Appeal No. 17-35357

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLONY INSURANCE COMPANY,
Plaintiff-Appellee,

v.

VICTORY CONSTRUCTION, LLC, dba PREMIER POOLS AND SPAS OF OREGON and VITALIY SHAVLOVSKIY,
Defendants-Appellants.

On Appeal From The United States District Court
For The District Of Oregon
Case No.: 3:16-cv-00457-HZ
The Honorable Marco A. Hernández

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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I. MOTION

Proposed *Amicus Curiae* listed above hereby file this motion for leave to file a Brief *Amicus Curiae* of United Policyholders (the "Proposed Brief"). Together with this motion, proposed *Amicus Curiae* have conditionally filed their Brief *Amicus Curiae* in this Court's docket. *See* Fed. R. App. P. 29(b). Consistent with Ninth Circuit Rule 29-3, proposed *Amicus Curiae* obtained the consent of all parties to this action prior to filing this motion. Proposed *Amicus Curiae* respectfully request that this Court accept the Proposed Brief for filing.

II. POINTS AND AUTHORITIES

A. Identification and Interest of Proposed *Amicus Curiae*

United Policyholders ("UP"), a non-profit 501(c)(3) organization, is a resource for insurance consumers in all 50 states. UP's reputation as a valuable information source for courts was confirmed when the Supreme Court cited its amicus brief in *Humana v. Forsyth*, 52 U.S. 299, 314 (1999). UP has filed amicus briefs on behalf of insureds in this and other courts in over 450 cases. Donations, grants, and volunteer labor support the organization's work. UP does not sell insurance or accept funding from insurance companies

UP has appeared as *amicus curiae* in a number of Oregon state-court appeals on issues of Oregon insurance law, including: *Allianz Global Risk US Ins. Co. et al. v. ACE Property & Casualty Ins. Co. et al.*, Case No. A159758

(Oregon Court of Appeals, 2016) (pending); *Strawn v. Farmers Insurance Company of Oregon et al.*, Case No. S057520 (Oregon Supreme Court, 2008); *St. Paul Fire & Marine v. McCormick & Baxter Creosoting Company*, Case No. S541584 (Oregon Supreme Court, 1998); *Groshong, vs. Mutual Enumclaw Insurance Company*, Case No. S43912 (Oregon Supreme Court, 1996); and *Fleming vs. USAA*, Case No. S44805 (Oregon Supreme Court, 1996). UP has also appeared as *amicus curiae* in a number of cases before this Court concerning Oregon insurance law, including: *Schnitzer Steel Industries, Inc. v. Continental Casualty Co.*, Case No. 15-35101 (2016); *Ash Grove Cement Co. v. Liberty Mutual Ins. Co. et al.*, Case No. 13-35900 (2014), and *Medallion Industries, Inc. v. Atlantic Mutual Ins. Co.*, Case No. 97-35317 (1996).

Insurance regulators, academics and journalists routinely seek UP's input on insurance and legal matters. UP's Executive Director has been appointed an official consumer representative to the National Association of Insurance Commissioners for seven consecutive years and serves in an advisory role to the American Law Institute's Restatement of the Law of Liability Insurance.

UP seeks to fulfill the "classic role of amicus curiae in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). UP hopes to provide assistance in analyzing public policy implications of the issues presented in a

way that compliments the arguments raised by counsel for the parties to this appeal, drawing the court's attention to relevant public policy considerations that have not yet been considered by the lower courts or the parties. Accordingly, UP offers expertise on insurance policy matters from both the commercial and individual perspective that will greatly assist the court.

B. Summary of Information that Proposed *Amicus Curiae* Will Present to the Court to Assist in Resolution of this Appeal

Amicus Curiae is concerned that the District Court's interpretation of the so-called "absolute pollution exclusion" does not comport with Oregon law or the understanding of the ordinary purchaser of insurance, and does not take into account the needs of both policyholders and insurers for predictability regarding the duty to defend where damage related to a so-called "pollutant" may be involved.

The Proposed Brief will provide information regarding the way that the "absolute pollution exclusion" has been interpreted nationwide, including a recent series of decisions from Washington State, to provide context for this Court regarding the need for a searching inquiry. Proposed *Amicus* will provide a suggested alternative analytical model that would provide greater predictability in the duty-to-defend context, in light of the current debate over the meaning of the pollution exclusion.

WHEREFORE, proposed *Amicus Curiae* respectfully request leave to appear as *Amicus Curiae* and to file the accompanying Proposed Brief.

Respectfully submitted this 30th day of October, 2017.

s/Seth H. Row

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF UNITED POLICYHOLDERS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 30, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 30th day of October, 2017.

s/Seth H. Row

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

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Dated: October 30, 2017

DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, *Amicus Curiae* state as follows:

Amicus United Policyholders is a non-profit 501(c)(3) organization, has no parent corporation, and no publicly held-corporation owns 10 percent or more of its stock.

DATED: October 30, 2017

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I. INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP"), a non-profit 501(c)(3) organization, is a resource for insurance consumers in all fifty states. UP's reputation as a valuable information source for courts was confirmed when the Supreme Court cited its amicus brief in *Humana v. Forsyth*, 52 U.S. 299, 314 (1999). UP has filed amicus briefs on behalf of insureds in this and other courts in over 450 cases. Insurance regulators, academics and journalists routinely seek UP's input on insurance and legal matters. UP's Executive Director has been appointed an official consumer representative to the National Association of Insurance Commissioners for six consecutive years. Accordingly, UP offers expertise on insurance policy matters that will greatly assist the court.

UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Commissioner of Labor & Indus*., 694 F.2d 203, 204 (9th Cir. 1982). To that end, UP appears in support of Appellant Victory Construction ("Victory") and submits that this Court should reverse the District Court's holding that the pollution exclusion in Colony Insurance Company's ("Colony") policy excused Colony from defending Victory in the underlying suit. Based on its own wording and role within the general liability policy, the pollution exclusion

should be interpreted as only applying to traditional environmental pollution where the insured was knowingly handling traditional environmental pollutants, not in cases of ordinary negligence not involving the handling of environmental pollutants.

II. PRELIMINARY STATEMENT[1]

The duty to defend is one of the most important of all of the benefits conferred by liability insurance coverage, particularly for a small business. This duty is broader than the duty to indemnify. For that reason, Oregon courts have consistently held that the duty to defend must be applied broadly, giving an expansive reading to coverage grants, while interpreting exclusions as narrowly as possible. In addition, Oregon courts apply rules of construction that favor the plain meaning of undefined terms and interpretation of such terms from the perspective of the "ordinary purchaser of insurance." As a result, under Oregon law broadly-drafted exclusions that contain undefined terms are frequently held not to excuse an insurer from their obligation to provide a defense.

The so-called "absolute pollution exclusion" that is found in almost all Commercial General Liability (CGL) policies, and that was before the District

[1] Pursuant to FRAP 29(c), *Amicus* states that no party or person other than *Amicus* authored or contributed funding for this brief.

Court in this case, falls into that category, and should not have been applied to excuse Colony from defending. The pollution exclusion has been the subject of much litigation nationally, some of it exploring the drafting history behind its broad language and the inconsistency between it and the "reasonable expectations" of commercial insureds. However, this Court does not need to delve into the drafting history of the exclusion or "reasonable expectations" to reverse the District Court here. This Court need only examine the language of the exclusion, in the context of liability coverage generally, to come to the conclusion that a narrow application is warranted.

Amicus also notes that a recent decision from Washington State provides an alternative way to reconcile the exclusion with the breadth of the duty to defend. Under this approach, the trial court examines the alleged actions of the policyholder that resulted in potential liability and compares those actions with the pollution exclusion; if the policyholder's negligent actions were the "efficient proximate cause" of the damage, but did not directly involve a traditional environmental pollutant, the exclusion would not apply *even if* the result of the policyholder's negligence was the release of a pollutant.

Although *Amicus* does not argue that this Court apply that Washington standard to this Oregon case, *Amicus* suggests that the Washington court's approach illustrates the tension between the broad coverage grant in the general liability policy and the impossibly overbroad pollution exclusion, further supporting a narrow interpretation of the exclusion.

III. ARGUMENT

A. Oregon Law Protects the Duty to Defend

Every general liability insurance policy makes two fundamental coverage promises: (1) a paid-for defense if the policyholder gets sued; and (2) indemnity against an adverse judgment in the event that defense is unsuccessful. The importance of that promise cannot be understated, as recognized in cases from across the country. "The long history of cases involving an insurer's duty to defend emphasizes the paramount importance placed by courts on the rights of the insured to a defense of claims brought against them." *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 729 F. Supp. 721, 724 (W.D. Wash, 1989) *aff'd*, 927 F.2d 459 (9th Cir. 1991). "The defense may be of greater benefit to the insured than the indemnity. ... An insurer refusing to defend exposes its insured to business failure and bankruptcy." *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wash. 2d 751, 765, 58 P.3d 276 (2002); *see also N. Ins. Co. of New York v. Nat'l Fire & Marine Ins. Co.*, 2013

WL 3481553 (D. Nev. July 12, 2013) (characterizing the "fundamental duty to defend" as "one of the most important benefits for which the insured paid premiums") *vac'd*, 2:11-CV-01672-PMP, 2014 WL 8728538 (D. Nev. Oct. 6, 2014) (per settlement).

> An insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability. As a consequence, * * * courts have been consistently solicitous of insureds' expectations on this score.

Pruyn v. Agric. Ins. Co., 36 Cal. App. 4th 500, 515, 42 Cal. Rptr. 2d 295, 302-303 (1995).

Oregon courts, therefore, apply the duty to defend broadly. For example, Oregon courts require that the facts alleged in an underlying complaint "rule out" coverage, putting the burden on the insurer to show why the underlying complaint does *not* trigger a defense obligation, rather than the reverse. *See W. Hills Dev. Co. v. Chartis Claims, Inc. Oregon Auto. Ins. Co.*, 360 Or. 650, 652, 385 P.3d 1053 (2016); *see also Fountaincourt Homeowners' v. Fountaincourt Develop.*, 360 Or. 341, 354, 380 P.3d 916 (2016). Put another way, all doubts as to whether an underlying complaint triggers a defense obligation are resolved "in favor of the insured." *W. Hills*, 360 Or. at 661, *quoting Lee v. Aetna Casualty & Surety Co.*, 178 F.2d 750, 752 (2d Cir. 1949).

In order to protect the duty to defend Oregon courts also apply interpretive principles that favor the policyholder in situations where the insurer asserts that an exclusion applies. One Oregon court put it this way:

> The interpretation of an insurance policy is a question of law. A court's goal in interpreting a policy is to determine the intent of the parties. Intent is determined by looking to the terms and conditions of the policy. The policy must be viewed by its four corners and considered as a whole. All parts and clauses of the policy must be construed to determine if and how far one clause is modified, limited or controlled by others.

North Pacific Ins. Co. v. Hamilton, 332 Or. 20, 24, 22 P.3d 739 (2001) ("*Hamilton*") (internal quotations and citations omitted) (emphasis added). "[E]very contract of insurance shall be construed according to the terms and conditions of the policy." ORS 742.016. Further, whereas grants of coverage are interpreted broadly to afford greatest possible protection to the insured, exclusionary clauses are construed narrowly against the insurer. *O'Neill v. Standard Ins. Co.*, 276 Or. 357, 361, 554 P.2d 997 (1976) (finding that contracts for insurance are to be construed liberally in favor of the insured); *United Pac. Ins. v. Truck Ins. Exch.*, 273 Or. 283, 293, 541 P.2d 448 (1975) (finding that exclusionary language is construed narrowly in favor of coverage).

Insurance policies are also to be construed from "the perspective of the 'ordinary purchaser of insurance.'" *North Pacific Ins. Co. v. Am. Mfrs Mut. Ins. Co.*, 200 Or. App. 473, 478, 115 P.3d 970 (2005) ("*North Pacific Ins.*").

Undefined policy terms are generally given their ordinary and common meaning. *Mut. of Enumclaw Ins. Co. v. Rohde*, 170 Or. App. 574, 579, 13 P.3d 1006 (2000). Where policy terms are unambiguous, they are enforced as written. *Groshong v. Mut. of Enumclaw Ins. Co.*, 329 Or. 303, 308, 985 P.2d 1284 (1999). Oregon courts refer to dictionary definitions when looking for the plain and ordinary meaning of undefined terms in insurance policies. *See, e.g.*, *Gonzales v. Farmers Ins. Co. of Oregon*, 210 Or. App. 54, 60, 150 P.3d 20 (2006).

However, where policy terms are susceptible to more than one plausible interpretation after being examined in light of the particular context in which the term is used in the policy and the broader context of the policy as a whole, Oregon courts deem the term legally ambiguous and construe it in favor of coverage for the insured. *Hoffman Constr. Co. v. Fred S. James & Co. of Or.*, 313 Or. 464, 469-71, 836 P.2d 703 (1992). In other words, the insurer prevails *only* by demonstrating that its interpretation is the only reasonable one and that the policy cannot be read any other way. *Id.* at 470-71. Conversely, if the insured offers a single reasonable interpretation, that interpretation will control, irrespective of any other reasonable interpretation offered by the insurer. *Id.*

Insurers have the unfettered right to define terms and phrases to mean exactly what they want them to mean. *Hamilton*, 332 Or. at 29. If an insurer

elects not to define a policy term the insurer must live with *any* reasonable interpretation articulated by the insured. *Hoffman*, 313 Or. at 471.

As applied to the duty to defend, these interpretive principles mean that where an insurer asserts that an exclusion applies, the trial court must carefully analyze the exclusion and apply it narrowly, without giving any "particular weight or effect" to that provision over other portions of the policy including the duty-to-defend grant. *See Bresee Homes, Inc. v. Farmers Ins. Exchange*, 353 Or. 112, 121-22, 293 P.3d 1036 (2012) (applying "products-completed operations hazard" exclusion narrowly in light of the conflict between it and the duty to defend in context of allegations of property damage in a construction defect case).

The CGL policy at issue here, like most such policies, provides broad coverage for liability arising from "bodily injury" that is caused by "an occurrence." ER 52. The "hazardous materials" exclusion, however, incorporates the "absolute pollution exclusion" and the definition of "pollutant," to create a potentially vast non-covered scope of liability. Colony argues that the exclusion in this case applies to all bodily injury resulting from any substance that falls within the definition of "pollutant." Colony argues that the exclusion applies even though the insured here was not handling the "pollutant," but rather allegedly created the "pollutant" – if indeed carbon monoxide is a

pollutant[2] – through negligent but ordinary operations of its business. That is exactly the scenario in which Oregon law compels a narrow interpretation and application of the exclusion.

B. The Problems with Adopting a Broad Reading of the Exclusion Are Well Recognized

Courts across the country have recognized that the language of the "absolute pollution exclusion" and definition of "pollutant" are very broad and have the potential to put a large swath of bodily injury and property damage claims outside of coverage. *See, e.g, Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992). These courts have recognized that some of the terms in the definition (in particular "irritant" and "contaminant") could apply to any substance, potentially creating a universe of excluded claims that is difficult to square with the societal and economic purposes of general liability coverage. *See id.* ("The 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.'"), *citing Westchester Fire Ins. Co. v. City of*

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[2] *Amicus* agrees with Victory that carbon monoxide does not fit within the definition of "pollutant."

Pittsburg, 768 F.Supp. 1463, 1470 (D. Kan.1991). As the Nevada Supreme Court put it:

> Taken at face value, the policy's definition of a pollutant is broad enough that it could be read to include items such as soap, shampoo, rubbing alcohol, and bleach insofar as these items are capable of reasonably being classified as contaminants or irritants. So, if no limitations are applicable, the pollution exclusion would seem to preclude coverage for any accident stemming from such items, including a person slipping on a puddle of bleach or developing a skin rash from using a bar of soap. Such results would undoubtedly be absurd and contrary to any reasonable policyholder's expectations.

Century Sur. Co. v. Casino W., Inc., 329 P.3d 614, 617 (Nev. 2014).

In order to avoid those extreme or absurd results many courts have resorted to examining the drafting history of the exclusion and, after doing so, found that the insurance industry's intent or aim with the exclusion was to apply it to "situations involving traditional environmental pollution." *See Apana v. TIG Ins. Co.*, 574 F.3d 679, 683 (9th Cir. 2009) (listing cases, and certifying question to the Hawaii Supreme Court). In addition, some courts have refused to apply the exclusion broadly based on application of the "reasonable expectations of the insured" doctrine. *Id.; see also Century Sur. Co. v. Casino W., Inc.*, 677 F.3d 903, 909, (9th Cir. 2012) (discussing trends in case law, and

certifying question about application of exclusion to Nevada Supreme Court), *certified question answered*, 329 P.3d 614 (Nev. 2014).[3]

Amicus offers the above to illustrate that the problems with this exclusionary language are well-recognized and are real. The over-breadth of the pollution exclusion results in a lack of certainty about what losses will be covered, which can be devastating to small business, particular with regard to the duty to defend. That lack of certainty is also detrimental to the insurance industry, which is continually forced to weigh the over-broad pollution exclusion language against the risk that a court will disagree with its interpretation in light of the extreme results that an over-broad interpretation will produce. It is clearly in the interests of policyholders (and insurers) to establish limits on the interpretation of the pollution exclusion to create consistency, and therefore predictability, in critical decisions about insurance coverage such as the duty to defend.

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[3] The Nevada Supreme Court concluded that the absolute pollution exclusion did not apply to claims for carbon monoxide poisoning under facts similar to those in this case, and found that the exclusion only applied to "traditional environmental pollution" in part because the exclusion "contains environmental terms of art," and because it found the exclusion to be ambiguous. *Century Surety*, 329 P.3d at 616-618.

That said, this Court does not need to resort to either the "drafting history" or "reasonable expectations" methods of interpretation to narrowly apply this exclusion to these facts while still faithfully applying Oregon law. Under Oregon law the exclusion must be interpreted narrowly; under a narrow interpretation the exclusion does not apply.

C. Under Oregon's "Ordinary Purchaser of Insurance" Standard the Court Should Question Colony's Broad Interpretation

Oregon courts interpret the terms of an insurance policy as would an "ordinary purchaser of insurance." *North Pacific Ins.*, 200 Or. App. at 478; *see Navigators Ins. Co. v. Hamlin*, 96 F. Supp. 3d 1181, 1190 (D. Or. 2015) (describing interpretive principle in *North Pacific Ins.* as asking what a "reasonable insured" could have "expected").

Therefore, this Court can and should ask whether an "ordinary purchaser of insurance" would interpret the term "contaminant" in the definition of "pollutant" broadly, as Colony advocates, to include a naturally-occurring gas that is the byproduct of the insured's normal business operations? What would the ordinary purchaser of insurance do with the fact that "pollutant" and "contaminant" are essentially synonyms? ER 13 (District Court's order, citing *Contaminant and Contaminate*, Oxford English Dictionary (2d ed. 2016). Would this hypothetical insured therefore conclude that "contaminant" refers to

some sub-set of "pollutants," and if so would the ordinary purchaser understand that sub-set to be defined by other terms in the definition such as "acids" and "chemicals"? Similarly, would an ordinary purchaser of insurance interpret "irritant" to include a substance that is not irritating at all, but is instead a colorless, odorless gas that only causes harm at high concentrations by interfering with the body's ability to take in oxygen? Would an ordinary purchaser instead interpret the term "irritant" also through the lens of the other terms listed in the definition?

Amicus suggests that the answer to that question is yes – an ordinary purchaser of insurance would not interpret the terms "contaminant" or "irritant" to be so broad as to include any substance without limitation, but would rather understand those terms to include only known hazardous substances such as traditional environmental pollutants. Under the "ordinary purchaser" interpretive standard required by Oregon law, the District Court should have adopted a narrow interpretation of the pollution exclusion and the definition of "pollutant," arriving at an interpretation that is consistent with the case law finding the definition to be essentially limited to situations involving traditional environmental pollution.

D. A Recent Case from Washington Suggests an Alternative Approach

In *Xia v. Probuilders Specialty Ins. Co.*, 188 Wash. 2d 171, 400 P.3d 1234 (2017), issued after the District Court's decision in this matter, the Washington Supreme Court rejected the application of the absolute pollution exclusion on nearly identical facts to those alleged here. In *Xia* the policyholder constructed a new home, but negligently installed an exhaust vent attached to the hot water heater; as a result, carbon monoxide was discharged into a basement room, causing the home owner to become ill. *Id.*, 188 Wash. 2d at 175. The builder's insurer denied coverage based on the pollution exclusion. *Id.* After suit was filed and a settlement reached, the homeowner, acting as judgment creditor, pursued coverage. *Id.* at 176.

The Washington Supreme Court surveyed its prior decisions involving the pollution exclusion, and found that those decisions had established that only when the pollution was a "traditional environmental harm *or* a pollutant acting as a pollutant" would the exclusion apply. *Id.* at 181 (emphasis added). The court found that carbon monoxide fell within the definition of "pollutant" in the ProBuilders' policy, and that it was acting "as a pollutant."[4] *Id.* at 187.

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[4] The definition of "pollutant" in *Xia* differed from the definition found in Victory's policy. The *Xia* definition included qualifying phrases after the listing
(Footnote cont'd on next page)

But the court did not stop there. The court went on to analyze whether the "pollution" alleged in *Xia* was the "efficient proximate cause" of the bodily injury, or whether some other non-excluded "occurrence" was the efficient proximate cause of injury. *Id.* at 185. The court held that even if the pollution alleged in the underlying suit qualified as a "traditional environmental harm" or if the pollutant was "acting as a pollutant," if the "efficient proximate cause" of the harm was an "initially covered occurrence," then the pollution exclusion would not apply. *Id.* at 185.

The *Xia* court went on to hold that the builder's negligent installation of the hot water heater was the "efficient proximate cause" of the bodily injury, and that the pollution exclusion did not apply to that cause (or "occurrence"), meaning that ProBuilders had an obligation to indemnify its policyholder.

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of types of substances that made it clear that the definition was intended to be very broad and broader than the standard-form definition. *Xia v. ProBuilders Specialty Ins. Co., RRG*, 189 Wash. App. 1041, 2015 WL 5011474, at *4 (2015), *review granted sub nom. Xia v. Probuilders Specialty Ins. Co.*, 185 Wash. 2d 1024, 369 P.3d 502 (2016), and *rev'd in part sub nom. Xia v. ProBuilders Specialty Ins. Co.*, 188 Wash. 2d 171, 400 P.3d 1234 (2017), *as modified* (Aug. 16, 2017), *reconsideration denied* (Aug. 17, 2017) (definition included phrase "the presence of any or all of which adversely affects human health or welfare, unfavorably alters ecological balances or degrades the vitality of the environment for esthetic, cultural or historical purposes, whether such substances would be or are deemed or thought to be toxic, and whether such substances are naturally occurring or otherwise.").

Id. at 187. In response to the insurer's complaint that application of the "efficient proximate cause" concept would render the exclusion useless, the court pointed out that in prior Washington cases the exclusion would have applied, because in those cases the efficient proximate cause was the polluting act itself. *Id.* The court gave as an example a case in which the insured negligently applied a sealant that emitted toxic fumes. *Id.* (*discussing Cook v. Evanson,* 83 Wash. App. 149, 151, 920 P.2d 1223, 1224 (1996)).

Applying *Xia,* a federal court in the Eastern District of Washington held that the pollution exclusion did apply, in a case involving the alleged over-application of animal manure to crop-land leading to contamination of groundwater. *Dolsen Companies v. Bedivere Ins. Co.*, No. 1:16-CV-3141-TOR, 2017 WL 3996440, at *6 (E.D. Wash. Sept. 11, 2017). The *Dolsen* court held that the manure was a "pollutant," and that the case was distinguishable from *Xia* because the "initial peril" – the application of the manure – was the polluting act, and therefore that the "efficient proximate cause" was "intimately tied to the pollutant." *Id.,* 2017 WL 3996440, at *7. The court offered the opinion that the *Xia* framework – distinguishing between initial causation that involves a pollutant (not covered) and initial causation that does not involve a pollutant (covered) is "workable." *Id.*

Whether or not Oregon courts would adopt the "efficient proximate cause" analysis used by the *Xia* court, the fact that the Washington Supreme Court adopted that analytical model – previously only applied to first-party property losses[5] – to avoid a harsh result demonstrates the disjunction between, on the one hand, the broad coverage that the general liability policy is supposed to provide to ordinary tradespeople and, on the other hand, the over-broad language of the pollution exclusion.

As demonstrated in *Xia* (and the cases in which courts have experienced the drafting history of the exclusion), courts are going to great lengths to avoid applying the absolute pollution exclusion in cases where the insured is not itself handling anything that an ordinary purchaser of insurance would consider a "pollutant." In *Xia* it appears that the Washington Supreme Court felt hamstrung by prior decisions that had not limited the interpretation of the pollution exclusion to traditional environmental pollution, requiring it to dig deeper into interpretive concepts applicable to insurance coverage to reconcile the broad liability coverage grant with the hugely overbroad exclusion of "pollutants." *Xia*, 188 Wash. 2d at 180.

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[5] *Xia*, 188 Wash. 2d 193, n.1, 400 P.3d at 1246, n.1 (Owens, J., dissenting).

Because Oregon does not have the well-developed body of law concerning the pollution exclusion that Washington had going into the *Xia* decision, it is not necessary for this Court to consider whether Oregon would embrace the *Xia* paradigm. This Court should, instead, interpret the definition of pollution narrowly, consistent with Oregon law, and find that it does not apply outside of the traditional environmental contamination context, based on the wording of the exclusion and the "ordinary purchaser of insurance" interpretive principle.

IV. CONCLUSION

The interpretive principles advocated by *Amicus* here are consistent with Oregon law, and would create some degree of consistency – and therefore predictability – in insurance-coverage decision making where "pollutants" are concerned. That predictability would benefit policyholders, particularly small business policyholders that rely on the defense promised by insurers in the general liability policy for the stability of their businesses. It would also benefit insurers tasked with making quick decisions about the duty to defend.

For all of the foregoing reasons, *Amicus* respectfully urges this Court to reverse the District Court's grant of summary judgment to Colony.

Respectfully submitted this 30th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) because this brief contains 4019 or less words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows software in 14 pt. Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 30, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 30th day of October, 2017.

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