IN THE SUPREME COURT
STATE OF GEORGIA

GEORGIA FARM BUREAU MUTUAL INSURANCE COMPANY,	)	
Appellant,	)	
v.	)	**Case No. S15G1177**
BOBBY CHUPP and AMY SMITH, Individually and as Next Friend of TYASIA BROWN, a minor,	)	
Appellees.	)	

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

David J. Hungeling (#378417)
LAW OFFICE OF DAVID J. HUNGELING, P.C.
1718 Peachtree Street, N.W.
Peachtree 25th, Suite 599
Atlanta, GA 30309
Phone: 404-647-0341
Fax: 404-574-2467
E-Mail: david@hungelinglaw.com

Counsel for *Amicus Curiae* United Policyholders

Michael H. Sampson (*pro hac vice* pending)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Phone: 412-288-3618
Fax: 412-288-3063
E-Mail: msampson@reedsmith.com

Evan T. Knott (*pro hac vice* pending)
Emily E. Garrison (*pro hac vice* pending)
REED SMITH LLP
109 South Wacker Drive, 40th Floor
Chicago, IL 60606
Phone: 312-207-1000
Fax: 312-207-6400
E-Mail: eknott@reedsmith.com
egarrison@reedsmith.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF FACTS 1

ARGUMENT 2

I. THE GENESIS OF THE ABSOLUTE POLLUTION EXCLUSION DEMONSTRATES THE INSURANCE INDUSTRY'S INTENT TO LIMIT THE APPLICATION OF THAT EXCLUSION TO TRADITIONAL ENVIRONMENTAL AND INDUSTRIAL POLLUTION. 4

A. The Absolute Pollution Exclusion Emerged in Response to the Enactment of Stringent Federal Environmental Statutes and Insurers' Concerns about Coverage for Gradual Contamination of the Natural Environment. 4

B. The Insurance Industry Represented to Insurance Regulators that the Absolute Pollution Exclusion Did Not Expand the Exclusion Beyond Traditional Environmental and Industrial Pollution Claims. 11

C. The Absolute Pollution Exclusion's Language Tracks Environmental Terms of Art in Federal Environmental Statutes. 14

D. Numerous Courts Have Recognized that the Absolute Pollution Exclusion Was Only Intended to Apply to Traditional Environmental and Industrial Pollution. 16

II. HAD THE INSURER HERE INTENDED TO EXCLUDE COVERAGE FOR INJURY RESULTING FROM EXPOSURE TO LEAD-BASED PAINT, IT COULD AND SHOULD HAVE INCLUDED IN ITS POLICY A LONG-AVAILABLE LEAD-PAINT EXCLUSION. 21

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

4 G Properties, LLC v. GALS Real Estate, Inc.,
289 Ga. App. 315 (2008) 11, 16

American States Ins. Co. v. Kiger,
662 N.E.2d 945 (Ind. 1996) 19

American States Ins. Co. v. Koloms,
687 N.E.2d 72 (Ill. 1997) .....*passim*

American. States Ins. Co. v. Zippro Constr. Co.,
216 Ga. App. 499 (1995) 19

Andersen v. Highland House Co.,
757 N.E.2d 329 (Ohio 2001) 10

Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.,
136 F. Supp. 2d 1340 (N.D. Ga. 2001).....29, 30

Atlantic Mut. Ins. Co. v. McFadden,
595 N.E.2d 762 (Mass. 1992).....17

Blue v. R.L. Glosson Contracting, Inc.,
173 Ga. App. 622 (1985) 11

Cepeda v. Varveris,
651 N.Y.S.2d 185 (N.Y. App. Div. 1996).....17

Chantel Assocs. v. Mount Vernon Fire Ins. Co.,
656 A.2d 779 (Md. 1995) 22

Claussen v. Aetna Cas. & Sur. Co.,
259 Ga. 333 (1989) 6, 7

Danbury Ins. Co. v. Novella,
727 A.2d 279 (Conn. Super. Ct. 1998).....16

Doerr v. Mobil Oil Corp.,
774 So. 2d 119 (La. 2000) 17

Fireman's Fund Ins. Cos. v. Atlantic Richfield Co.,
115 Cal. Rptr. 2d 26 (Cal. Ct. App. 2001).....26, 27

Gainsco Ins. Co. v. Amoco Production Co.,
53 P.3d 1051 (Wyo. 2002).....18

General Acc. Ins. Co. of Am. v. Idbar Realty Corp.,
622 N.Y.S.2d 417 (N.Y. Sup. Ct. 1994).....17

General Forms, Inc. v. Continental Cas. Co.,
123 Ga. App. 52 (1970) 11

Generali–U.S. Branch v. Caribe Realty Corp.,
612 N.Y.S.2d 296 (N.Y. Sup. Ct. 1994).....17

Georgia Farm Bureau Mut. Ins. Co. v. Meyers,
249 Ga. App. 322 (2001) 25

Georgia Ins. Co. of N.Y. v. Naimberg Realty Assocs.,
650 N.Y.S.2d 246 (N.Y. App. Div. 1996).....17

Hartford Fire Ins. Co. v. Merrett Underwriting Agency Mgmt. Ltd.,
509 U.S. 764 (1993).....6

Herald Square Loft Corp. v. Merimack Mutual Fire Ins. Co.,
344 F. Supp. 2d 915 (S.D.N.Y. 2004) 23

Hurst v. Grange Mut. Cas. Co.,
266 Ga. 712 (1996) 21

Insurance Co. of Ill. v. Stringfield,
685 N.E.2d 980 (Ill. 1997).....16

Kerr-McGee Corp. v. Georgia Cas. & Sur. Co.,
256 Ga. App. 458 (2002) 5, 29

Lefrak Org., Inc. v. Chubb Custom Ins. Co.,
942 F. Supp. 949 (S.D.N.Y. 1996) 16

Leksi, Inc. v. Federal Ins. Co.,
129 F.R.D. 99 (D.N.J. 1989).....11

MacKinnon v. Truck Ins. Exch.,
73 P.3d 1205 (Cal. 2003).....5, 10, 19

McMillan v. State Mut. Life Assurance Co. of Am.,
922 F.2d 1073 (3rd Cir. 1990).....25

McNeil Lab, Inc. v. North River Ins. Co.,
645 F. Supp. 525 (D.N.J. 1986).....26

The Medical Protective Co. v. Watkins,
198 F.3d 100 (3rd Cir. 1999).....25

Morton Int'l, Inc. v. General Acc. Ins. Co. of Am.,
629 A.2d 831 (N.J. 1993).....6

Nationwide Mut. Ins. Co. v. Shoemaker,
965 F. Supp. 700 (E.D. Pa. 1997).....30

Nav-Its, Inc. v. Selective Ins. Co. of Am.,
869 A.2d 929 (N.J. 2005).....14

Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.,
505 F.2d 989 (2d Cir. 1974).....26, 27

Pardee Constr. Co. v. Insurance Co. of the West,
92 Cal. Rptr. 2d 443 (Cal. Ct. App. 2000).....28

Perry v. Economy Fire & Cas. Co.,
724 N.E.2d 151 (Ill. App. Ct. 1999).....23, 24

Philadelphia Elec. Co. v. Nationwide Mut. Ins. Co.,
721 F. Supp. 740 (E.D. Pa. 1989).....26

Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.,
976 F.2d 1037 (7th Cir. 1992).....18, 19

Porterfield v. Audubon Indem. Co.,
856 So. 2d 789 (Ala. 2002).....16

Reed v. Auto-Owners Ins. Co.,
284 Ga. 286 (2008) 19, 20

Regional Bank of Colo. v. St. Paul Fire & Marine Ins. Co.,
35 F.3d 494 (10th Cir. 1994) 18

Roland v. Georgia Farm Bureau Mut. Ins. Co.,
265 Ga. 776 (1995) 29

Smith v. Georgia Farm Bureau Mut. Ins. Co.,
331 Ga. App. 780 (2015) 19, 24

State Farm Mut. Auto. Ins. Co. v. Seeba,
209 Ga. App. 328 (1993) 21

Sullins v. Allstate Ins. Co.,
667 A.2d 617 (Md. 1995) 17, 23, 25

Tudor v. American Emp'rs. Ins. Co.,
121 Ga. App. 240 (1970) 18

Weaver v. Royal Ins. Co. of Am.,
674 A.2d 975 (N.H. 1996) 17

Westview Assocs. v. Guaranty Nat'l. Ins. Co.,
740 N.E.2d 220 (N.Y. 2000).....22, 23

Statutes

33 U.S.C.A. § 1251, *et seq.*.....4

42 U.S.C.A. § 4851, *et seq.*.....15

42 U.S.C.A. § 6901, *et seq.*.....4

42 U.S.C.A. § 7401, *et seq.*.....4

42 U.S.C.A. § 9601, *et seq.*.....4

42 U.S.C.A. § 9607(a)(4).....15

Regulations

24 C.F.R. § 35.80 15

40 C.F.R. § 745.103 15

Other Authorities

Donald S. Malecki, Why attach a lead paint exclusion to CGL, http://www.roughnotes.com/rnmagazine/1998/november98/11p54.htm 28

Letter from Dennis R. Connolly, Senior Counsel, American Insurance Association to the Office of Financial Institutions and Capital Markets Policy, United States Treasury Department (October 16, 1981), *reprinted in* NAIC Proceedings, 1982-1 NAIC Proc. 596 .....8, 9

Letter from James L. Kimble, Senior Counsel, American Insurance Association to the Office of the General Counsel of the EPA Kimble, Counsel, AIA, *The Need For A Post-Closure Liability Fund For Waste Disposal Sites* (July 25, 1980), *reprinted in* NAIC Proceedings, 1982-1 NAIC Proc. 596 8

AIA Comments on Environmental Pollution Legislation & Regulation (Dec. 28, 1981), *reprinted at* NAIC Proceedings, 1982-1 NAIC Proc. 596 14

Report of the Advisory Committee on Environmental Liability Insurance (Dec. 9, 1986), 1987-4 NAIC Proc. 867 9

Stempel, *Reason and Pollution: Construing the "Absolute" Pollution Exclusion in Context and in Light of its Purpose and Party Expectations*, 34 Tort & Ins. L.J. 1, 37 (1998) 13

SUA Insurance Company Filing, Wisconsin Office of the Commissioner of Insurance, *available at* https://ociaccess.oci.wi.gov/Companyfilings/document?docid=120880&filid=118727 22

Pursuant to Georgia Supreme Court Rule 23, United Policyholders respectfully submits this *amicus curiae* brief in support of Appellees Amy Smith, individually and as next friend of Tyasia Brown, and Bobby Chupp.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

United Policyholders is a non-profit 501(c)(3) corporation founded in 1991 as an educational resource for the public on insurance issues and insurance consumer rights. It operates nationwide and is funded by donations and grants from individuals, businesses, and foundations. United Policyholders contributes on an on-going basis to the formulation of insurance-related public policy at both the national and state levels and is a general information clearinghouse on consumer issues related to commercial and personal lines insurance policies. United Policyholders has participated as *amicus curiae* in more than 300 cases throughout the United States, including cases adjudicated in Georgia state courts and the United States Court of Appeals for the Eleventh Circuit.

United Policyholders has a significant interest in the ruling under review, as it will greatly affect the rights of insurance policyholders, who are the focus of its educational mission.

STATEMENT OF FACTS

United Policyholders adopts and incorporates herein by reference the Statements of Facts contained in each of the Appellees' Briefs.

ARGUMENT

Claims for personal injury resulting from lead-based paint ingestion are ***not*** excluded from coverage pursuant to pollution exclusions typically included in commercial general liability ("CGL") insurance policies. Such exclusions typically provide that coverage does not apply to:

> ***… "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":***
>
> > … 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….

Often referred to as the "absolute" or "total" pollution exclusion, this provision – as evidenced by, *inter alia*, testimony offered by representatives of the insurance industry itself – was intended to apply only to, and to bar coverage only for, claims involving traditional environmental and industrial pollution, such as soil and groundwater contamination from a hazardous waste disposal facility.

Indeed, the drafting of this exclusion by the insurance industry was a reaction to the passage of numerous federal environmental laws, such as the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund legislation"), which increased many policyholders' – and insurers' – liability, or potential liability, for environmental pollution.

By the admission of its own representatives, the insurance industry never intended the exclusion to apply to claims involving non-environmental or non-industrial irritants, such as lead-based paint in one's home or rental property.

Conversely, there is no evidence that the insurance industry intended the pollution exclusion to apply to claims involving lead-based paint. There is no mention of "lead-based paint," or even "lead" more generally, anywhere in the exclusion or in the corresponding, typical definition of "pollutants."

Rather, there has long been a separate exclusion available on the insurance market expressly precluding coverage for lead-based-paint-related liabilities. Such exclusions are explicit; for example:

> It is agreed that this insurance does not apply to any liability for bodily injury or personal injury arising out of exposure to, ingestion of lead paint or any substance or matter containing lead paint or the residue of lead paint.

That such a separate exclusion has long been available on the market is strong – if not, decisive – evidence that the pollution exclusion was not intended to preclude coverage for lead-based-paint related liabilities.

I. THE GENESIS OF THE ABSOLUTE POLLUTION EXCLUSION DEMONSTRATES THE INSURANCE INDUSTRY'S INTENT TO LIMIT THE APPLICATION OF THAT EXCLUSION TO TRADITIONAL ENVIRONMENTAL AND INDUSTRIAL POLLUTION.

A. The Absolute Pollution Exclusion Emerged in Response to the Enactment of Stringent Federal Environmental Statutes and Insurers' Concerns about Coverage for Gradual Contamination of the Natural Environment.

In the early to mid-1980s, in response to mounting concerns nationwide about environmental damage at sites polluted by gradual, systematic industrial pollution, the federal government promulgated a series of environmental laws and regulations, including, but not limited to, CERCLA,[1] the Resource Conservation and Recovery Act,[2] the Clean Water Act,[3] and the Clean Air Act.[4] These laws imposed strict, joint, several, and retroactive liability for the expensive and time-consuming remediation of damage caused to the environment from the release of toxic materials and industrial pollutants. In light of these aggressive statutes and regulations, businesses (especially large corporations) – and their liability insurers

1 *See* 42 U.S.C.A. § 9601, *et seq.*

2 *See* 42 U.S.C.A. § 6901, *et seq.*

3 *See* 33 U.S.C.A. § 1251, *et seq.*

4 *See* 42 U.S.C.A. § 7401, *et seq.*, as amended.

– faced staggering financial liability to fund the cleanup of environmental contamination that was mandated by these laws.[5]

The absolute pollution exclusion – included not just in the insurance policy Georgia Farm Bureau Mutual Insurance Company ("Georgia Farm Bureau") sold to Bobby Chupp but also in most other CGL insurance policies – was developed in response to these new laws and financial risks. *See Kerr-McGee Corp. v. Georgia Cas. & Sur. Co.*, 256 Ga. App. 458, 463 (2002) ("The purpose of total pollution exclusion was to bar coverage responsibility for government-mandated cleanup under the Superfund for gradual environmental damages of any type."). *See also American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 80-82 (Ill. 1997) ("[T]he history of the [absolute] pollution exclusion amply demonstrates that the predominate motivation [for its development] … was the avoidance of the 'enormous expense and exposure resulting from the 'explosion' of environmental litigation.'"); *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1216 (Cal. 2003) ("[T]here appears to be little dispute that the pollution exclusion was adopted to address the enormous potential liability resulting from anti-pollution laws enacted between 1966 and 1980.").

---

[5] Recognizing the significance of the purpose and drafting history of the pollution exclusion, Appellant also chronicled in its brief what it believes to be the history of the "[e]volution of the pollution exclusion clauses." Brief of Appellant Georgia Farm Bureau Mut. Ins. Co. (July 27, 2014) ("Appellant's Br.") at 8-9.

Prior to this time, many CGL policies included what had been a standard pollution exclusion, often referred to as the "sudden and accidental" pollution exclusion, which was developed by the Insurance Services Office, Inc. ("ISO")[6] in the early 1970s. That exclusion precluded coverage for:

> bodily injury or property damage arising out of the discharge, dispersal, or release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants…; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental ….

See, e.g., *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 334 (1989).

Importantly, this earlier iteration of the pollution exclusion was intended to apply only to traditional environmental pollution. *See, e.g.*, *Koloms*, 687 N.E.2d at 81 (discussing exclusion's "original purpose of excluding coverage for environmental pollution"); *Morton Int'l, Inc. v. General Acc. Ins. Co. of Am.*, 629 A.2d 831, 849-50 (N.J. 1993) ("Foreseeing an impending increase in claims for environmentally-related losses … the insurance industry…began in 1970 the process of drafting … the standard pollution-exclusion clause.").

By the end of the 1980s, a number of courts had considered whether this prior iteration of the pollution exclusion barred claims for gradual environmental

---

[6] "ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms." *Hartford Fire Ins. Co. v. Merrett Underwriting Agency Mgmt. Ltd.*, 509 U.S. 764, 772 (1993).

pollution. *See, e.g., Koloms*, 687 N.E.2d at 80-81 (explaining that between 1973 and 1986, "various courts labored over the exact meaning of the words 'sudden and accidental'"). Courts in many states, including Georgia, held that the "sudden and accidental" exception in the qualified pollution exclusion required insurers to provide coverage for gradual environmental contamination so long as the release of pollution was "unexpected and unintended." *See, e.g., Claussen*, 259 Ga. at 336-37 (holding that term "sudden" was capable of more than one reasonable interpretation, and therefore was to be construed in favor of the insured to mean an "unexpected and unintended," rather than temporally abrupt, release of pollution).

These legislative and judicial developments deeply troubled the insurance industry. For example, even when the Superfund legislation was still under consideration by Congress, the American Insurance Association ("AIA"), and other industry representatives, expressed concern to the National Association of Insurance Commissioners ("NAIC") about potential pollution liability.[7]

[7] These concerns are reflected in the voluminous Proceedings of the National Association of Insurance Commissioners (the "NAIC Proceedings"), published just prior to the adoption of the absolute pollution exclusion in 1986. The NAIC Proceedings are available on Lexis.com in the folder entitled "National Association of Insurance Commissioners Proceedings" located in the topical database for "Insurance." The citations to this database folder *infra* locate the pertinent portions of the NAIC Proceedings available on Lexis.com. Upon request from this Court, counsel for United Policyholders would be pleased to provide to this Court copies of any of the non-decisional, secondary authorities and reference materials cited in this brief.

In particular, the industry voiced its concern that "the member companies of the AIA will be asked to be the principal domestic source of post-closure liability insurance for hazardous waste disposal sites."[8] The AIA's counsel further reported that the insurance industry's concerns about liability insurance coverage for pollution were that "[t]he dissimilarities between the current liability theories for toxic substances discharges and disposal and the liability theories preferred in 'superfund' legislation will impede the development of an insurance market."[9] In addition, the AIA expressed concern that the Superfund legislation would impose a "revolutionary statutory liability system" and that "[t]he imposition of a brand new and hitherto unanticipated retroactive liability on both insurer and insured is unjust, counterproductive, and should be deleted. Joint and several liability for the sweeping damages contemplated under Superfund is neither philosophically nor financially desirable."[10]

---

8 *See* Letter from James L. Kimble, Senior Counsel, American Insurance Association to the Office of the General Counsel of the EPA Kimble, Counsel, AIA, *The Need For A Post-Closure Liability Fund For Waste Disposal Sites* (July 25, 1980), *reprinted in* NAIC Proceedings, 1982-1 NAIC Proc. 596. The AIA is a trade association of 152 publicly owned property and casualty insurance companies. *See id.*

9 *See id.*, NAIC Proceedings, 1982-1 NAIC Proc. 596.

10 *See* Letter from Dennis R. Connolly, Senior Counsel, American Insurance Association to the Office of Financial Institutions and Capital Markets Policy, United States Treasury Department (October 16, 1981), *reprinted in* NAIC Proceedings, 1982-1 NAIC Proc. 596.

The NAIC also was provided with excerpts from a letter from the AIA to the U.S. Environmental Protection Agency ("EPA") expressing concerns about the Superfund legislation:

> The dynamic combination in this law of new strict liability, limitation of defenses, and joint and several liability, all retroactively applied, will disrupt both past and future insurance arrangements.[11]

In light of these concerns, the NAIC appointed an Advisory Committee to study the implications for insurance coverage under CGL insurance for "pollution" while also reviewing the proposed absolute pollution exclusion. *See Report of the Advisory Committee on Environmental Liability Insurance* (Dec. 9, 1986), 1987-4 NAIC Proc. 867. This Advisory Committee was chaired by a member of the insurance industry, George M. Mulligan of the AIA. *See id.* In analyzing the "Background and History of the Problem," the Advisory Committee focused on "state and federal environmental laws and their administration, [and] examine[d] the development of insurance products and the underwriting and delivery systems dealing with pollution coverages." *Id.*

In sum, this evidence demonstrates that the insurance industry's concern was ***not*** about ordinary accidents involving routine waste materials (such as lead-based

---

[11] *See id.*, NAIC Proceedings, 1982-1 NAIC Proc. 596.

paint), but rather about the aggressive and sweeping legal liability imposed by the Superfund legislation (and other new laws) addressing industrial pollution.

Ultimately, by 1985, the insurance industry, through ISO, developed and filed a new CGL insurance form, *i.e.*, the so-called "absolute" pollution exclusion.[12] *See Koloms*, 687 N.E.2d at 81. That exclusion was then adopted by insurance regulators and "incorporated into the standard form CGL [policies] in 1986." *Andersen v. Highland House Co.*, 757 N.E.2d 329, 333 (Ohio 2001) (internal quotations omitted). "[T]he 1986 amendment to the exclusion was wrought, not to broaden the provision's scope beyond its original purpose of excluding coverage for environmental pollution, but rather to remove the 'sudden and accidental' exception to coverage which … resulted in a costly onslaught of litigation." *Koloms*, 687 N.E.2d at 81.

The Illinois Supreme Court cautioned that it "would be remiss, therefore, if [it] were to simply look to the bare words of the exclusion, ignore its *raison d'être*, and apply it to situations which do not remotely resemble traditional environmental contamination." *Id. See also MacKinnon*, 73 P.3d at 1217 (explaining that the

[12] In *MacKinnon*, 73 P.3d at 1210 n.3, the California Supreme Court eschewed the use of the term "absolute" pollution exclusion, noting that insurance policies themselves do not use it and that it suggests the exclusion is broader than it actually is.

"history and purpose of the clause, while not determinative, may properly be used by courts as an aid to discern the meaning of disputed policy language").[13]

B. The Insurance Industry Represented to Insurance Regulators that the Absolute Pollution Exclusion Did Not Expand the Exclusion Beyond Traditional Environmental and Industrial Pollution Claims.

The intent that the absolute pollution exclusion, like the sudden and accidental pollution exclusion, apply only to traditional environmental and industrial pollution claims is further reflected in statements made by insurance-industry representatives in 1985 when state insurance regulators were considering the proposed absolute pollution exclusion for approval. Industry representatives indicated publicly that the change being proposed to the pollution exclusion was only intended to make clear that coverage for gradual, traditional pollution claims

[13] Of course, the cardinal rule of contract construction in Georgia, as in virtually every other (if not every other) jurisdiction, is to ascertain the intention of the parties. *See 4 G Properties, LLC v. GALS Real Estate, Inc.*, 289 Ga. App. 315, 316 (2008). Although Georgia courts have not directly addressed the issue, other courts, such as the Supreme Court of Illinois, have recognized the importance of considering evidence of drafting history to help discern the meaning of standard insurance policy language. *See also, e.g., Leksi, Inc. v. Federal Ins. Co.*, 129 F.R.D. 99, 104 (D.N.J. 1989) (finding that the meaning of an insurance policy may be determined from the parties' intent, and the policy's drafting history is relevant to show that intent). This approach is consistent with Georgia law recognizing the admissibility of evidence of trade custom and usage to interpret and give meaning to terms of art in contract language. *Cf., e.g., 4 G Properties*, 289 Ga. App. at 316 (stating that technical words, or words of art, used in any contract will be understand to have that peculiar meaning); *Blue v. R.L. Glosson Contracting, Inc.*, 173 Ga. App. 622, 623 (1985) (explaining that industry usage of a term of art is controlling) (citing Restatement (Second) of Contracts § 222(3)); *General Forms, Inc. v. Continental Cas. Co.*, 123 Ga. App. 52, 54 (1970) (holding that while trade custom or usage evidence cannot be used to contradict an express contract term, parol evidence is admissible to show that the parties contracted with the intention that the custom of the trade should apply to the contract).

and Superfund liability would be excluded for coverage. The new absolute pollution exclusion was not intended to be so far-reaching as to encompass household chemicals, paints, or other such products.

For example, the scope of the proposed absolute pollution exclusion was debated before the Texas Insurance Board in 1985, during which the following exchange took place between one representative of that board and two insurance industry representatives about whether an insurer could invoke the exclusion against a policyholder that runs a grocery store and was sued by a customer who was injured by bleach that spilled at the store:

> Mr. Harrel [representing Liberty Mutual]: It [the pollution exclusion] can be read that way [broadly and literally], just as today's policy [with] the [sudden and accidental] pollution exclusion can be read in context with the rest of the policy to exclude any products liability claim. You can read today's CGL policy and say that if you insure a tank manufacturer whose tank is put in the ground and leaks, that leak is a pollution loss. And the pollution exclusion if you read it literally would deny coverage for that. ***I don't know anybody that's reading the policy that way, and I think you can read the new policy just the way you read it*** [literally]. ***But our insured would be at the State Board … quicker than a New York minute if, in fact, every time a bottle of Clorox fell off a shelf at a grocery store and we denied the claim because it's a pollution loss.***
>
> Mr. Thornberry [of the Texas Insurance Board]: 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. Harrel: ***We have overdrafted the exclusion.*** We'll tell you, we'll tell anybody else, we overdrafted it. But anything else puts us back where we are today [covering gradual environmental pollution].
>
> Mr. Rinehimer [representing Travelers]: My claims people have talked about some of these claim scenarios you're talking about and they have no intention of trying to enforce the exclusion against smoke from a hostile fire, for instance.[14]

The New Jersey Supreme Court analyzed similar evidence and noted that "[o]ne commentator reviewed the transcripts of the hearings before the New Jersey insurance regulators and stated:

> In 1985, for example, the New Jersey State Insurance Department held hearings to determine whether to approve what became the 1986 exclusion. In those hearings, the New Jersey insurance commissioners heard testimony from various members of the insurance industry regarding the [absolute pollution exclusion]. The regulators were concerned that the then-proposed exclusion sought to sweep too many potential non-environmental liabilities within its reach. The insurance industry sought to allay those fears and, thus, secure the needed approval of this exclusion. Michael A. Averill, a manager of the Insurance Services Office, Inc. ("ISO"), an insurance industry trade organization, Commercial Casualty Division, stated that the insurance industry did not intend to use the revised pollution exclusion as a bar to coverage: "[The purpose of the change in policy language] is to introduce a complete on-site emission and partial off-site exclusion for some operations. *For some operations. It is not an absolute exclusion.*"

---

[14] Stempel, *Reason and Pollution: Construing the "Absolute" Pollution Exclusion in Context and in Light of its Purpose and Party Expectations*, 34 Tort & Ins. L.J. 1, 37 (1998) (quoting Texas State Board of Insurance, Transcript of Proceedings: Hearing to Consider, Discuss, and Act on Commercial General Liability Policy Forms Filed by the Insurance Services Office, Inc., Board Docket No. 1472 (Oct. 30, 1985), Vol. I at 6-10) (emphasis added).

Nav-Its, Inc. v. Selective Ins. Co. of Am., 869 A.2d 929, 936 (N.J. 2005) (citing Lorelie S. Masters, *Absolutely Not Total: State Courts Recognize the Historical Limits of the "Absolute" and "Total" Pollution Exclusions*, Envtl. Claims J. Vol. 15, No. 4, 453-54 (Autumn 2003)) (emphasis in the original).

This evidence confirms that the insurance industry intended to limit the scope of the absolute pollution exclusion to damage resulting from traditional environmental and industrial pollution. The industry did not intend to exclude coverage for injuries caused by household items, or even paint on a home's walls.

C. The Absolute Pollution Exclusion's Language Tracks Environmental Terms of Art in Federal Environmental Statutes.

The insurance industry's intent also is evidenced by the terms it included in the absolute pollution exclusion – terms which are aligned with the Superfund legislation and other environmental statutes. Indeed, the AIA informed the NAIC just prior to the adoption of the "absolute" pollution exclusion in 1986 that

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

See AIA Comments on Environmental Pollution Legislation & Regulation (Dec. 28, 1981), *reprinted at* NAIC Proceedings, 1982-1 NAIC Proc. 596. In turn, the term "pollutants" typically used in the "absolute" pollution exclusion in CGL policies, such as the one at issue here, is defined to:

> mean 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.

Moreover, the typical absolute pollution exclusion, such as the one at issue here, applies to the "actual, alleged or threatened" release of contaminants, a concept that is again mirrored in the Superfund legislation that establishes liability for "a release, or a threatened release" of contaminants. *See* 42 U.S.C.A. § 9607(a)(4).[15] Courts that have studied the development of this exclusion have observed that the "operative terms" in the exclusion, such as "discharge," "dispersal," "release," and "escape," are terms of art in environmental law that generally connote injury or damage resulting from hazardous waste contamination – not everyday exposure to household materials that may fall under some other broad definition of "pollutant." As the Alabama Supreme Court explained:

> [the pollution 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," and ***"[t]he incorporation of environmental liability terms and concepts into the absolute pollution exclusion illustrates that the exclusion was designed to be limited to injury for typical, industrial environmental damage."***

---

[15] By contrast, none of the language in the absolute pollution exclusion derives from the Residential Lead-Based Paint Hazard Reduction Act of 1992 or any other state or federal statute(s) or regulation(s) regulating lead-based paint, or even lead. *Compare* 42 U.S.C.A. § 4851, *et seq.*; 24 C.F.R. § 35.80, *et seq.*; 40 C.F.R. § 745.103, *et seq.*

Porterfield v. Audubon Indem. Co., 856 So. 2d 789, 797 (Ala. 2002) (emphasis added) (citation omitted).[16]

D. Numerous Courts Have Recognized that the Absolute Pollution Exclusion Was Only Intended to Apply to Traditional Environmental and Industrial Pollution.

The Supreme Court of Alabama is far from the only court to hold that the application of the absolute pollution exclusion is limited to claims involving typical industrial, environmental pollution. Numerous other courts have concluded that the absolute pollution exclusion was only intended to preclude coverage for ***traditional environmental and industrial pollution*** – and ***not for claims of injurious exposure to lead found in a house or other dwelling***. *See, e.g., Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 953 (S.D.N.Y. 1996) (finding it reasonable to conclude that claimants' lead-paint poisoning claims did not constitute "environmental" pollution); *Danbury Ins. Co. v. Novella*, 727 A.2d 279, 283 (Conn. Super. Ct. 1998) ("[T]he clause excludes coverage for injury caused by environmental or industrial pollution, but does not exclude coverage for injury alleged to be caused by exposure to lead paint"); *Insurance Co. of Ill. v. Stringfield*, 685 N.E.2d 980 (Ill. 1997) (holding that lead-poisoning claim did not

[16] Additionally, in Georgia, technical words, or words of art, used in an insurance policy, will be understood to have that special meaning. *See 4 G Properties*, 289 Ga. App. at 316. Thus, construed in accordance with that canon of construction, the absolute pollution exclusion should be read to apply only to claims involving traditional environmental and industrial pollution and not to apply to claims for injurious exposure to lead-based paint.

result from a "pollutant"); *Weaver v. Royal Ins. Co. of Am.*, 674 A.2d 975 (N.H. 1996) (holding that pollution exclusion did not bar coverage for lead-poisoning claim); *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 623 (Md. 1995) ("[T]he insurance industry intended the pollution exclusion to apply only to environmental pollution" and not to lead paint); *Atlantic Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762, 764 (Mass. 1992) ("[A]n insured could reasonably have understood the provision … to exclude coverage for injury caused by certain forms of industrial pollution, but not coverage for injury allegedly caused by the presence of leaded materials in a private residence"); *Georgia Ins. Co. of N.Y. v. Naimberg Realty Assocs.*, 650 N.Y.S.2d 246, 247 (N.Y. App. Div. 1996) ("[T]he pollution exclusions … [are] limited to environmental and industrial pollution"); *Cepeda v. Varveris*, 651 N.Y.S.2d 185, 186 (N.Y. App. Div. 1996) (same).[17] *See also* Appellant's Br. at 23 n.76.[18]

---

[17] *See also, e.g., Generali–U.S. Branch v. Caribe Realty Corp.*, 612 N.Y.S.2d 296 (N.Y. Sup. Ct. 1994) ("[T]here is a reasonable interpretation of the exclusion other than that it applies to claims based on lead poisoning – that the exclusion clause only applies to claims for injuries based on environmental pollution"); *General Acc. Ins. Co. of Am. v. Idbar Realty Corp.*, 622 N.Y.S.2d 417, 419 (N.Y. Sup. Ct. 1994) (same).

[18] Other courts have also reached the same conclusion – *i.e.*, that the absolute pollution exclusion was intended to apply only to traditional environmental and industrial pollution – when considering the application of that exclusion to claims involving substances other than lead. *See, e.g., Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 135 (La. 2000) ("In light of the origin of pollution exclusions … 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") (discharge of hydrocarbons into water system); *Koloms*, 687 N.E.2d at 80-82 (carbon monoxide poisoning).

Indeed, a policyholder would not reasonably expect the presence of lead-based paint in a dwelling to constitute environmental pollution. *See, e.g., Regional Bank of Colo. v. St. Paul Fire & Marine Ins. Co.*, 35 F.3d 494, 498 (10th Cir. 1994) (holding that "[i]t seems far more reasonable that a policyholder would understand the exclusion as being limited to irritants and contaminants commonly thought of as pollution and not as applying to every possible irritant or contaminant imaginable."); *Gainsco Ins. Co. v. Amoco Production Co.*, 53 P.3d 1051, 1066 (Wyo. 2002) (pollution exclusion excludes "governmentally mandated cleanup costs" and no "person in the position of the insured would understand the word 'pollution' in this exclusion to mean anything other than environmental pollution"). *See also infra* at 29 (discussing insured's reasonable expectations).

To construe such circumstances as "pollution" would "extend [the pollution exclusion] far beyond its intended scope, and lead to some absurd results." *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992);[19] *American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948-49 (Ind. 1996) (applying absolute pollution exclusion to preclude coverage for gas station policyholder for releases of gasoline "would negate virtually all coverage"). As the U.S. Court of Appeals for the Seventh Circuit recognized:

---

[19] *See also Tudor v. American Emp'rs. Ins. Co.*, 121 Ga. App. 240, 240 (1970) (refusing to "give the language of the policy a construction which would … lead to an absurd result").

> [R]eading the clause broadly would [improperly] 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 …. [O]ne would not ordinarily characterize these events as pollution.

Pipefitters, 976 F.2d at 1043. Neither Appellant nor its *amicus* "point to any evidence that the exclusion was directed at ordinary acts of negligence involving harmful substances." *MacKinnon*, 73 P.3d at 1216.

Appellant and *Amicus Curiae* Complex Insurance Coverage Litigation Association, however, assert that this Court in *Reed v. Auto-Owners Ins. Co.*, 284 Ga. 286 (2008), as well as the Court of Appeals in *American. States Ins. Co. v. Zippro Constr. Co.*, 216 Ga. App. 499 (1995), "expressly rejected the argument that [the absolute] pollution exclusion … could 'reasonably be read as being limited to what is commonly or traditionally considered environmental pollution.'" Brief of Amicus Curiae Complex Insurance Coverage Litigation Association (July 31, 2015) at 13-14. *See also* Appellant's Br. at 23-24.

Reed, however, is inapposite. *See Smith v. Georgia Farm Bureau Mut. Ins. Co.*, 331 Ga. App. 780, 785 (2015); Brief of Appellee Amy Smith (Aug. 7, 2015) ("Appellee Smith's Br.") at 10-13. This Court's statement in *Reed* on this issue is *dicta*; this Court did not directly consider the question whether Georgia courts, like courts in other jurisdictions, could consider the drafting history and purpose of the absolute pollution exclusion, or any other insurance policy provision, to determine

its meaning. In *Reed*, this Court held only that carbon monoxide was a "pollutant" and that the pollution exclusion in a CGL policy precluded coverage for a claim involving carbon monoxide.

In reaching its decision, this Court admittedly rejected "the [Court of Appeals] dissenters' focus on extra-textual sources of interpretation [that] ***led them to find ambiguity*** in the pollution exclusion clause where there is none." *Reed*, 284 Ga. at 288 (emphasis added). However, as discussed *supra*, Georgia law permits parol evidence to be considered for purposes other than to find ambiguity. Indeed, it is appropriate for this Court to consider such evidence – and drafting history and purpose – even if this Court believes that the pollution exclusion is unambiguous. Nonetheless, if this Court believes that *Reed* is on point, United Policyholders respectfully suggests that this Court should overrule *Reed*, such that the Court may consider the drafting history and purpose of the pollution exclusion.

Moreover, in *Zippro*, which was decided in 1995, the Court of Appeals does not appear to have even considered the drafting history or purpose of the pollution exclusion. As such, that decision has no bearing on the arguments raised herein.[20]

[20] Moreover, neither the insureds, this Court in *Reed*, nor the Court of Appeals in *Zippro* appear to have considered the arguments addressed in Section II of this brief, *i.e.*, that the availability of a more specific exclusion weighs strongly (if not decisively) against application of the absolute pollution exclusion to claims involving lead-based paint.

To the extent that this Court believes otherwise, United Policyholders again respectfully suggests that that decision was wrongly decided.

II. HAD THE INSURER HERE INTENDED TO EXCLUDE COVERAGE FOR INJURY RESULTING FROM EXPOSURE TO LEAD-BASED PAINT, IT COULD AND SHOULD HAVE INCLUDED IN ITS POLICY A LONG-AVAILABLE LEAD-PAINT EXCLUSION.

Regardless whether this Court believes that it has already addressed the propriety of considering the drafting history or purpose of a policy provision to discern its meaning, this Court should still affirm the Court of Appeals' decision on separate grounds – namely, it may take into account other available language that the insurer could have used, but did not, when drafting the policy.

"In Georgia, an insurer may fix the terms of its policy as it wishes, insuring against certain risks and excluding others, providing that the terms are not contrary to law …. ***Where an insurer grants coverage to an insured, any exclusion from that coverage must be defined clearly and distinctly.***" *Hurst v. Grange Mut. Cas. Co.*, 266 Ga. 712, 716 (1996) (emphasis added). *See also State Farm Mut. Auto. Ins. Co. v. Seeba*, 209 Ga. App. 328, 329 (1993) ("[T]he insurer, 'having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms.'").

The pollution exclusion (such as the one included in the insurance policy which Georgia Farm Bureau sold to Mr. Chupp) is far from clear, distinct, or explicit, at least as it pertains to lead-based-paint-related liabilities. Indeed,

nowhere in that exclusion or in the applicable, typical definition of excluded "pollutants" is "lead-based paint," or even "lead," referenced.

In contrast, in 2010, when Georgia Farm Bureau sold Mr. Chupp his CGL policy, there ***was*** a separate lead-paint exclusion available in the insurance market and already in use by CGL insurers. Unlike the pollution exclusion included in Mr. Chupp's policy, the lead-paint exclusion – an exclusion which Georgia Farm Bureau did not include in Mr. Chupp's policy – specifically addresses, and clearly and explicitly precludes coverage for, lead-based-paint-related liabilities. One example of such an exclusion is as follows:

> It is agreed that this insurance does not apply to any liability for bodily injury or personal injury arising out of exposure to, ingestion of lead paint or any substance or matter containing lead paint or the residue of lead paint.

Westview Assocs. v. Guar. Nat'l. Ins. Co., 740 N.E.2d 220, 221 n.* (N.Y. 2000).[21]

---

[21] A lead-paint exclusion may be phrased in other ways as well. *See, e.g., Chantel Assocs. v. Mount Vernon Fire Ins. Co.*, 656 A.2d 779, 782 n.5 (Md. 1995) ("The first policy provided that [the insurer] 'should not be obligated to make any payment or defend any claim arising out of lead paint poisoning … injuries.'" The second policy provided that the 'policy excludes any and all losses arising out of lead-paint poisoning.'"); SUA Insurance Company Filing, Wisconsin Office of the Commissioner of Insurance, *available at* https://ociaccess.oci.wi.gov/Companyfilings/document?docid=120880&filid=118727 (last visited on Sept. 18, 2015) (attaching "Exclusion - Lead Paint," which reads as follows: "This insurance does not apply to … 'Bodily Injury', 'property damage,' or 'personal and advertising injury' arising out of the actual or alleged manufacture, distribution, sale, resale, re-branding, installation, repair, removal, encapsulation, abatement, replacement or handling of, or exposure to, lead paint or products containing lead, whether or not the lead is or was at any time airborne as a particle, contained in a product ingested, inhaled, transmitted in any fashion, or found in any form whatsoever.").

Indeed, insurers have included lead-paint exclusions in CGL policies since at least the 1980s – years before the policy at issue here incepted on July 23, 2010. *See, e.g.*, *Chantel Assocs.*, 656 A.2d at 782 (discussing CGL policies from 1986 through 1988 that contained lead-paint exclusions); *Westview Assocs.*, 740 N.E.2d at 221 (considering "commercial general liability insurance policy" for "the period June 20, 1994 to June 20, 1995[,]" which included "a specific exclusion for injuries caused by lead paint") (footnote omitted); *Sullins*, 667 A.2d at 624 n.3 (Md. 1995) (citing *Chantel Assoc.* and another case and noting that provisions excluding lead-paint poisoning claims from coverage were already being included in insurance policies before 1995).[22]

The lead-paint exclusion – which expressly does what the pollution exclusion does not do (*i.e.*, clearly and explicitly limit coverage for lead-based-paint-related claims) – is ***materially*** different from the pollution exclusion. *Cf. Perry v. Economy Fire & Cas. Co.*, 724 N.E.2d 151, 153 (Ill. App. Ct. 1999) ("The lead paint exclusion constituted a material change in coverage to the insureds' original policy, which did not contain the lead paint exclusion."). Rejecting an insurer's contention that addition of a lead-paint exclusion to a pre-1999 policy

[22] *Cf. also Herald Square Loft Corp. v. Merimack Mutual Fire Ins. Co.*, 344 F. Supp. 2d 915, 923 (S.D.N.Y. 2004) (explaining that insurer provided insured notice in 2003 of "a reduction in coverage: a lead paint exclusion form is added") (internal quotations omitted); Appellee Smith's Br. at 20 n.46 (discussing "specific lead paint exclusion … made available to insurance carriers in New Jersey in 1999").

"did not materially alter the policy" (such that a state statute requiring notice of the change would apply), the Appellate Court of Illinois explained:

> We find meritless [the insurer's] arguments that the exclusion did not materially alter the policy. [The insurer] claims that, at the time it added the lead paint exclusion, it believed that another exclusion in the original policy, the absolute pollution exclusion, would have also barred coverage for injuries from lead-based paint. Ergo, [the insurer] argues, this "belief" on its part rendered the lead paint exclusion a mere policy "clarification." [The insurer] has pointed to nothing in the record that indicates that the modification was in fact considered to be, or presented to the insureds as, a clarification of the absolute pollution exclusion rather than a newly added separate exclusion. In any event, [the insurer] is wrong. … "[A]s a matter of law, the standard pollution exclusion found in general liability policies does not preclude coverage for personal injuries arising out of a minor's ingestion of lead." ***Thus, the addition of the lead paint exclusion precluding such coverage was a material change in the policy*** ….

Id. (emphasis added) (citations omitted).

Had Georgia Farm Bureau intended to exclude coverage for claims involving lead-based paint, it could have, and should have, done so. *See Smith*, 331 Ga. App. at 785 ("We hold that if [Georgia Farm Bureau] has intended to exclude injuries caused by lead-based paint from coverage in the policy at issue in this case, it was required, as the insurer that drafted the policy, to specifically exclude lead-based paint injuries from coverage.") (footnote omitted). "The insurer, in preparing the language of its policy, has the burden of using language

that is clear and precise." *Georgia Farm Bureau Mut. Ins. Co. v. Meyers*, 249 Ga. App. 322, 324 (2001).[23]

Georgia Farm Bureau, however, failed to include precise, clear, or explicit language – as it is required to do – establishing that its policy did not provide coverage for lead-based-paint-related liabilities. "To be sure that lead paint poisoning claims were excluded from coverage," the insurer could have included a straight-forward lead-paint exclusion in the policy it sold to Mr. Chupp. *Sullins*, 667 A.2d at 624 n.3 ("To be sure that lead paint poisoning claims were excluded …[the insurer] could have included a provision, such as those included in [other policies], explicitly excluding such claims") (citations omitted). But, it did not.

That such an exclusion was available in the insurance market but not included in the Georgia Farm Bureau policy is strong evidence that (i) the policy was intended to provide coverage for lead-based-paint-related claims and (ii) the pollution exclusion was ***not*** intended to preclude coverage for such claims.

---

[23] *See also, e.g., The Medical Protective Co. v. Watkins*, 198 F.3d 100, 104-05 (3rd Cir. 1999) ("The burden of precisely drafting the policy rested with the insurance company and scrivener, … and it was free to employ more precise language."); *McMillan v. State Mut. Life Assurance Co. of Am.*, 922 F.2d 1073, 1076-77 (3rd Cir. 1990) ("The burden of drafting with precision rests with the insurance company, the scrivener of the policy. If [the insurer] desired to limit its liability … to only those felonious assaults committed during a period identified by the most restrictive understanding of 'on authorized business,' it was certainly at liberty to adopt more precise language to accomplish that purpose.").

Indeed, "several courts have observed an insurance company's failure to use available language to exclude certain types of liability gives rise to the inference that the parties intended not to so limit coverage." *Fireman's Fund Ins. Cos. v. Atlantic Richfield Co.*, 115 Cal. Rptr. 2d 26, 33 (Cal. Ct. App. 2001). *Cf. also Philadelphia Elec. Co. v. Nationwide Mut. Ins. Co.*, 721 F. Supp. 740, 742 (E.D. Pa. 1989) ("If the parties had intended coverage to be limited to the vicarious liability type suggested by the defendants, language clearly embodying that intention was available …."); *McNeil Lab, Inc. v. North River Ins. Co.*, 645 F. Supp. 525, 540 (D.N.J. 1986) ("It is, of course, possible in construing a policy for a court to consider that alternative language explicitly placing the asserted coverage clearly outside the policy could have been used ….").

For example, in *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974), the U.S. Court of Appeals for the Second Circuit was tasked with determining whether certain policy exclusions precluded coverage for the hijacking of an airplane. At the outset, that court observed, "Various exclusionary terms in use or being considered for use prior to the present loss would have excluded the loss had they been employed." *Id.* at 1000. After considering different, more exacting language which the insurers had considered and could have used – and which "might well have excluded the present loss" – the Second Circuit concluded that when the insurers failed to include the more precise

language in their exclusions, "they acted at their own peril." *Id.* at 1001 (footnote omitted).

In coming to that conclusion, the Second Circuit observed that "[t]he evidence indicates that the risk of a hijacking was well known to the all risk insurers." *Id.* at 1000. That court also considered that the insurers had been on notice that the version of the exclusion on which they were relying might not exclude coverage for this particular type of loss. *See, e.g.*, *id.* at 1001 ("Not only does it appear from the record that various clauses which would have excluded the present loss were in common use, but it appears that the General Policy Committee of the USAIG, which supplied the forms for the present all risk insurance, realized by May, 1970 that 'current war risk exclusions do not appear to be effective against intentional damage such as might be caused by hijackings, by bombs placed in aircraft by political activists, by riotous acts, etc.") (footnote omitted). *See also Fireman's Fund*, 115 Cal. Rptr. 2d at 852 ("In this case, [the insurer] chose not to include limiting language, even though courts have been broadly interpreting the language used in the endorsement … since at least 1986.").

Such considerations similarly strengthen the conclusion here that Georgia Farm Bureau's failure to use available language to exclude liability for lead-based-paint-related liabilities means that the parties intended not to so limit coverage. Not only would (or, at least, should) the insurer have been aware of the risks of

lead-based paint,[24] it would (or, at least, should) also have been aware of the cases discussed *supra* at 16-17 finding that the pollution exclusion did not apply to claims involving lead-based paint or other non-industrial irritants. "Undoubtedly, it is cases [such as those] that have prompted insurers to add lead paint exclusions to their policies, particularly in cases involving habitational [sic] occupancies, such as apartment houses." Donald S. Malecki, Why attach a lead paint exclusion to CGL, http://www.roughnotes.com/rnmagazine/1998/november98/11p54.htm (last visited on Sept. 9, 2015).

Even though a number of courts had interpreted the pollution exclusion not to apply to claims involving lead-based paint or other non-industrial-irritants, and even though certain insurers had added lead-paint exclusions to their CGL policies, Georgia Farm Bureau still chose not to add a lead-paint exclusion to the policy it sold to Mr. Chupp. As such, its "failure to use available language expressly excluding coverage … implies a manifested intent not to do so. … If the parties had intended coverage to be limited to the [extent] suggested by … [the insurers], language clearly embodying that intention was available." *Pardee Constr. Co. v. Insurance Co. of the West*, 92 Cal. Rptr. 2d 443, 456-57 (Cal. Ct. App. 2000)

[24] *See, e.g.*, Appellee Smith's Br. at 17 ("The entire insurance industry – including [Georgia Farm Bureau] – has known of the potential dangers of lead-based paint for more than 35 years.").

(internal quotations omitted). In other words, by failing to include the available lead-paint exclusion, Georgia Farm Bureau acted at its own peril.

Absent the inclusion of a specific lead-paint exclusion in his policy, Mr. Chupp would have reasonably expected that the policy Georgia Farm Bureau sold to him would provide coverage for bodily injury claims involving lead-based paint. (He also would have reasonably expected that the presence of lead-based paint in an older dwelling would ***not*** constitute environmental pollution.) *See, e.g., Kerr-McGee Corp.*, 256 Ga. App. at 463 ("Therefore, no reasonable person would consider the purpose of the exclusion to actually apply to the unique facts of this case.) *Cf. Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.*, 136 F. Supp. 2d 1340, 1348 (N.D. Ga. 2001) ("[I]nsurance contracts are to be read in accordance with the reasonable expectations of the insured, where possible.") (applying Georgia canons of insurance policy construction); *Roland v. Georgia Farm Bureau Mut. Ins. Co.*, 265 Ga. 776, 777 (1995) ("A contract of insurance should be strictly construed against the insurer and read in favor of coverage in accordance with the reasonable expectations of the insured."). It would have been reasonable for the insured to expect that if his insurer wanted to exclude coverage for lead-paint liabilities that the insurer would have included in its policy an available lead-paint exclusion.

It is not for this Court now – or for any court – to rewrite this policy to include an exclusion (*i.e.*, a lead-paint exclusion) which was available to the

insurer for use but which the insurer chose not to include. As the U.S. District Court for the Eastern District of Pennsylvania has advised, "[A] court should not impute to an insurance company, 'the benefit of … language which it chose not to adopt.'" *Nationwide Mut. Ins. Co. v. Shoemaker*, 965 F. Supp. 700, 703 (E.D. Pa. 1997). *Cf. Arrow Exterminators*, 136 F. Supp. 2d at 1349 (declining to rewrite insurance policy per insurer's request). Accordingly, this Court should not interpret the pollution exclusion to bar coverage for lead-paint-related liabilities.

CONCLUSION

For each of the foregoing reasons, and upon each of the foregoing authorities, *Amicus Curiae* United Policyholders respectfully requests that this Court affirm the Court of Appeals' decision.

Dated: September 18, 2015 Respectfully submitted,

/s/: David J. Hungeling
David J. Hungeling (#378417)
LAW OFFICE OF DAVID J. HUNGELING, P.C.
1718 Peachtree Street, N.W.
Peachtree 25th, Suite 599
Atlanta, GA 30309
Phone: 404-647-0341
Fax: 404-574-2467
E-Mail: david@hungelinglaw.com

Michael H. Sampson
(*pro hac vice* pending)
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Phone: 412-288-3618
Fax: 412-288-3063
E-Mail: msampson@reedsmith.com

Evan T. Knott
(*pro hac vice* pending)
Emily E. Garrison
(*pro hac vice* pending)
REED SMITH LLP
109 South Wacker Drive, 40th Floor
Chicago, IL 60606
Phone: 312-207-1000
Fax: 312-207-6400
E-Mail: eknott@reedsmith.com
egarrison@reedsmith.com

Counsel for *Amicus Curiae*
United Policyholders

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2015, a true and correct copy of the foregoing BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLEES was sent to the following counsel via prepaid first-class mail:

C. Andrew Childers CHILDERS, SCHLUETER & SMITH, LLC 1932 North Druid Hills Road, Ste. 100 Atlanta, Georgia 30319 Jonathan W. Johnson JONATHAN W. JOHNSON LLC 2296 Henderson Mill Road, Ste. 304 Atlanta, Georgia 30345 *Attorneys Appellee Amy Smith*	Lee M. Gillis, Jr. Duke R. Groover JAMES-BATES-BRANNAN-GROOVER-LLP 231 Riverside Drive Macon, Georgia 31201 Norman S. Fletcher Brinson Askew Berry Seigler Richardson & Davis LLP P.O. Box 5007 Rome, Georgia 30162 *Attorneys for Appellant Georgia Farm Bureau Mutual Insurance Company*
John L. Strauss JOHN L. STRAUSS PC 1132 Conyers Street SE Covington, Georgia 30014 *Attorney for Appellee Bobby Chupp*	Seth Friedman WEISSMAN, NOWACK, CURRY & WILCO, PC One Alliance Center, 4th Floor 2500 Lenox Road Atlanta, Georgia 30326 *Attorneys for* Amicus Curiae *Complex Insurance Claims Litigation Association*

/s/: David J. Hungeling
David J. Hungeling