation will allow.'" Notwithstanding that premise, the words of an insurance policy should be given their ordinary meaning, and in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability.
>
> [121 N.J. 530, 537 (1990) (citations omitted)].

The Supreme Court recently declared in Gibson v. Callaghan that:

> Insurance policies are contracts of adhesion and, as such, are subject to special rules of interpretation. *Longobardi v. Chubb Ins. Co.*, 121 N.J. 530, 537, 582 A.2d 1257 (1990); *Meier v. New Jersey Life Ins. Co.*, 101 N.J. 597, 611-12, 503 A.2d 862 (1986). As this Court noted in *Allen v. Metropolitan Life Insurance Co.*, 44 N.J. 294, 305, 208

A.2d 638 (1965), an insurance company is "expert in its field and its varied and complex instruments are prepared by it unilaterally whereas the assured or prospective assured is a layman unversed in insurance provisions and practices." Therefore, when called on to interpret insurance policies, we "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175, 607 A.2d 1255 (1992); *see also Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 335, 495 A.2d 406 (1985) (noting that terms of insurance policies are subject to "careful judicial scrutiny to avoid injury to the public").

Certain well-established rules for interpreting insurance policies have developed from that understanding of the nature of insurance policies. Generally, the words of an insurance policy are to be given their plain, ordinary meaning. *Voorhees, supra*, 128 N.J. at 175, 607 A.2d 1255; *Longobardi, supra*, 121 N.J. at 537, 582 A.2d 1257. In the absence of any ambiguity, courts "should not write for the insured a better policy of insurance than the one purchased." *Longobardi, supra*, 121 N.J. at 537, 582 A.2d 1257 (quoting *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 116 N.J. 517, 529, 562 A.2d 208(1989)); *see also Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 43, 161 A.2d 717 (1960) ("When the terms of an insurance contract are clear, it is the

function of a court to enforce it as written and not to make a better contract for either of the parties.").

However, that ambiguities in an insurance policy are to be interpreted in favor of the insured is fundamental. *See Cruz-Mendez v. ISU/Ins. Servs.*, 156 N.J. 556, 571, 722 A.2d 515 (1999); *Doto v. Russo*, 140 N.J. 544, 556, 659 A.2d 1371 (1995); *Hunt v. Hospital Serv. Plan of New Jersey*, 33 N.J. 98, 102, 162 A.2d 561 (1960). When obligated to construe an ambiguous clause in an insurance policy, courts should consider whether more precise language by the insurer, had such language been included in the policy, "would have put the matter beyond reasonable question." *Doto, supra*, 140 N.J. at 557, 659 A.2d 1371 (quoting *Mazzilli v. Accident & Cas. Ins. Co.*, 35 N.J. 1, 7, 170 A.2d 800 (1961)); *see also Kook v. American Sur. Co.*, 88 N.J. Super. 43, 51, 210 A.2d 633 (App.Div. 1965) ("[C]onsideration should be given [about] whether alternative or more precise language, if used, would have put the matter beyond reasonable question.").

Further, insurance policies must be construed to comport with the reasonable expectations of the insured. *American Motorists Ins. Co. v. L-C-A Sales Co.*, 155 N.J. 29, 41, 713 A.2d 1007 (1998); *see also DiOrio v. New Jersey Mfrs. Ins. Co.*, 79 N.J. 257, 269, 398 A.2d 1274 (1979) ("Recognizing the position of laymen with respect to insurance policies prepared and marketed by

the insurer, our courts have endorsed the principle of giving effect to the 'reasonable expectations' of the insured for the purpose of rendering a 'fair interpretation' of the boundaries of insurance coverage."); *Allen, supra*, 44 N.J. at 305, 208 A.2d 638 ("[An insured's] reasonable expectations in the transaction may not justly be frustrated and courts have properly molded their governing interpretative principles with that uppermost in mind."). That canon of interpretation is consistent with judicial recognition of the "unique nature" of insurance contracts. See *Sparks, supra*, 100 N.J. at 338, 495 A.2d 406. In exceptional circumstances, "even an unambiguous contract has been interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured." *Werner Indus., Inc. v. First State Ins. Co.*, 112 N.J. 30, 35-36, 548 A.2d 188 (1988); *see also* Robert E. Keeton, *Insurance Law Rights at Variance with policy Provisions*, 38 *Harv. L.Rev.* 961, 967 1970) ("The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.").

Concerning exclusion clauses that proscribe or limit coverage, we have observed that "[i]n general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." *American Motorists,*

supra, 155 N.J. at 41, 713 A.2d 1007 (quoting *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 95, 698 A.2d 9 (1997)). Conversely, clauses that extend coverage are to be viewed broadly and liberally. *Mazzilli, supra*, 35 N.J. at 8, 170 A.2d 800; *Cobra Prods., Inc. v. Federal Ins. Co.*, 317 N.J. Super. 392, 400, 722 A.2d 545 (App.Div. 1998).

[158 N.J. 662, 669-71 (1999)].

In construing absolute pollution exclusions, the court in S.N. Golden Estates v. Continental, 293 N.J. Super. 395, (App. Div. 1996), distinguished between environmental claims and personal injury or property damage claims. The court said:

> In addition, the plaintiffs in the underlying action do not allege the kind of damages that the Absolute Pollution exclusion was designed to exclude from coverage. Several foreign jurisdictions have held that the absolute pollution exclusion was intended to apply only to environmental claims, and not to claims of personal injury or property damage which can be separated from the substance's environmental toxicity. *See e.g. Minerva Enter. Inc. v. Bituminous Casualty Corp.*, 312 Ark. 128, 851 S.W.2d 403, 405 (1993) (holding that an insured real estate developer would not reasonably expect that damages caused by the back-up of a septic system would be

included in the descriptions set out in the exclusion); *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 667 A.2d 617, 620-23 (1995) (pollution exclusion was intended to insulate insurance companies from liability for environmental claims, not to insulate them from all claims involving substances which could be classified as pollutants). *See also Red Panther Chem. Co. v. Insurance Co. of the State of Pa.*, 43 F.3d 514, 518-19 (10th Cir.1994) (refusing to universally adopt the environmental/non-environmental distinction but holding that a case-by-case approach must be used to determine the absolute pollution exclusion's applicability in the given set of circumstances).

This line of cases is directly applicable to the present case. There is no indication that the damage claims of the plaintiffs in the underlying action are dependent upon the toxicity of the sewage that has flowed onto their properties and homes, or that they are claiming damages for the remediation of a hazardous condition. Indeed, to the extent that compensatory damages for cleanup of the flooded homes are sought, the complaint does not allege that these costs will differ from the cleanup costs that would be incurred if the homes were simply flooded with ordinary water. Therefore, the present case is different from prior New Jersey cases interpreting the Absolute Pollution exclusion, all of which have involved claims for traditional environmental type damages, i.e., containment and remediation of

pollutants which have permeated the land, water or air. *See, e.g., A & S Fuel Oil Co. Inc. v. Royal Indem. Co., Inc.*, 279 N.J. Super. 367, 652 A.2d 1236 (App. Div. 1995)(owner and operator of fuel truck that spilled heating oil into river not covered under commercial automobile insurance for costs of containing and remediating the spill), *certif. denied*, 141 N.J. 98, 660 A.2d 1196 (1995); *Nunn v. Franklin Mut. Ins. Co.*, 274 N.J. Super. 543, 644 A.2d 1111 (App. Div. 1994) (insurance policy with absolute pollution exclusion did not cover cleanup costs to insured's property after heating oil tank ruptured); *Harvard Indus., Inc. v. Aetna Casualty & Surety Co.*, 273 N.J. Super. 467, 642 A.2d 438 (Law Div. 1993) (absolute pollution exclusion barred claims for government-directed cleanup costs at various sites); *United States Bronze Powders, Inc. v. Commerce & Indus. Ins. Co.*, 259 N.J. Super. 109, 611 A.2d 667 (Law Div. 1992) (absolute pollution exclusion barred coverage for containment and remediation costs incurred as a result of airborne contamination of soil by a spill of copper sulphate and other chemicals); *Vantage Dev. Corp., Inc. v. American Env't Technologies Corp.*, 251 N.J. Super. 516, 598 A.2d 948 (Law Div. 1991) (absolute pollution exclusion barred coverage for cleanup and containment of oil allegedly spilled on insured's property by vandals). In contrast, plaintiffs in the underlying action claim damages that are not dependent on the substance that flowed onto their properties being classified as a pollutant

and that do not involve any form of environmental remediation. Therefore, the Absolute Pollution exclusion does not apply.

[293 N.J. Super. at 402-04 (emphasis added].

It is important therefore that in determining whether an absolute pollution clause will or will not apply to exclude coverage in a particular case, a court must distinguish between personal injury or property damage claims, and traditional environmental type damage claims, i.e., damages for the cost of environmental cleanup, containment or remediation of or from pollutants which have permeated the land, water or air. Nunn is an example of the latter, while S.N. Golden Estates and this case are examples of the former. This distinction does not turn on or depend on whether there is an ambiguity in the policy, or the reasonable expectations of the insured,[2] but rather,

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[2]See Nunn, supra, 274 N.J. Super. at 549-50, attempting to distinguish the holdings in Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165 (1992) (an insured's reasonable expectations can overcome even an unambiguous policy) and State v. Signo Trading

the distinction between personal injury or property damage claims vs. traditional environment type damages claims (damages for the cost of environmental cleanup, containment or remediation from environmental pollution).

Besides the Arkansas and Maryland decisions cited in S.N. Golden Estates, supra, well-reasoned cases from other jurisdictions have also applied the same personal injury or property damage claims vs. traditional environmental type damage (containment, remediation) claims distinction, in construing pollution exclusion clauses. See, e.g. Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995) (under New York law, coverage for personal

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Intern. Inc., 130 N.J. 51 (1992) (the doctrine of reasonable expectations applies only when the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage), on the basis that Voorhees involved a homeowner's policy and therefore a less sophisticated consumer that a commercial insured, while Signo involved a commercial policy. However, the Supreme Court made no such distinction in its 1999 decision in Gibson.

injury and wrongful death claims from inhalation of carbon monoxide is not barred by the standard pollution exclusion in commercial liability policies); Karroll v. Atomergic Chemetals Corp., 600 N.Y.S.2d (1993) (coverage for personal injury claim of bulldozer operator sprayed with sulphuric acid not excluded by pollution exclusion clause, because such clauses could be "reasonably interpreted to apply only to instances of environmental pollution"); Miano v. Hehn, 614 N.Y.S. 2d 829, 830 (1994) (relying on Karroll); Schumann v. State of New York, 610 N.Y.S. 2d 987, 990 (Ct. Cl. 1994); Regional Bank of Colorado, N.A. v. St. Paul Fire and Marine Ins. Co., 35 F.3d 394 (10th Cir. 1994) (applying Colorado law, coverage for personal injury claims from inhalation of carbon monoxide is not barred by the pollution exclusion clause of a comprehensive general liability policy; reasonable expectation doctrine applies to interpret

unambiguous policy provisions, even under commercial liability policy issued to a commercial insured).

The same distinction was referred to in Byrd ex rel. Byrd v. Blumenreich, supra. There, in the course of holding that an absolute pollution exclusion clause in a commercial general liability policy issued to a commercial landlord did not apply to a personal injury claim on behalf of a child's ingestion of lead paint chips, the court cited Lefrak Organization, Inc. v. Chubb Custom Ins. Co., 942 F.Supp. 949 (S.D.N.Y. 1996) (applying New York law), and said:

> In rejecting the insurer's reliance on the pollution exclusion clause, the court in *Lefrak* concluded that lead paint was not included within the pollution exclusion clause and that the ordinary policyholder would read the wording of the clause as applying to environmental pollution only. *Lefrak, supra*, 942 F.Supp. at 953. Pollution occurring indoors was not deemed to be environmental. *Ibid.*
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> [317 N.J. Super. at 501 (emphasis added)].

The only New Jersey decision Selective cites to

support its assertion that the pollution exclusion clause in the policy applies to defeat coverage of Nav-Its for Dr. Scalia's personal injury claim is an unpublished opinion in Leo Haus, Inc. v. Selective Insurance Company of America, No. L-00501-00 (Law Div. Monmouth County, May 11, 2000) appeal docketed, No. A-005535-98T5 (App. Div. 2001). That case involves a personal injury claim from exposure to carbon monoxide over a period of one year, and what Selective asserts to be the same pollution exclusion clause as in this case. Judge Gilroy found the clause to be clear and unambiguous, and ruled that it applied to exclude liability coverage because "the injury and exposure occurred over a one year period of time, and not within [the] "limited 48 hour period" exception to the exclusion that is contained in both this Selective policy, and in the Selective policy in Haus, Exception "B". Haus can be factually distinguished on the

latter point, because as Nav-It's counsel argues in his brief:

> Exception "B" to Selective's limited pollution exclusion had actually been satisfied based on the record before the Court. We pointed to the underlying Complaint which was attached to Exhibit "F" to the Medoway Certification and, more specifically, ¶¶¶27, 28 and 38 of that Complaint, all of which indicated that Dr. Scalia inhaled and was exposed to toxic fumes on or about July 28, 1998 through August 5, 1998.
>
> We argued that each of the exposures and the injuries resulting therefrom occurred within the building and within a 24-hour timeframe which satisfies the exception's 48-hour period requirement. We pointed out that Nav-Its' contracting work began each of those days noted above and concluded each day. Thus, Dr. Scalia was exposed within a 48-hour period, sustained injury within a 48-hour period and that exposure and injury all occurred within the confines of the building in which Nav-Its was performing its interior fit-out operations. (See transcript of oral argument attached to Exhibit "D" of Selective's motion for reconsideration, at pgs. 18-21).

However, whether or not Exception "B" applies is not necessary to the outcome in this case. In Haus, the

court did not cite S.N. Golden Estates or any of the other cases cited above, which distinguish between personal injury or property damage claims vs. traditional environmental type damage claims (damages for environmental cleanup, containment or remediation), and hold that personal injury or property damage claims are not excluded under so-called absolute pollution clauses, while remediation, cleanup or containment claims (the traditional environmental type damage claims) are excluded. Nor, does the Haus opinion note the statement in Byrd that indoor pollution is not environmental, and that pollution exclusion clauses should be read as applying to environmental pollution only.

So that it is clear, the determination that the pollution exclusion clause in Selective's policy is supported by the holdings and the rationale of S.N. Golden Estates, Byrd and the other federal and state

court decisions cited above. In summary, the pollution exclusion clause in Selective's policy must be read and interpreted to apply only to environmental pollution clauses, i.e., claims for traditional environmental type damages, i.e., containment, cleanup or remediation of the environment; and not to personal injury or property damage claims.

This same result would obtain through an application of the reasonable expectations doctrine. Zacarias v. Allstate Ins. Co., 168 N.J. 590 (2001); Gibson v. Callaghan, supra; American Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29 (1998). It is clear that the reasonable expectations doctrine applies to commercial liability policies, not just personal policies. See, e.g., American Motorists Ins. Co., supra, 155 N.J. at 41 (comprehensive general liability policy; the doctrine of the reasonable expectations of the insured will be applied in favor

of coverage, even if there are no ambiguities, if the plain meaning of policy language conflicts with the reasonable expectations of the commercial insured); Werner Industries, Inc. v. First State Ins. Co., 112 N.J. 30, 35-6 (1988) (commercial excess insurance policy). In Zacarias, the Supreme court noted in pertinent part:

> Broadly stated, we discern two rules from the above cases. First, in enforcing an insurance policy, courts will depart from the literal text and interpret it in accordance with the insured's understanding, even when that understanding contradicts the insurer's intent, if the text appears overly technical or contains hidden pitfalls, *Kievit, supra*, 34 N.J. at 482, 170 A.2d 22, cannot be understood without employing subtle or legalistic distinctions, *id.* at 488, 170 A.2d 22, is obscured by fine print, *Gerhardt, supra*, 48 N.J. at 293, 225 A.2d 328, or requires strenuous study to comprehend, *Sparks, supra*, 100 N.J. at 339, 495 A.2d 406. Second, the plain terms of the contract will be enforced if the "entangled and professional interpretation of an insurance underwriter is [not] pitted against that of an average purchaser of insurance," *DiOrio, supra*, 79 N.J. at 270, 398 A.2d 1274, or the provision is not so "confusing that the

> average policyholder cannot make out the boundaries of coverage," *Weedo, supra*, 81 N.J. at 247, 405 A.2d 788.
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> [168 N.J. at 601-04].

The Supreme Court in Werner discussed the application of the reasonable expectations doctrine in a commercial policy setting, stating:

> The fundamental principle of insurance law is to fulfill the objectively reasonable expectations of the parties. *See, e.g. Zuckerman v. National Union Fire Ins. Co.*, 100 N.J. 304 (1985). Nevertheless, "[t]he recognition that insurance policies are not readily understood has impelled courts to resolve ambiguities in such contracts against the insurance companies." *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 336 (1985) (citations omitted). At times even an unambiguous contract has been interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured:
>
> > The interpretation of insurance contracts to accord with the reasonable expectations of the insured, regardless of the existence of any ambiguity in the policy, constitutes judicial recognition of the unique nature of contracts of insurance. By traditional standards

> of contract law, the consent of both parties, based on an informed understanding of the terms and conditions of the contract, is rarely present in insurance contracts. W.D. Slawson, "Standard Form Contracts and Democratic Control of Lawmaking Power," 84 *Harv. L. Rev.* 529, 539-41 (1971); *R. Keeton, Insurance Law* 350-52 (1971). Because understanding is lacking, the consent necessary to sustain traditional contracts cannot be presumed to exist in most contracts of insurance. Such consent can be inferred only to the extent that the policy language conforms to public expectations and commercially reasonable standards. *See* W.D. Slawson, *supra*, 84 *Harv. L. Rev.* at 566; *R. Keeton, supra*, at 350-52. In instances in which the insurance contract is inconsistent with public expectations and commercially accepted standards, judicial regulation of insurance contracts is essential in order to prevent overreaching and injustice. *R. Keeton, supra*, at 350-52; R. Keeton, "Insurance law Rights at Variance with Policy Provisions," 83 *Harv. L. Rev.* 961, 967 (1970). [*Sparks, supra*, 100 N.J. at 338.]
>
> [112 N.J. at 35-6].

The Supreme Court recently addressed the reasonable

expectations of the insured doctrine again in Gibson, supra, citing the American Motorists and Werner decisions involving application of the doctrine to commercial policies. The Court said:

> Further, insurance policies must be construed to comport with the reasonable expectations of the insured. *American Motorists Ins. Co. v. L-C-A Sales Co.*, 155 N.J. 29, 41, 713 A.2d 1007 (1998); *see also DiOrio v. New Jersey Mfrs. Ins. Co.*, 79 N.J. 257, 269, 398 A.2d 1274 (1979) ("Recognizing the position of laymen with respect to insurance policies prepared and marketed by the insurer, our courts have endorsed the principle of giving effect to the 'reasonable expectations' of the insured for the purpose of rendering a 'fair interpretation' of the boundaries of insurance coverage."); *Allen, supra*, 44 N.J. at 305, 208 A.2d 638 ("[An insured's] reasonable expectations in the transaction may not justly be frustrated and courts have properly molded their governing interpretative principles with that uppermost in mind."). That canon of interpretation is consistent with judicial recognition of the "unique nature" of insurance contracts. See *Sparks, supra*, 100 N.J. at 338, 495 A.2d 406. In exceptional circumstances, "even an unambiguous contract has been interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured." *Werner Indus., Inc. v. First State*

Ins. Co., 112 N.J. 30, 35-36, 548 A.2d 188 (1988); *see also* Robert E. Keeton, *Insurance Law Rights at Variance with policy Provisions*, 38 *Harv. L.Rev.* 961, 967 1970) ("The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.").

Concerning exclusion clauses that proscribe or limit coverage, we have observed that "[i]n general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." *American Motorists, supra*, 155 N.J. at 41, 713 A.2d 1007 (quoting *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 95, 698 A.2d 9 (1997)). Conversely, clauses that extend coverage are to be viewed broadly and liberally. *Mazzilli, supra*, 35 N.J. at 8, 170 A.2d 800; *Cobra Prods., Inc. v. Federal Ins. Co.*, 317 N.J. Super. 392, 400, 722 A.2d 545 (App.Div. 1998).

[158 N.J. 662, 669-71 (1999)].

It is uncontroverted in this case that Nav-Its was a contractor, that its business was known to Selective, and that in during the course of that business, painting operations would foreseeably be a

part of the business. Nav-Its' business was listed in the declarations page of the Selective policy as a general contractor. Selective certainly knew or should have known that the operations of a general contractor may extend to painting or sealants. The emission of odors or fumes is part and parcel of commercial painting or sealant applications.

The "...declarations page, the one page of the policy tailored to [this] particular insured and not merely boilerplate... must be deemed to define coverage and [Nav-Its'] expectation of coverage." Zaciarias, supra, 168 N.J. at 602, quoting Lehrhoff, supra, 271 N.J. Super. at 347. Absent some warning in the declarations page or other conspicuous portion of the policy that coverage of such operations common to general contracting as painting or applying sealants is excluded, Nav-Its' reasonable expectation of such coverage raised by the declaration page is warranted.

Such reasonable expectation is further buttressed by the pronouncements in S.N. Golden Estates and the other cases cited above, which distinguish between personal injury or property damage claims vs. traditional environmental type damage claims (damages for environmental cleanup, containment or remediation), and hold that personal injury or property damage claims are not excluded under so-called absolute pollution clauses, while remediation, cleanup or containment claims (the traditional environmental type damage claims) are excluded. It is also buttressed by the statement in Byrd that indoor pollution is not environmental, and that pollution exclusion clauses should be read as applying to environmental pollution only.

Accordingly, Selective's reconsideration motion is denied. The Order denying its summary judgment motion and granting Nav-It's cross-motion for

partial summary judgment stands.

With respect to plaintiff's claim for counsel fees, the parties may take limited discovery by way of no more than ten (10) interrogatories and document requests on that subject. The plaintiff's motion for counsel fees will be adjourned until January 25, 2002.

Dated: January 4, 2002

William J. Cook

WILLIAM J. COOK, J.S.C.