In The
Supreme Court of Virginia

RECORD NO. 051986

CITY OF CHESAPEAKE, VIRGINIA,

Appellant,

v.

STATES SELF-INSURERS RISK RETENTION GROUP, INC.,

Appellee.

BRIEF OF *AMICUS CURIAE*

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STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND ITS INTEREST IN THE CASE

United Policyholders ("UP") was founded in 1991 as a not-for-profit, 501(c)(3) organization dedicated to educating the public on insurance issues and consumer rights. UP is funded by donations and grants from individuals, businesses, and foundations. UP serves as a non-commercial information resource on coverage and claims issues. The organization monitors legal and marketplace developments that impact policyholders and participates in forums aimed at formulating public policy on insurance transactions. UP publishes materials that give practical guidance on buying, coverage and claim issues to property and business owners and advocates, disaster relief personnel, attorneys and adjusters at www.uphelp.org.

Additionally, UP has taken a prominent role in protecting the interests of the general public, by acting as a watchdog with respect to the insurance industry. In this connection, the outcome of this case is extremely important to the insurance purchasing public, and particularly, any policyholder that purchases coverage for environmentally related damages. Indeed, whether chlorine is considered a pollutant and, more importantly, the application of the "absolute" and "total" pollution exclusions, are of great significance.

UP previously has appeared as *amicus curiae* in over one hundred and thirty cases throughout the United States, including numerous cases in the California courts.[1] UP also has appeared as *amicus curiae* in cases before the United States Supreme Court. See Humana, Inc. v. Forsyth, No. 97-303 (U.S. Sept. 18, 1998); FL Aerospace v. Aetna Casualty and Surety Co., No. 90-289 (U.S. Sept. 13, 1990), and the United States Supreme Court cited United Policyholders' brief in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999). UP was the only national consumer

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[1] County of San Diego v. Ace Property & Cas. Ins. Co., (2005) 37 Cal.4th 406 [33 Cal.Rptr.3d 583]; Powerine Oil Co., Inc. v. Superior Court, (2005) 37 Cal.4th 377 [33 Cal.Rptr.3d 562]; Johnson v. Ford Motor Co., (2005) 35 Cal.4th 1191 [29 Cal.Rptr.3d 401]; Simon v. San Paolo U.S. Holding Co., Inc., (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379]; Julian v. Hartford Underwriters Ins. Co., (2005) 35 Cal.4th 747 [27 Cal.Rptr.3d 648]; Garamendi v. Golden Eagle Ins. Co., (2005) 127 Cal.App.4th 480 [25 Cal.Rptr.3d 642]; American Ins. Ass'n v. Garamendi, (2005) 127 Cal.App.4th 228 [24 Cal.Rptr.3d 905]; Watts Industries, Inc. v. Zurich American Ins. Co., (2004) 121 Cal.App.4th 1029 [18 Cal.Rptr.3d 61]; Cassim v. Allstate Ins. Co., (2004) 33 Cal.4th 780 [16 Cal.Rptr.3d 374]; Marselis v. Allstate Ins. Co., (2004) 121 Cal.App.4th 122 [16 Cal.Rptr.3d 668]; Hameid v. National Fire Ins. of Hartford, (2003) 31 Cal.4th 16 [1 Cal.Rptr.3d 401]; Rosen v. State Farm General Ins. Co., (2003) 30 Cal.4th 1070 [135 Cal.Rptr.2d 361]; County of San Diego v. Ace Property & Casualty Ins. Co., (2002) 103 Cal.App.4th 1335 [127 Cal.Rptr.2d 672]; Dart Industries, Inc. v. Commercial Union Ins. Co., (2002) 28 Cal.4th 1059 [124 Cal.Rptr.2d 142]; Bialo v. Western Mut. Ins. Co., (2002) 95 Cal.App.4th 68 [115 Cal.Rptr.2d 3]; Vu v. Prudential Property & Casualty Ins. Co., (2001) 26 Cal.4th 1142 [113 Cal.Rptr.2d 70]; 20th Century Ins. Co. v. Superior Court, (2001) 90 Cal.App.4th 1247 [109 Cal.Rptr.2d 611]; and AICCO, Inc. v. Insurance Co. of North America, (2001) 90 Cal.App.4th 579 [109 Cal.Rptr.2d 359].

organization to submit an *amicus* brief in the landmark case of State Farm v. Campbell, 538 U.S. 408 (2003).

QUESTIONS PRESENTED

1. Whether the "absolute" or "total" pollution exclusions bar insurance coverage for claims arising out of alleged bodily injury from the City's water supply?

2. Whether the insurance industry can prove that there is no possibility of coverage because the required treatment of water is "pollution" for purposes of avoiding contractual promises to perform in light of the language and intent of the "absolute" or "total" pollution exclusions?

3. Whether, in interpreting the pollution exclusion in this case, may either or both of the following be considered a reliable part of the circumstances surrounding the parties at the time the exclusion was adopted:

   (a) the language of contemporary environmental legislation and regulations; and

   (b) the historical circumstances that preceded and allegedly led to the adoption of the exclusion?

STATEMENT OF FACT

UP incorporates by reference the Statement of the Case and Statement of Facts set forth in the City's opening brief as if fully set forth herein.

ARGUMENT

A. CHLORINE IS NOT A POLLUTANT

1. Chlorination Of Drinking Water Has Saved Tens Of Thousands Of Lives Over The Last 100 Years

The United States considers chlorination of tap water as:

> critical to protect the public from disease-causing microorganisms. Drinking water is chlorinated to kill bacteria and viruses that cause serious illnesses and, in some cases, death. Chlorination of drinking water has benefited public health enormously by lowering the rates of infectious diseases (for example, typhoid, hepatitis, and cholera) spread through untreated water. In the beginning of the last century tens of thousands of people died from disease-causing microorganisms in the water supply.
>
> * * *
>
> Disinfection byproducts (DBPs) form when disinfectants used to treat drinking water such as chlorine react with naturally occurring materials in the water. The predominant byproducts that result from use of chlorine as a disinfectant are trihalomethanes. . . . [Trihalomethanes] form when chlorine reacts with organic and inorganic material in source water [such as decomposing plant material].

United States Environmental Protection Agency, Mid-Atlantic Region: Questions and Answers on Health Effects of Disinfection Byproducts (May, 2004), www.epa.gov/dclead/disinfection.htm. In essence, this Court is

being asked to decide if chlorination is "pollution" for purposes of avoiding contractual promises to perform made by the insurance industry. The insurance industry and its interests should not be what drives public health policy.

2. Chlorine Is Not A "Pollutant" And Its Use To Protect Public Health Does Not Result In Pollution

Public water supplies generally must be chlorinated. As explained herein, for purposes of insurance coverage, chlorine is not a "pollutant." Rather, it serves a useful purpose and its use by the City of Chesapeake is required. The fact that chlorination may result in the presence of trihalomethanes ("THMs") as a result of the minute presence of naturally--occurring organic matter in water does not lead inevitably to the conclusion that THMs are a "pollutant." This is true in general and based upon the plain language of the definition of "pollutant" in the liability insurance policy at issue. Accordingly, there is at least a possibility of coverage based solely on the facts and plain contract language. Even if this were not the case, the exclusionary language relied upon — which insurance companies bear the burden of proving applies unequivocally — does not, and was never intended to, apply under these circumstances. Moreover, the subject exclusion as drafted is vague and is so broad as to lead to absurd results. For these and other reasons discussed in more detail below, the insurance company has failed to meet its burden and,

accordingly, had a duty to defend the City of Chesapeake against the underlying claims alleged.

3. The Exclusionary Language At Issue Mirrors Federal Hazardous Substance Clean-Up Statutes And Was Never Intended To Bar Claims Like Those Alleged Against The City Of Chesapeake

The language in the so-called absolute and total pollution exclusions appears to be, on its face, boundless. As explained in more detail below, not surprisingly, at the time the insurance industry submitted the so-called absolute and total pollution exclusions for approval, insurance regulators expressed concern that the extreme breadth of the language in these exclusions made them ripe for abuse by the insurance industry. In response, the insurance industry pled the purported difficulty of drafting an exclusion that would achieve its stated object — barring coverage for government-mandated environmental cleanup of property damage from long-term, industrial pollution — without using broad terms that could, if applied irresponsibly simply to deny valid claims, bar coverage for all manner of exposures. Admitting the overbreadth of the language, the insurance industry essentially told regulators "trust us," and promised not to be overzealous in applying the exclusions.

As the following analysis demonstrates, the insurance industry has again broken its promise. Specifically, insurance company claims handlers, including those at States Self-Insurers Risk Retention Group, Inc. ("States"), taking advantage of courts and policyholders ignorant of the

insurance industry's representations to regulators, have used the so-called absolute and total pollution exclusions to bar coverage for all manner of commonplace harms; that is, the exposures motivating business to buy liability insurance in the first place. In light of all the evidence, including the insurance industry's original, regulatory-accepted intent, about half of the cases nationwide to consider this issue, and at least 12 (or approximately two-thirds of the state supreme courts to address the issue), have found that the so-called absolute and total pollution exclusions do not bar coverage for claims outside of the context of traditional, long-term industrial pollution – claims such as those alleged against the City of Chesapeake.

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

The insurance industry's ever-expanding application of the "absolute" and "total "pollution exclusions has met with very mixed results and increasing skepticism from many courts. The fact, however, that some courts have adopted the industry's broad interpretation of these exclusions to exclude coverage for alleged injuries that have nothing to do with traditional "pollution" indicates that this will continue to be an area of controversy for several years to come, just as application of the "sudden and accidental" pollution exclusion was and continues to be heavily

litigated. As shown herein, however, there should be no controversy in this case because THMs arising naturally as a result of ambient organic compounds combining with chlorine used to disinfect drinking water are not, and for insurance coverage purposes, never were intended, to be "pollutants."

1. In Securing Approval for the Absolute and Total Pollution Exclusions, the Insurance Industry Promised Regulators That It Would Not Be Overzealous in Applying the Exclusions

As a result of its coverage obligations in the wake of CERCLA (a/k/a "Superfund") and other federal environmental statutes enacted in or around 1980, the insurance industry, through the Insurance Services Office ("ISO"), an insurance industry trade organization which drafts and revises standard-form liability insurance policies and endorsements, drafted another pollution exclusion: the so-called absolute pollution exclusion. ISO specifically crafted this following exclusion to exclude liability for government-directed cleanup of damage to the natural environment:

> This insurance does not apply to:
>
> * * *
>
> Pollution
>
> a. *Bodily injury* or *property damage* arising out of the actual, alleged or threatened discharge, dispersal, seep age, migration, release or escape of *pollutants*:

(1) at or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any "Insured";

(2) at or from any premises, site or location which is or was at any time used by or for any "Insured" or others for the handling, storage, disposal, processing or treatment of waste;

(3) which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any "Insured" or any person or organization for whom any "Insured" may be legally responsible; or

(4) at or from any premises, site or location on which any "Insured" or any contractors or sub contractors working directly or indirectly on any "Insured's" behalf are performing operations;

(a) if the pollutants are brought on to the premises, site or location in connection with such operations by such "Insured", contractor or subcontractor; or

(b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

This language is identical to the exclusion at issue relied on by States. States' insurance policy also states:

> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapor, soot, fumes, acids, alkilydes, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

As shown in more detail below, courts generally have recognized that many of the key terms in the so-called absolute pollution exclusion or similar exclusionary language — "release," "disposal," and "escape" — are environmental terms of art; indeed, many are key defining terms for the imposition of liability under CERCLA. See, e.g., 42 U.S.C. 9607(10)(defining "release"); 42 U.S.C. 9607(a) (imposing liability). For instance, the exclusion incorporates the concept of a "threatened discharge, disposal, release or a surge of pollutants." Liability for a mere threat of an injury is a concept that is fundamental to modern environmental statutes, including CERCLA, but is foreign to normal tort liability. See id. The 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.

2. Insurance Industry's Marketing Intent of the So-Called Absolute Exclusion

Indeed, the insurance industry submitted a companion pollution liability insurance policy to the nation's insurance regulators at the time it introduced the so-called absolute pollution exclusion, representing it to be designed to restore the insurance coverage excluded by the exclusion. As noted by former Louisiana Insurance Commissioner James H. Brown, this companion policy only restored insurance coverage for "environmental damage":

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

James H. Brown, La. Ins. Commissioner, Letter to the Editor, National Underwriter Prop. & Casualty Ed., April 22, 1996 at 30 (emphasis added).[2] Commissioner Brown aptly noted that "[t]he exclusion should not be read more broadly than the policy which restores the deleted coverage," and suggested that the insurance industry should be estopped from asserting an interpretation of the so-called absolute pollution exclusion that is contrary to the one given to the nation's insurance regulators:

> When the ISO package was presented to regulators, it was represented that the buyback restored the coverage

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[2] The cited material are largely taken from the attached article entitled RECENT DEVELOPMENTS IN THE LAW REGARDING THE "ABSOLUTE" AND "TOTAL" POLLUTION EXCLUSIONS, THE "SUDDEN AND ACCIDENTAL" POLLUTION EXCLUSION AND TREATMENT OF THE "OCCURRENCE DEFINITION. Amici would be happy to provide more documentation upon request.

> excluded by the [absolute pollution exclusion]; it was not represented that the buyback was more limited in scope than the exclusion.

Id. at 30, 54.

3. "Absolute" Is a Misnomer: It Does Not Exclude All Coverage

Indeed, the insurance industry recognized that the very name "absolute" pollution exclusion is really a misnomer. A senior analyst and representative of one of this nation's largest insurance companies, Aetna Casualty and Surety Company (now Travelers Casualty & Surety Company a/k/a St. Paul/Travelers) testified that the so-called absolute pollution exclusion is in fact an oxymoron, and is even so characterized in company-sponsored training programs for claims representatives, explaining:

> I . . . talk about what is called the, quote, absolute pollution exclusion . . . . [M]ore than anything else I'm trying to get across the fact that even though it's called a pollution exclusion, there are still things that are covered . . . . "[P]ollution exclusion" is another oxymoron because it's not a total exclusion, because there are situations where coverage could be available . . . .[3]

Indeed, ISO reiterated to Louisiana regulators in 1985 that the so-called absolute pollution exclusion was not "absolute":

> In the aftermath of the elimination of the sudden and accidental qualification, the new exclusion has been at

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[3] Deposition testimony of James G. King, Senior Analyst, Aetna Casualty & S7E7 Surety Co., taken July 17, 1991 at 25-28, Hi-Mill Mfg. Co. v. Aetna Cas. & Sur. Co., 884 F. Supp. 1109 (E.D. Mich. 1995), aff'd, 98 F. 3d 1341 (6th Cir 1996).

> times mislabeled as absolute. This is an unfortunate misnomer. Given the coverage exceptions I mentioned earlier, this is not an absolute pollution exclusion.[4]

Nonetheless, as Commissioner Brown has noted, the "absolute" pollution exclusion was written in such broad terms that it is susceptible to abuse by insurance companies, arguing that it applies in situations far removed from government environmental enforcement actions: "the supposed definition [of the "absolute pollution exclusion"] has been expanded even further [by insurance companies] to mean if any potential pollutant, i.e. household [chlorine] bleach, is involved in the accident, the [insurance] company can rely on the ["absolute pollution exclusion"] to be relieved of responsibility." Letter to the Editor from Commissioner James H. "Jim" Brown, Nat'l. Underwriter Prop. & Casualty Ed., (May 1996) at 16. These interpretations come despite the fact that the insurance industry secured approval of the "absolute" pollution exclusion by representing to regulators in Virginia and other states that it would not read the exclusion to bar coverage in situations outside those of typical, industrial pollution.

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

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[4] Statement of Robert Miller, ISO Regional Vice President for the Southern Region, to the Louisiana Insurance Commissioner, Sept. 6, 1995, Tr. at 57.

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[4] Statement of Robert Miller, ISO Regional Vice President for the Southern Region, to the Louisiana Insurance Commissioner, Sept. 6, 1995, Tr. at 57.

nationwide, was unavoidably ambiguous and was not intended to bar coverage in all instances. These representatives discussed several examples of passive pollution which were not intended to be barred from coverage, including leaking underground tanks.

One of the Texas regulators, David Thornberry said that he was concerned that the exclusion was overbroad and ambiguous. Wade Harrel, a representative of Liberty Mutual Insurance Company, responded that no one would read the exclusion literally:

> **MR. THORNBERRY:** My reading of that language is so broad that the example I have been given in the past[,] the grocery store where 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 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. HARREL:** That is a reading, yeah. It can be read that way . . . I don't know anybody that's reading the policy that way, and I think you can read the policy just the way you read it.[5]

Despite Mr. Harrel's assurances, and the insurance industry's assertion that courts would not read the exclusion overboardly in seeking to deny valid claims, the Texas insurance regulator continued to complain that the exclusion was ambiguous. The response of Ed Rinehimer, of Travelers

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[5] "Hearing to Consider, Discuss, and Act on Commercial General Liability Forms Filed by the Insurance Services Office, Inc.," (Oct. 31, 1985), at 7-8.

Insurance Company, suggested that nothing could be done to eliminate ambiguity:

> **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. HARREL:** 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:** Would you like to volunteer to be on the next drafting committee?

Id. at 8.

Mr. Rinehimer indicated that in order to make the so-called absolute pollution exclusion effective, specific, risk-by-risk exclusions would have to be included. The example that he provided was for a specific hazardous substances such as benzene. Id. at 9. This testimony shows that the exclusion would be subject to selective enforcement:

> 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 hostile fire, for instance.

Id. at 10.

In fact, the Liberty Mutual representative said specifically that the manufacturer of leaking underground storage tanks should not lose coverage for "pollution":

> 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.

Id. at 7. These insurance industry representatives admitted that the exclusion was "overdrafted," and said they did not intend it to be applied broadly. Id. at 8-9. Pleading the impossibility of drafting an exclusion narrowly tailored to address only long-term industrial pollution of the environment, the insurance industry essentially told regulators that they should trust them not to abuse an "overdrafted" exclusion.

4. "Total" Pollution Exclusion Is Also Limited; Coverage Still Exists

The "Total Pollution Exclusion," introduced in 1988, differs from the so-called absolute pollution exclusion only in that it removes coverage for releases from products and for certain, off-site releases of pollutants:

> a. "Bodily Injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time;
>
> a. Any loss, or expense arising out of any
>
> (1) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

(2) Claim or "suit" by or on behalf of a governmental authority for damages because or testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

ISO, in setting forth the effect of the "Total Pollution Exclusion Endorsement," stated:

> [T]he endorsement eliminates the pollution coverage left in the policy by the [1985 pollution exclusion] — products/completed operations coverage and certain off site discharges.[6]

Further, the National Association of Insurance Commissioners working group described the "total" pollution exclusion as "an option to delete the pollution coverage from the products and completed operations cover-age. . . ."[7]

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6 ISO Explanatory Memorandum at 2.

7 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.

5. Courts Nationwide Are Increasingly Enforcing the Promises the Insurance Industry Made to Regulators To Secure Approval of the "Absolute" and "Total" Pollution Exclusions

Despite their promises to regulators that they could be trusted, and despite the foregoing drafting and regulatory history, members of the insurance industry have used the so-called absolute and total pollution exclusions to deny coverage for all kinds of claims. Fortunately, an increasing number of courts have refused to give effect to so-called absolute and total pollution exclusions in contexts that do not involve traditional, industrial pollution of the environment.

Indeed, the highest courts of New York and California have examined the history of the pollution exclusion and concluded that the exclusion does not apply to ordinary acts of negligence, but only to what is commonly considered industrial pollution. In Belt Painting Corp. v. TIG Ins. Co., 795 N.E.2d 15 (N.Y. 2003), the New York Court of Appeals held that the exclusion was ambiguous as applied to the release of paint fumes in the normal course of a painting contractor's business, and it therefore affirmed summary judgment in favor of the insured. See id. at 16.

Based upon the thirty-year history of pollution exclusion clauses in insurance contracts, the Belt Painting court held that pollution exclusions "originated in insurers' efforts to avoid potentially open-ended liability for the type of long-term, gradual discharge of hazardous wasted and byproducts exemplified by the Times Beach and Love Canal disasters."

Id. at 18. As to the so-called absolute and total pollution exclusion, the court concluded that "[r]easonable minds can disagree as to whether the exclusion applies here." Id. at 20. The Belt Painting court concluded that the use of environmental statutory terms of art in the exclusion at issue "supports our conclusion that it does not clearly and unequivocally exclude a personal injury claim arising from indoor exposure to [the painting contractor's] tools of its trade." Id.[8]

Further, the court rejected the insurance company's reliance on the policy definition of "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant including . . . fumes." Id. (alteration in original). The court stated that the insurance company "proves too much," and it expressed reluctance "to adopt an interpretation that would infinitely enlarge the scope of the term 'pollutants,' and seemingly contradict both a 'common speech' understanding of the relevant terms and the reasonable expectations of a businessperson." Id. Moreover, the court held that worlds such as "fumes" could not be isolated from its context in the exclusion, which: "applies only if the underlying injury is caused by "discharge, dispersal, seepage, migration, release or escape" of the fumes." Id.

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[8] In view of the decision in Belt Painting, the Richardson dissent erred in relying on Continental Casualty. A.2d at 359.

The Supreme Court of California used similar reasoning in determining that a comparable pollution exclusion did not exclude coverage for a landlord's liability for a tenant's death allegedly caused by the negligent spraying of pesticide to kill bees at the landlord's apartment building. In MacKinnon v. Truck Insurance Exchange, 73 P.3d 1205 (Cd. 2003), the California Supreme Court held that the application of the pollution exclusion is limited to injuries arising from events commonly thought of as pollution, i.e., environmental pollution, and is not to be applied to "every possible irritant or contaminant imaginable." Id. at 1216. To reach its holding conclusion, the court, like the Belt Painting court, examined the history and purpose of the pollution exclusion which, "while not determinative, may properly be used by courts as an aid to discern the meaning of disputed policy language." Id. at 1217. The court noted that "[i]t may be an overstatement to declare that 'discharge, dispersal, release or escape,' by themselves, are environmental terms of art. But, these terms, used in conjunction with 'pollutant,' commonly refer to the sort [of] conventional environmental pollution at which the pollution exclusion was primarily targeted." Id. at 1216.[9]

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

The court found the language of the pollution exclusion ambiguous because the definitional phrase "any irritant or contaminant" was "too broad to meaningfully define 'pollutant.'" Id. The court therefore turned to "the common connotative meaning of that term." Id. It relied on the United State's Court of Appeals for the Tenth Circuit's decision in Regional Bank of Colorado, N.A. v. St. Paul Fire & Marine Ins. Co., 35 F.3d 494 (10th Cir. 1994), a case considering whether carbon monoxide fumes emitted from a residential heater constituted "pollution" within the meaning of the pollution exclusion. As noted by the MacKinnon court, the Regional Bank court emphasized that a reasonable policyholder would not believe "irritant" applied to carbon monoxide emitted from a residential heater:

> A reasonable policy holder would not understand the policy to exclude coverage for *anything* that irritates. 'Irritant' is not to be read literally and in isolation, but must be construed in the context of how it is used in the policy, i.e., defining 'pollutant.' [¶] While a reasonable person of ordinary intelligence might well understand carbon monoxide is a pollutant when it is emitted in an industrial or environmental setting, an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as 'pollution.' It seems far more reasonable that a policyholder would understand it as being limited to irritants and contaminants *commonly thought of as pollution* and not as applying to every possible irritant or contaminant imaginable.

MacKinnon, 73 P.3d at 1216 (quoting Regional Bank, 35 F.3d at 498 (second emphasis added by MacKinnon court)). Similarly, chlorination of

drinking water is not commonly though of as pollution by any reasonable policyholder or insurance company.

Likewise, the Louisiana Supreme Court found that the so-called "total" pollution exclusion "was designed to exclude coverage for environmental pollution only." Doerr v. Mobil Oil Corp., 774 So. 2d 119 (La. 2000). 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, residents of 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 that was denied by order of the trial court. That order was reversed by the Fourth Circuit Court of

Appeal based on the Louisiana Supreme Court's ruling in Ducote v. Koch Pipeline Co., L.P., 730 So.2d 432 (La. 1999).[10]

Doerr, considering the same "total" pollution exclusion as that in Ducote, initially focused on the fact that the exclusion, as worded, had virtually unlimited application, could be used to justify denying coverage for virtually any type of damage. Louisiana law requires courts to avoid absurdities by determining the "true meaning" of the exclusion. To discover the "true meaning," 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

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

pollution exclusions must 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."

774 So. 2d at 135. States' denial of the City of Chesapeake's claim is one such absurd consequence. It was never the intended purpose of the exclusionary policy language at issue to reach naturally occurring substances.

In evaluating so-called absolute and total pollution exclusions, the court indicated that the trier of fact should examine: (1) whether the insured is a "polluter" within the meaning of the exclusion (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.). Id. at 134-35. 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.

In Keggi v. Northbrook Property & Casualty Insurance Co., 13 P.3d 785 (Ariz. Ct. App. 2000), the Arizona Court of Appeals ruled that the so-called absolute pollution exclusion does not apply to injuries caused by bacteria-contaminated water. Keggi, a professional golfer, sued Desert Mountain for injuries suffered as a result of the ingestion of tap water that was contaminated by total and fecal coliform bacteria. Ironically, had the water been properly chlorinated, Keggi likely would not have gotten sick. Nonetheless, Desert Mountain tendered defense of Keggi's lawsuit to its insurance companies which denied the claim based on the absolute pollution exclusion. Thereafter, Desert Mountain filed a declaratory judgement action against its insurance companies, and settled with Keggi and assigned its rights against those companies to her. Reviewing the grant of the trial court's grant of summary judgment against Keggi on the basis of the absolute pollution exclusion, the Arizona Court of Appeals reversed, finding that the bacteria that caused Keggi's injuries were not "pollutants" within the meaning of the absolute pollution exclusion. Specifically, noting that the exclusion limited the definition of pollutant to

"irritants" and "contaminants" that are "solid, liquid, gaseous or thermal," the court held that water-borne bacteria can not be considered a "pollutant":

> The water-borne bacteria alleged to have caused Keggi's injury do not fit neatly within this definition. To the extent that bacteria might be considered "irritants" or "contaminants" they are living, organic irritants or contaminants which defy description under the policy as "solid," "liquid," "gaseous," or "thermal" pollutants.

Id. at 789.

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

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

Id. at 790.

Addressing the defendant's argument that "pollutants" include "any contaminant" and that bacteria could be considered a "contaminant" and therefore a "pollutant," the court, after reviewing numerous decisions to consider this issue, determined the exclusion was intended to preclude coverage for traditional environmental pollution by hazardous industrial

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waste of the type addressed by CERCLA and other state and federal environmental statutes. Id. The court concluded that the insurance industry did not intend for the exclusion to bar coverage for "all contact with substances that can be classified as pollutants" Id. at 790. Finally, the court recognized that the exclusion was written in such broad terms as to be essentially boundless, and, thus, that it must have a limiting principle: it bars coverage only for traditional, industrial pollution of the environment of the type addressed by federal and state statutes. Id.

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," "release," and "escape" were environmental terms or art matching those used in government environmental statutes. Further, the court agreed that "[t]he terms 'irritant' and 'contaminant,' 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.

Id. at 945 (emphasis omitted). 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:

> [T]his 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."

Id. at 946. Similarly, no one discharged, dispersed, released or allowed THMs to escape into the City of Chesapeake's drinking water. They arose naturally as a result of the addition of chlorine – as required – to protect human health. Chlorine was not used to treat drinking water as part of any disposal or to cause intentional harm.

In Kenyon v. Security Insurance Co., 626 N.Y.S. 2d 347 (Sup. Ct. 1993) the policyholder, an architectural and engineering firm, was sued for damages by a condominium resident claiming she had suffered carbon monoxide poisoning from a defectively designed and installed furnace. Granting the policyholder's motion for summary judgment, the court

rejected, on four grounds, the insurance company's argument that the absolute pollution exclusion applied. First, the court noted that a "quick reference guide" included with the policy stated that the exclusion was limited to pollution capable of environmental damage. Id. at 350. Second, more generally, the court found that the terms in the exclusion were environmental terms of art, apparently drafted in response to governmental and regulatory directives. Id. Third, the court found that cases throughout the country had construed the clause in line with "[t]he historical purpose of the pollution exclusion": "to insure that industrial or commercial polluters would be compelled to bear the cost of their wrongdoing." Id. Accordingly, the court found that there existed ambiguity as to whether "it may rightfully be invoked to deny coverage from activities which have few indicia of traditional environmental pollution cases." Id. at 351. Perhaps most important, the court found that the nature of the policyholder's business and the sweeping coverage he purchased to protect himself supported coverage:

> The [policyholder] was in the business of engineering and architecture.... [H]e did not generate or produce hazardous substances routinely in the course of his profession, nor did he dispose of toxic waste as part of his business. He purchased a sweeping professional liability policy to protect himself from claims of damage resulting from the pursuit of his profession. Under the broad coverage he purchased, he reasonably expected coverage under the policy. [The insurance company], as his insurer, certainly knew the nature of his business and, if they desired to do so, could have drafted

> unambiguous endorsements to eliminate coverage . . . [Moreover], the $84,000 annual premium paid by [the policyholder] is strong evidence that he believed that the broad coverage he purchased covered his professional activities unless he was a polluter. The context and language of the endorsement support the conclusion that [the policyholder's] expectation was not unreasonable.

Id. (citations omitted).

Finally, in Red Panther Chem. Co. v. Ins. Co. of the State of Penn., 43 F.3d 514 (10th Cir. 1994) (applying Mississippi law), the policyholder was sued 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. The court reversed summary judgment in favor of the insurance company, remanding to the district court to conduct an inquiry into the scope of the Total Pollution Exclusion "based on the common usages and understandings of the insurance industry and the purposes of the exclusion in conjunction with the hazards and risks" the policy "was designed to protect against." Id. Specifically, the court found that the exclusion was ambiguous in the context of the facts of the case:

> We do not believe it presently evident [the policyholder] and the Insurance Company unambiguously contracted to exclude coverage for this claim based on the Total Pollution Exclusion endorsement. We reach this conclusion because of the unique factual circumstances involved in [the mechanic's] underlying claim against [the policyholder]. The critical question is whether the word "escape" contained in the exclusion is meant to include the expulsion of a container of pollutants from a

> moving vehicle. We believe that provision is ambiguous; therefore, in this context, summary judgment was not appropriate.

Id.

As can be seen, a common thread running through these decisions is the reliance on policy term interpretation and historical circumstances in refusing to apply the insurance industry's new interpretation of these exclusions. Based upon the reasonable interpretation of the so-called absolute and total pollution exclusion, UP respectfully submits that the exclusion should not apply to claims other than those for the long-term, industrial pollution.

Here, the Court should come to the same conclusion as these court. The City of Chesapeake is not a polluter and it is not engaged in the routine generation or disposal of hazardous substances or toxic waste. States, however, did collect considerable premiums from the City and was, or should have been, familiar enough with the City's activities in underwriting the risk to know that drinking water had to be chlorinated. States easily could have excluded coverage for the specific alleged liabilities at issue or simply decided not to underwrite and sell insurance coverage to the City. To be sure, there is no evidence that States unambiguously contracted to exclude coverage for alleged liability arising out of

established programs for ensuring the safety of the public water supply. These indisputable facts mean that it is not only reasonable for the City to expect coverage under these circumstances, but also for this Court to find that, at a minimum, the possibility of such coverage exists, which, of course, is the standard for determined duty to defend. See, e.g., Virginia Elec. & Power Co. v. Northbrook Property & Cas. Ins. Co., 252 Va. 265, 268, 475 S.E.2d 264, 265 (Va. 1996)

6. Principles of Existing Coverage Under "Absolute" and "Total" Exclusions

Sorting through these decisions reveals a few general principles. First, many courts have refused to apply absolute or total pollution exclusions in circumstances other than those involving industrial pollution of the natural environment, recognizing that these exclusions were drafted to address typical, industrial pollution of the type addressed by CERCLA.[11] A few cases that have enforced a broad reading of the

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[11] See, e.g., Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1181 (6th Cir. 1999 (applying Michigan law); Nautilus Ins. Co. v. Jabar, 188 F.3d 27, 30(1st Cir. 1999)(applying Maine law); Bituminous Cas. Corp. v. Advanced Adhesive Technology, Inc., 73 F.3d 335, 339 (11th Cir. 1996) (applying Georgia law); Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34, 37 (2d Cir. 1995)(applying New York law); Regional Bank of Colorado, N.A. v. St. Paul Fire and Marine Ins. Co., 35 F.3d 494, 498 (10th Cir. 1994) (applying Colorado law); Sargent Const. Co., Inc. v. State Auto. Ins. Co., 23 F.3d 1324, 1327 (8th Cir. 1994)(applying Missouri law); Boise Cascade Corp., Inc. v. Reliance Nat. Indem. Co., Inc., 99 F. Supp. 2d 87, 102 (D. Me. 2000) (applying Maine law); Garfield Slope Housing Corp. v. Public Service Mut. Ins. Co., 973 F. Supp. 326, 336 (E.D.N.Y. 1997) (applying New York law); Lefrak Organization, Inc. v. Chubb Custom

Ins. Co., 942 F. Supp. 949, 954 (S.D.N.Y. 1996) (applying New York law); Calvert Ins. Co. v. S & L Realty Corp., 926 F. Supp. 44, 46-47 (S.D.N.Y. 1996)(applying New York law); Island Associates, Inc. v. Eric Group, Inc., 894 F. Supp. 200, 202 (W.D. Pa. 1995)(applying Pennsylvania law); Center for Creative Studies, 871 F. Supp. at 944-45, 945 n.5 (applying Michigan law); Regent Ins. Co. v. Holmes, 835 F. Supp. 579, 582 (D.Kan. 1993) (applying Kansas law); Regional Bank of Rifle v. St. Paul Fire and Marine Ins. Co., (NO. CIV. A. 91-M-461), 1993 WL 739662 at *2 (D.Colo. May 27, 1993) (applying Colorado law); Westchester Fire Ins. Co. v. City of Pittsburg, Kan., 768 F. Supp. 1463, 1469 n.9, 1471 (D.Kan. Jun 1991) (applying Kansas law); Keggi. 13 P.3d at 790 (applying Arizona law); Grow Group, Inc. v. North River Ins. Co., No. C 92-2328 SC, slip op. at 11 (N.D. Cal. Aug. 14, 1992) (applying California law); Minerva Enterprises, Inc. v. Bituminous Cas. Corp., 851 S.W.2d 403, 404 (Ark. 1993)(applying Arkansas law); Essex Ins. Co. v. Avondale Mills, Inc., 639 So.2d 1339, 1341 (Ala. 1994)(applying Alabama law); Danbury Ins. Co. v. Novella, 727 A.2d 279, 283 (Conn. Super. 1993)(applying Connecticut law); American States Ins. Co. v. Koloms, 687 N.E.2d 72, 79 (Ill. 1997) (applying Illinois law); Insurance Co. of Illinois v. Stringfield, 685 N.E.2d 980, 984 (Ill. App. 1994)(applying Illinois law); Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 680 (Ky. App. 1996)(applying Kentucky law); Doerr, 774 So. 2d at 135(applying Louisiana law); Sandbom v. BASF Wyandotte, Corp., 674 So.2d 349, 363 (La. App. 1996) (applying Louisiana law); Avery v. Commercial Union Ins. Co., 621 So.2d 184, 189 (La. App. 1993) (applying Louisiana law); West v. Board of Com'rs of Port of New Orleans, 591 So.2d 1358,1360 (La. App. 1991)(applying Louisiana law); Thompson v. Temple, 580 So.2d 1133, 1134 (La. App. 1991)(applying Louisiana law); Western Alliance Ins. Co. v. Gill, 686 N.E.2d 997, 999 (Mass. 1997)(applying Massachusetts law); Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762, 764 (Mass. 1992)(applying Massachusetts law); Weaver v. Royal Ins. Co., 674 A.2d 975, 977 (N.H. 1996)(applying New Hampshire law); S.N. Golden Estates, Inc. v. Continental Cas. Co., 680 A.2d 1114, 118 (N.J. Super App. Div.1996)(applying New Jersey law); Roofers' Joint Training, Apprentice and Educational Committee of Western New York v. General Acc. Ins. Co., 713 N.Y.S.2d 615, 617 (App. Div. 2000)(applying New York law); Cepeda v. Varveris, 651 N.Y.S.2d 185,186 (App. Div. 1996)(applying New York law); Kenyon, 626 N.Y.S.2d at 350 (applying New York law); General Acc. Ins. Co. v. Idbar Realty Corp., 622 N.Y.S.2d 417, 419 (Sup. Ct. 1994)(applying

absolute and total pollution exclusions have reached expressly contrary conclusions.[12]

Second, and similarly, 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:

New York law); Generali-U.S. Branch v. Caribe Realty Corp., 612 N.Y.S.2d 296, 299 (Sup. Ct. 1994) (applying New York law); Karroll v. Atomergic Chemetals Corp., , 600 N.Y.S.2d 101, 102 (App. Div. 1993)(applying New York law); Eastern Mut. Ins. Co. v. Kleinke, No. 2123-00, slip op. at 8 (Sup. Ct. N.Y. Cty. Jan. 17, 2001) (applying New York law); Gamble Farm Inn, Inc. v. Selective Ins. Co., 656 A.2d 142, 146-47 (Pa. Super.1995)(applying Pennsylvania law); Kent Farms, Inc. v. Zurich Ins. Co., 998 P.2d 292, 295 (Wash. 2000)(applying Washington law).

[12] National Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co., 162 F.3d 821, 825 (4th Cir. 1998)(applying District of Columbia law); Reliance Ins. Co. v. Moessner. 121 F.3d 895 (3d Cir. 1997) (applying Pennsylvania law); Certain Underwriters at Lloyd's London v. C.A. Turner Const. Co., Inc., 112 F.3d 184, 188 (5th Cir. 1997)(applying Texas law); Park-Ohio Industries, Inc. v. Home Indem. Co., 975 F.2d 1215, 1219 (6th Cir. 1992)(applying Ohio law); Clarendon Am. Ins. Co. v. Bay, Inc., 10 F.Supp. 2d 736, 743 (S.D. Tex. 1998) (applying Texas law); West American Ins. Co. v. Band & Desenberg, 925 F.Supp.758, 761-762 (M.D. Fla. 1996), aff'd, 138 F3d 1428 (11th Cir. 1998)(applying Florida law); TerraMatrix, Inc. v. U.S. Fire Ins. Co., 939 P.2d 483, 488 (Colo. App. 1997)(applying Colorado law); Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1137 (Fla. 1998)(applying Florida law); Bernhardt v. Hartford Fire Ins. Co., 648 A.2d 1047, 1051-1052 (Md. App. 1994)(applying Maryland law); Madison Const. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 109 (Pa. 1999) (applying Pennsylvania law); Cook v. Evanson, 920 P.2d 1223, 1226 (Wash. App. 1996) (applying Washington law).

> 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.

Bodine, slip op. at 2 (applying California law). 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.[13]

Third, many courts have upheld the reasonable expectations of an ordinary commercial policyholder that, in return for its tens of thousands of dollars in premiums, it would have coverage for common

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[13] See, e.g., Jabar, 188 F.3d at 30 (applying Maine law); Kellman, 197 F.3d at 1182 (applying Michigan law); Regional Bank, 35 F.3d at 498 (applying Colorado law); Island Assocs., 894 F Supp. at 202 (applying Pennsylvania law); Pittsburg, 794 F. Supp. at 1469 n.9 (applying Kansas law); Center for Creative Studies, 871 F. Supp. at 945 (applying Michigan law); Keggi, 13 P.3d at 790 (applying Arizona law); Danbury, 727 A.2d at 281 (applying Connecticut law); Koloms, 687 N.E.2d at 79 (applying Illinois law); RSJ, 926 S.W.2d at 680 (applying Kentucky law); Roofers' Joint Trading, 713 N.Y.S.2d at 617 (applying New York law); Donaldson v. Urban Land Interests, Inc., 564 N.W.2d 728, 732 (Wisc. 1997)(applying Wisconsin law).

home or workplace accidents.[14] Indeed, the "suitability" principle — finding that an insurance company must be deemed to have sold a policy suitable for the policyholder's operations and adopted by the United States Supreme Court in Buck & Hedrick v. Chesapeake Ins. Co., 26 U.S. (1 Pet.) 151 (1828) — requires that insurance companies be deemed to have sold insurance coverage sufficient to cover the policyholder's normal tort exposures.[15]

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[14] Jabar 188 F.3d at 30 (applying Maine law); Kellman, 197 F.3d at 1183 (applying Michigan law); Boise Cascade, 99 F. Supp. 2d at 102 (applying Maine law); Regional Bank of Rifle, 1993 WL 739662, at *2 (applying California law); Gill 686 N.E.2d at 999 (applying Massachusetts law); Roofers' Joint Trading, 713 N.Y.S.2d at 617 (applying New York law); Donaldson, 564 N.W.2d at 732 (applying Wisconsin law); Kent Farms, 998 P.2d at 295 (applying Washington law); American States Ins. Co. v. Nethery, 79 F.3d 473, 477 (5th Cir. 1996)(applying Mississippi law); Park-Ohio, 975 F.2d at 1218 (applying Ohio law); RPS, 915 F. Supp. at 884; Terramatrix, 939 P.2d at 488; Deni Assocs., 711 So. 2d at 1140 (applying Florida law); Cook, 920 P.2d at 1227 (applying Washington law).

[15] See, e.g., NI West. Inc. v. Louis Usdin Co. (In Re Hub Recycling, Inc.), 106 B.R. 372 (D.N.J. 1989) (refusing to apply the absolute pollution to a recycling business); American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996) (refusing to apply an absolute pollution exclusion to gasoline leaks from a gas station because the sale of gasoline was a normal part of the policyholder's business operations); Bentz v. Mutual Fire, Marine & Inland Ins. Co., 575 A.2d 795 (Md. App. 1990) (finding that, where the policyholder's business was pesticide application and the insurer was aware of the nature of the business, the insurance policy was intended to cover the policyholder's "normal operations").

Fourth, some courts have found that the substance that was released or that escaped is not a "pollutant."[16] Fifth, and relatedly, some

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[16] See, e.g., Sargent, 23 F.3d at 1327 (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 and noting the definition of pollutants was ambiguous: pollutants could encompass those substances which were "irritants or contaminants" in the case at issue or which were capable of causing physical irritation or contamination to the environment, regardless of the facts at issue); Titan Holdings Syndicate, Inc. v. City of Keene, N.H., 898 F.2d 265, 268-269 (1st Cir. 1990)(applying New Hampshire law) (finding that excessive noise and light do not constitute "pollutants"); Purity Spring Resort v. TIG Ins. Co., No. 99-295-JD, slip op. at 11 (D.N.H. July 18, 2000) (applying New Hampshire law) (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); Keggi, 13 P.3d at 789 (applying Arizona law) (finding "[t]he water-borne bacteria alleged to have caused Keggi's injury do not fit neatly within this definition. To the extent that bacteria might be considered 'irritants' or 'contaminants' they are living, organic irritants or contaminants which defy description under the policy as 'solid," 'liquid," 'gaseous,' or 'thermal' pollutants."); Stringfield, 685 N.E.2d at 983 (applying Massachusetts law) (finding that lead paint was not a pollutant, as paint was not contaminated at the time that lead was added); Incorporated Village of Cedarhurst v. Hanover Ins. Co., 675 N.E.2d 822,822 (N.Y. 1996)(applying New York law) (finding that absolute pollution exclusion did not bar coverage fur damages from overflow of municipal sewer system because claims did not allege damage from sewage as pollutant); Roofers' Joint Trading, 713 N.Y.S.2d at 617 (applying New York law) (finding that fumes from roofing adhesive used as intended were not pollutants); Kleinke, No. 2123-00, slip op.at 10 (applying New York law) (finding that a question existed as to whether E Coli bacteria constituted a pollutant); Kent Farms, 998 P.2d at 295 (applying Washington law) (finding that damage to driver injured by diesel fuel was not caused by fuel acting as a

courts have found that there has been no "release" of "pollutant."[17] Last, many of the above cases posit these five reasons for refusing to enforce absolute and total pollution exclusions in conjunction with the ambiguity doctrine. For example, a court may find the language of an absolute pollution exclusion to be, at a minimum, ambiguous as to whether it includes lead paint within its definition of "pollutants." Under universal

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pollutant any more than if a barrel of fuel had rolled over driver); Perkins Hardwood Lumber Co. v. Bituminous Cas. Corp., 378 S.E.2d 407,409 (Ga. App. 1989)(applying Georgia law) (finding smoke from non-hostile fire meets definition of pollutant).

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

rules of insurance policy construction, such ambiguities are construed against the drafting insurance companies and in favor of coverage.

7. Similar Types of Claims Courts Have Found To Be Outside the Ambit of the Absolute and Total Pollution Exclusions

In addition to plumbing the types of reasons that courts have given for refusing to apply the absolute and total pollution exclusions, one can examine the types of claims similar to the one at issue here that courts have found to be outside the parameters of those exclusions. These claims fall into three broad categories:

- **Sewage, Sewers, Sewage Treatment Plants, Septic Tanks, Bacteria.** These claims typically involve exposure to backedup sewage or to contaminated water.[18]

- **Attenuated Causation.** These cases are of the variety that make one wonder why the insurance company litigated them and why, after the insurance company lost, it did not pay the policyholder a premium to decertify the opinion.[19]

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[18] Titan, 898 F.2d 265 (applying New Hampshire law) (particulates, noise and bright lights from sewage treatment plant); Evanston Ins. Co. v. Treister, 794 F. Supp. 560 (D.V.I. 1992) (applying the law of the Virgin Islands) (defective sewer lines); Keggi, 13 P.3d 785 (applying Arizona law) (fecal coliform bacteria); Minerva, 851 S.W.2d 403 (applying Arkansas law) (back up of raw sewage); Golden Estates, 680 A.2d 1114 (applying New Jersey law) (defective septic systems); Kleinke, No. 2123-00, slip op. (applying New York law) (E Coli bacteria).

[19] Red Panther, 43 F.3d 514 (applying Mississippi law) (insecticide in can falls off truck on highway, lodges in undercarriage of car, and falls on mechanic who raised up car); Grow Group, No. C 92-2328 SC, slip op. (applying California law) (back injury incurred in fleeing cloud of gas); Avery, 621 So.2d 184 (applying Louisiana law) (smoke from fire blinded motorists and caused accident).

In short, they all involve injury that only tangentially involved a pollutant.

- **Substances Obviously Not Pollutants.** Like the attenuated causation cases, these cases fall into the "head scratcher" category; needless to say, if your claim involves lake water, carbon monoxide or dioxide or some substance that is obviously not a pollutant, it is not excluded by the absolute and total pollution exclusions.[20]

CONCLUSION

History is critical to a proper interpretation of the pollution exclusion. As the foregoing makes clear, history is squarely on the side of policyholders fighting against overreaching and unreasonable attempted applications of so-called absolute and total pollution exclusions. In virtually every circumstance where courts have considered the historical context of the exclusions' drafting, state regulatory submission and approval and incorporation into policies, the insurance industry's historically unjustifiable actions have been rejected. The *amicus* is only asking this Court to make sure that representations by the insurance industry as to what these provisions mean at the time they are adopted remain the standard by which those provisions' later applications are measured. When that test is applied, at a minimum, the City of

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[20] Purity Spring, No. 99-295-JD, slip op. (applying New Hampshire law) (damage to spring from lake water); West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc., 503 N.W.2d 596 (Iowa 1993) (applying Iowa law) (sand); Donaldson, 564 N.W.2d 728 (applying Wisconsin law) (carbon dioxide from breathing).

Chesapeake will be entitled to a defense against the underlying claims at issue – which is why policyholders buy insurance in the first place.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:26(d) of the Rules of The Supreme Court of Virginia I herby certify that twenty copies of this Brief of *Amicus Curiae* were hand-filed with the Clerk's Office of the Virginia Supreme Court on this 12th day of December, 2005. Additionally, I certify that 3 copies of the Brief were served, via U.S. Mail, postage prepaid on each of the following:

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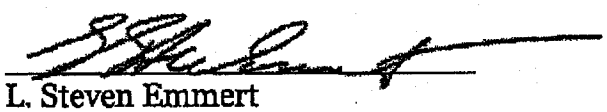

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