IN THE SUPREME COURT
OF THE STATE OF OREGON

TERRY FLEMING,	)	
	)	Supreme Court
Plaintiff-Respondent,	)	No. S44805
Petitioner on Review,	)	
	)	Court of Appeals
v.	)	No. A86826
	)	
UNITED SERVICES AUTOMOBILE	)	Multnomah County Circuit
ASSOCIATION, a foreign corporation,	)	Court No. 9312-08128
	)	
Defendant-Appellant,	)	
Respondent on Review.	)	

BRIEF OF AMICUS CURIAE IN SUPPORT OF TERRY FLEMING'S PETITION FOR REVIEW

On Petition for Review of the Decision of the
Oregon Court of Appeals dated October 9, 1996
(Petition for Reconsideration Denied on September 4, 1997)
from the panel of Deits, P.J., DeMuniz and Armstrong, J.J.

On Appeal from the Judgment of the Multnomah County Circuit Court
The Honorable Phillip J. Roth, Circuit Court Judge

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Amicus Brief

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae United Policyholders ("United Policyholders" or "Amicus") is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. United Policyholders also seeks to file amicus curiae briefs in insurance coverage cases of public importance and its amicus curiae briefs have been accepted by federal and state appellate courts across the country. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced throughout the country.

United Policyholders believes that the interpretation of pollution exclusions, particularly those contained in homeowners insurance policies, is a subject of great importance and potential impact upon tens, probably hundreds, of thousands of Oregon policyholders that are homeowners or small landlords. The insurance policy provisions at issue in this case are standard-form insurance provisions that have been used throughout the insurance industry and the country for the past decade. Amicus curiae believes that the Court of Appeals' opinion is fundamentally flawed and will have great negative impact upon Oregon policyholders.

ARGUMENT

I. A SUMMARY OF WHY THIS COURT SHOULD REVIEW THE COURT OF APPEALS' OPINION.

As argued more completely below, amicus curiae respectfully asserts that this Court must review the Court of Appeals' opinion because:

-The exclusion at issue is a standard-form exclusion that is contained in homeowners insurance policies issued by scores of insurance companies to tens of thousands of Oregon policyholders;

-The Court of Appeals' holding may result in an unprecedented reduction of homeowners' insurance coverage for a large variety of relatively common occurrences such as:

--Damage or injury caused by a chemical substance contained in a residence;

--Damage or injury caused by indoor spills, releases, or escapes of anything deemed to be a "chemical";

--Damage or injuries caused by leaks from faulty residential heaters;

--Damage or injuries caused by gas leaks from household appliances, such as stoves or dryers;

--Damage caused by a tenant's activities such as painting;

--Damage or injuries caused by the use of a child's chemistry set;

--Damage or injuries caused within a building from toilet or sewage problems;

--Damage caused by the escape of steam within a building; and

--Injuries such as scalding caused by excessively hot water;

-The methodology employed by the Court of Appeals is contrary to that in Moore v. Mutual of Enumclaw Insurance Company, 317 Or. 235, 855 P.2d 626 (1993) ("Moore"), in which this Court recognized that the history of mandated insurance policy provisions must be looked at in order to determine the meaning of insurance policy provisions;

-The Court of Appeals' opinion is contrary to the history of the revision of the exclusion which reveals that the exclusion was only intended to "clarify," but not "expand," the prior version of the exclusion. The prior version of the exclusion provided insurance coverage for the damages at issue herein and the Court of Appeals' opinion has created a judicial expansion of the scope of the exclusion;

-The Court of Appeals' opinion ignored evidence concerning the insurance company's public, published interpretation of the effect of its policy as well as ignored the published interpretation of ISO, the actual drafter of the standard-form exclusion at issue. Public policy requires that Oregon consumers be allowed to rely upon and introduce as evidence advertisements concerning the nature and performance of the products that they buy;

-The Court of Appeals' opinion is contrary to the emerging judicial consensus that pollution exclusions containing terms similar or identical to that at issue herein employ environmental terms of art and do not exclude insurance coverage when the alleged pollutant and damage are confined within a building;

-The Court of Appeals' holding erroneously relied upon its prior opinions in Transamerica Ins. Co. v. Sunnes, 77 Or. App. 136, 711 P.2d 212 (1985), review denied, 301 Or. 76, 717 P.2d 631 (1986) ("Sunnes") and Mays v. Transamerica Ins. Co., 103 Or. App. 578, 799 P.2d 653 (1990), review denied, 806 P.2d 128 (1991) ("Mays") for the proposition that "exclusions that were similar to the one at issue here were unambiguous...." This proposition relied upon by the Court of Appeals below is directly contrary to this Court's holding in St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoteing Co., 324 Or. 184, 923 P.2d 1200, 1218 (1996) ("McCormick & Baxter"), this Court held that the exclusions construed in Sunnes and Mays were ambiguous.

-The cases that USAA cited and relied upon below were cases that are contrary to the modern trend and, in most cases, have either been subsequently rejected within their jurisdictions or were inconsistent with established higher court precedent;

-Numerous courts have held that key terms employed in the exclusion at issue are ambiguous. Although the Court of Appeals recognized that the exclusion was ambiguous in some respects, the Court of Appeals ignored the impact of that ambiguity when it interpreted the exclusion. In so doing, the Court of Appeals violated this Court's instruction that once any policy term or provision is found to be ambiguous, the term "must 'reasonably be given a broader or narrower meaning, depending on the intention of the parties in the context in which such words are used by them." Hoffman Construction Co. of Alaska v. Fred S. James & Co., 313 Or. 464, 470, 836 P.2d 703 (1992) ("Hoffman") (citations omitted).

-Numerous courts have recognized that the key definition of "pollutants" employed in this and similar exclusions is so overbroad as to be "meaningless."

For all of these reasons, United Policyholders respectfully requests that the Court must grant the Petition for Review in the interest of all Oregon homeowners.

II. THIS COURT SHOULD REVIEW THE COURT OF APPEALS' INTERPRETATION OF THE EXCLUSION AS IT WOULD DIVEST OREGON POLICYHOLDERS OF INSURANCE COVERAGE FOR INNUMERABLE COMMON OCCURRENCES

As an initial matter, it is respectfully asserted that this Court should review the Court of Appeals' opinion as it may well result in an unprecedented reduction of insurance coverage for Oregon homeowners and small landlords for innumerable common occurrences. The Court of Appeals accepted USAA's interpretation that the pollution exclusion at issue, which is a standard-form exclusion used insurance industry-wide, "clearly and unambiguously applies to the damage and means of damage that occurred: A loss caused by the discharge, dispersal, seepage, migration, release or escape of chemicals." Fleming v. USAA, 144 Or. App. 1, 5, 925 P.2d 140, 142 (1996) ("Fleming").

Under this broad reading, however, the standard ISO homeowners insurance policy currently in use and issued to tens, if not hundreds of thousands of Oregon homeowners and small landlords, and upon which they rely for protection from financial catastrophe, does not provide insurance coverage for property damage caused by a large variety of common occurrences:

A. Damage Caused By An Indoor Spill of any Chemical Substance.

Under the Court of Appeals' literal interpretation of the policy there could be no coverage caused by any indoor accident involving a chemical. (Query, what is not a chemical?). For instance, if a tenant, perhaps illegally, utilizes a kerosene heater and causes a kerosene spill which leaks into the apartment below, causing extensive damage to sheetrock

and flooring, there likely would be no coverage.

B. Carbon Monoxide Leakage from Faulty Residential Heater.

Under the Court of Appeals' erroneous interpretation Oregon homeowners and small landlords will have trouble establishing insurance coverage for injuries caused by a faulty heater that emits carbon monoxide into an apartment, injuring tenants.

C. Gas Leaks from Residential Stoves.

Under the Court of Appeals' erroneous interpretation, Oregon homeowners and small landlords may no longer have any insurance coverage for injuries caused by faulty gas heater or kitchen stove or piping which leaks gas into an apartment, injuring tenants or severely damaging the building, or both. Would not insurance companies characterize gas as a "chemical?"

D. Damage Caused By Tenant's Activities, Such as Painting.

Assume that the tenant is an artist that works in oil paints, producing large numbers of "original oil paintings" of the type commonly sold in large malls. Being sloppy, the tenant regularly spills cleaning solvents and oil paints, which, over time, causes severe damage to the floors. Additionally, the artist uses an aerosol spray fixative which it applies to the paintings when leaned up against the walls of the house, causing extensive damage to the sheet rock. Are not all of these things "chemicals that are excluded under the Court of Appeals' opinion?"

E. Damage Caused By Children's Chemistry Sets.

Assume a homeowner or tenant has a child with a strong interest in chemistry. The child improperly mixes several chemicals. The chemicals release fumes which subsequently explode and cause severe injuries to the building and its occupants.

To bring this example closer to home, assume that, rather than exploding, the fumes from the child's chemical set permeate the apartment, eventually ruining the sheet rock. Under the Court of Appeals' interpretation, Oregon homeowners and small landlords will have no insurance coverage for these or numerous similar catastrophes.

F. Toilet or Sewage Problems Within a Building.

Assume a situation in which a malfunction of part of the plumbing system breaks or the municipal sewage system causes a backup or other escape of liquid sewage into a residence or apartment, causing damage to sheet rock or flooring. Would not this property damage also be excluded under USAA's and the Court of Appeals' literal interpretation of the standard-form pollution exclusion because the sewage or toilet material was a "waste" which "escaped?"

G. Damage Caused by the Escape or Leakage of Steam.

Under the literal interpretation adopted by the Court of Appeals, the policy apparently would not provide insurance coverage for extensive damage to sheet rock walls caused by the permeation of steam released from a ruptured radiator line. Under the Court of Appeals' reading, insurance companies would undoubtedly characterize steam as a "thermal irritant or contaminant." Similarly, damage in the form of buckling floors could be excluded if the steam condensed and the water permeated the floor.

What happens if the landlord's tenant illegally conducts a catering business from a residential property? The tenant installs a commercial stove and operates it long hours for several months. The constant steam emissions from the cooking process again cause extensive damage to the sheet-rocking of the house. Is not this property damage from a "thermal irritant" that will be excluded under the Court of Appeals' broad interpretation?

H. Damage from Scalding Burns Caused By Excessively Hot Water.

Assume that a homeowner or landlord negligently sets the residential hot water heater to produce hot water at a temperature of 211 degrees. The homeowner's or tenant's child turns on the shower and suffers severe burns. Under the Court of Appeals' literal interpretation Oregon homeowners and small landlords might have no coverage for such injuries caused by the release of a "thermal irritant."

All of these instances are certainly situations which one can easily imagine arising from the ownership or rental of a home. Similarly, the use by a tenant of a rental property for illegal purposes, particularly the manufacture of illegal drugs, although not frequently occurring, is certainly a common enough problem associated with residential rentals. In some urban neighborhoods a not insignificant portion of the rental population is involved in illegal drug use, distribution, or packaging or manufacturing. A reasonable policyholder, if it considered the possibility that its rental property would be used for illegal purposes, would not anticipate that damage from that activity would be considered "pollution" excluded under a "pollution exclusion." Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34, 39 (2d Cir. 1995). ("[T]he pollution exclusion clause can reasonably be interpreted as applying only to environmental pollution[;] [a] reasonable policyholder might not characterize the escape of carbon monoxide from a faulty residential heating and ventilation system as environmental pollution....").

It is simply unreasonable to interpret an exclusion for "pollution" to exclude insurance coverage under these facts. Under the Court of Appeals' and USAA's interpretation, insurance coverage for all of the above and innumerable other common potential injuries for which Oregon policyholders routinely purchase insurance coverage

could be excluded. This Court must review the Court of Appeals' opinion as it is clearly in error and, if left unmodified, will have devastating effect on all Oregon policyholders.

III. UNDER MOORE, THE COURT OF APPEALS SHOULD HAVE EXAMINED THE HISTORY OF THE EXCLUSION, WHICH REVEALS THAT IT WAS INTENDED TO CLARIFY, BUT NOT EXPAND, THE PRIOR ONE-WORD "CONTAMINATION EXCLUSION"; THE COURT OF APPEALS' INTERPRETATION IMPERMISSIVELY EXPANDS THE EXTENT OF THE EXCLUSION TO THE DETRIMENT OF THOUSANDS OF OREGON POLICYHOLDERS.

A. The USAA Insurance Policy is a Standard-Form Homeowner's Policy That is Highly Regulated By the Oregon Insurance Department.

The USAA homeowners policy and its pollution exclusion is not an ordinary two-party contract. Instead it is an insurance policy which is highly regulated by the Oregon Department of Insurance and can only be sold and interpreted by USAA in accordance with the Oregon Insurance Code. O.R.S. 737.001 et seq..

The exclusion at issue herein was not drafted by USAA. The exclusion was drafted by the Insurance Services Office, Inc. ("ISO"), an insurance industry service organization, on behalf of hundreds of member or subscriber insurance companies such as USAA. An exemption from the application of federal antitrust laws permits members of the insurance industry, including USAA, to collectively discuss, adopt, and utilize standardized terms and provisions. See 15 U.S.C.A. §§ 1011-1033 (West 1976 and Supp. 1992). It was this exemption that allows USAA and other insurance companies, through their regulatory agent, ISO, to jointly develop standard-form insurance policies such as the USAA homeowners policy at issue herein.

The unique exemption from the application of federal antitrust laws for members of the insurance industry rests upon the recognition that insurance companies have public as

well as private obligations. In particular, standardized terms are designed to serve the public interest by facilitating uniformity of insurance coverage and consistency in the interpretation of the terms of insurance policies.

The federal antitrust exemption for the insurance industry is conditioned upon state regulation. See 15 U.S.C.A. § 1012. In Oregon, the business of insurance and the contents and issuance of insurance policies is heavily regulated by the Commissioner of Insurance. See generally, O.R.S. 737.001 et seq. A fundamental purpose of the Commissioner's regulation of insurance policy forms and premium rates is "to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate cooperation among insurers in rate making and other related matters." O.R.S. 737.025; see also, 15 U.S.C.A. § 1011 (state regulation "of the business of insurance is in the public interest").

Importantly, "no basic policy form ..., or rider, endorsement or renewal certificate form shall be delivered or issued for delivery in this state until the form has been filed with and approved by the director." O.R.S. 742.003(1). Accordingly, and at all times relevant herein, USAA was required to file with the director of insurance the insurance policy plans, rating plans, and rating systems utilized for its insurance policies. O.R.S. 737.205(1).

B. The Basic Language of the USAA Insurance Policy, and Specifically the Exclusion at Issue Herein, are Standard-Form Insurance Provisions Whose Language was Drafted By The Insurance Services Office, Inc., Which Drafted the Exclusion and Secured Its Approval from the Oregon Insurance Commissioner on Behalf of USAA and Others.

The USAA insurance policy, and particularly the pollution exclusion at issue herein, was drafted by ISO, was filed with the Oregon Insurance Commissioner by ISO, and it was ISO that secured regulatory approval of the policy language. Under the Oregon

Insurance Code, instead of drafting and seeking regulatory approval of its own insurance policy forms, an insurance company could essentially act in concert with other insurance companies and adopt uniform or standard-form insurance policy language. Under O.R.S. 737.205(2), an insurance company such as USAA can satisfy its obligations to file insurance policy language for regulatory approval "by becoming a member of or a subscriber to a licensed rating organization which makes such filings...." USAA took advantage of this provision and became a subscriber of ISO for the purpose of making rate filings in Oregon. See, ISO Report 20 Summary ISO Companies Affiliated for General Liabilities (Nov. 3, 1978) ("ISO Companies") at 114. (listing USAA as a subscriber of ISO for policy form, rates, and rating manual filings in Oregon.) (Attached at Appendix "A"). Because USAA adopted ISO's language, however, the intent of the insurance policy provision at issue herein, at least from the drafter's perspective, is that of ISO and not USAA.

C. In a Case Virtually Identical to this One, this Court looked to the History of the Exclusion in Determining Its Scope and Effect.

Moore v. Mutual of Enumclaw Insurance Company, 317 Or. 235, 855 P.2d 626 (1993) ("Moore") is a case which similarly involved the question of whether a standard-form fire insurance policy provided insurance coverage for damages resulting from a tenant's methamphetamine laboratory. This Court did not reach that substantive question, as the policyholder's action was found to be untimely. 317 Or. at 250, 855 P.2d at 635.

In Moore, this Court was also called on to "determin[e] the meaning of the phrase 'inception of loss,' ..." in a standard form fire insurance policy. In reaching its interpretation of that meaning, the Court looked to the history of the provision, tracing it all the way back from 1907 through the modern time. See 317 Or. at 245-47, 855 P.2d 632-34. Because the

policy language in question was drafted by the legislature, not the individual insurance company that issued the actual policy containing the language, this Court looked to the legislature's intent and not the insurance company's intent. 317 Or. at 244-45, 855 P.2d at 632.

The methodology this Court followed in Moore applies equally to the present controversy. The history and drafting intent of the policy exclusion at issue herein must similarly be examined. Like the language in Moore, the language of the exclusion at issue herein was mandated by the legislature, albeit in a slightly different fashion. In Moore the legislature mandated the specific language to be used by including it in the statute. Id. In this instance, the legislature mandated the language to be used in policies like USAA by delegated to the Insurance Commissioner the authority to approve specific policy language and by forbidding insurance companies from using anything other than the specific language approved by the Insurance Commissioner.

Because ISO, not USAA, drafted the exclusion at issue herein, it is ISO's, not USAA's intent that is relevant to the question of the drafter's intent.[1] Indeed, the Insurance Code implicitly recognizes that fact in the recognition that a subscriber that utilizes a rating organizations services to draft and secure regulatory approval of insurance policy language will receive and utilize the rating organization's rating manual, which describes the effect and use of specific insurance policy language and revisions thereto. As defined in the Insurance Code, a subscriber of a rating organization such as ISO is one "which is furnished at its

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1 Although the drafter ISO's intent, representing only one side of the insurance contract, is not binding upon the other side (the policyholder), the drafter's intent should certainly bind the insurance companies that use ISO's language from interpreting that language to provide less coverage than was intended by the drafter.

request: (a) [w]ith rates and rating manuals by a rating organization of which it is not a member." O.R.S. 737.017. USAA's ISO subscriber classification, "Q," indicates that it was a subscriber for "rates, rules, and forms." See, ISO Report at 116. Appendix "A." There can be no doubt that USAA utilized the standard ISO form, as USAA's own description of its insurance policy to the Oregon public carefully points out that "USAA's Homeowners Insurance Policy is a standard insurance policy." USAA, Homeowners Insurance (1988) at 1 (App.-44).

As an ISO subscriber utilizing the standard form ISO language approved by the insurance commissioner, USAA would have been furnished with ISO's rating manual to be used in conjunction with the standard ISO homeowner policy and pollution exclusion at issue herein. See ORS 737.017. Importantly, the record below contained ISO's explanation of the changes in the manual form that were implemented pursuant to the revision of the standard-form homeowners policy in which the exclusion of "contamination" was replaced with the pollution exclusion.[2] See, ISO, Notice to Manual Holders, Dwelling Policy Program (1980 Edition) Countrywide, Countrywide Notice No. 89-1 (circa 1989) at 2 (App.-55) ("Notice to Manual Holders").

When ISO revised the standard homeowners policy in 1988, in order for ISO members or subscribers, such as USAA to use the ISO revised form, the policy form, rates, and rating manuals had to be submitted to the Insurance Department for approval. USAA itself asserted below that its policy form was approved by the Insurance Department.

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2 To the best of amicus curiae's knowledge, the record does not contain copies of the ISO filings for the homeowner's policy forms, or the relevant rating manual.

ISO sent the Notice to Manual Holders to its members and subscribers, such as USAA, to inform its members and subscribers of the changes in its homeowners insurance policy resulting from the revisions of, among others, the rust and contamination exclusions. ISO represented that:

> The exclusion of rust has been **expanded** to exclude coverage for any other type of corrosion.
>
> The exclusion of contamination has been **clarified.** In addition, a definition of "pollutants" has been introduced.

ISO, Notice to Manual Holders, Dwelling Policy Program (1980 Edition) Countrywide, Countrywide Notice No. 89-1 (circa 1989) at 2 (App.-55) (emphasis added). Thus, ISO informed its manual holder-subscribers that in its revised policy the rust exclusion had been "expanded," i.e. broadened, while its contamination exclusion was merely "clarified", including a definition of pollutants. Since ISO was the drafter of the exclusion and its regulatory filing in Oregon on behalf of USAA, effectively indicated that the exclusion was not expanded, USAA was put on notice that the new exclusion developed by ISO and approved by the Insurance Commissioner did not change the insurance coverage in its homeowners policy. Indeed, as ISO had to file all rate manual changes with the Insurance Department, it is safe to conclude that ISO similarly told the Insurance Department that the new change was a clarification and not an expansion of the exclusion, i.e. a reduction in coverage.

It is uncontroverted by USAA below that the prior one-word exclusion in its standard-form policy -- "contamination" -- provides insurance coverage for property damage that a landlord sustained because of its tenant's illegal drug laboratory. See, Largent v. State Farm Fire & Casualty Co., 116 Or. App. 595, 842 P.2d 445 (1992), rev. den., 316 Or. 528,

854 P.2d 940 (1992) (contamination exclusion inapplicable to injuries caused by tenant's operation of a methamphetamine laboratory). Thus, under the methodology for interpreting mandated insurance policy provisions established by this Court in Moore, examination of the history of the development of the exclusion at issue herein, most particularly the intent expressed in the Notice to Manual Holders that the exclusion clarified, but did not expand the extent of the exclusion, dictates that the exclusion does not preclude insurance coverage under the circumstances of this case. The Court of Appeals' interpretation is contrary to that intent and the result that should be obtained under Moore. Under Largent, insurance coverage was provided under the prior form of the exclusion for precisely the same type of damage from precisely the same cause at issue herein. The Court of Appeals' interpretation has the effect of making the revision of the exclusion not the "clarification intended by ISO," but a one-hundred-and-eighty-degree expansion of the exclusion to where it now excludes that which was not excluded before!

Because this issue is of such great public significance in terms of the fundamental issue at stake-- the interpretation of a standard-form, legislature-mandated insurance policy provision potentially affecting tens of thousands of Oregon policyholders-- it is respectfully asserted that this Court should review and reverse the Court of Appeals' decision.

D. USAA's Position Below -- That the History of Mandated Insurance Policy Language Cannot Be Examined by the Court -- Is Contrary to This Court's Holding in Moore; Furthermore, This Position is Highly Damaging to Public Policy.

USAA strenuously argued below that material such as its, or ISO's, representations to the Oregon public or to insurance regulatory officials should not be considered by the Court of Appeals. The Court of Appeals apparently accepted USAA's

argument as the opinion fails to discuss any of the historical material that Fleming presented to the Court of Appeals. As set forth above, Moore requires a contrary approach. So does public policy.

USAA would have the court place itself in judicial blinders by considering only the language of the contract itself. The principle that USAA urged below should be rejected out-of-hand on public policy grounds as it would create dangerous precedent to all Oregon consumers, not just those who purchase insurance policies.

Imagine an automobile company that provides its customers with a sales brochure with the following description:

> All of our new Travelers have a powerful V-6 engine, which develops 200 h.p. This engine has plenty of power for passing on the highway or for towing your boat and camper.

A customer orders a Traveler, which, when delivered only has a four-cylinder engine which develops 120 horsepower and is completely unsuitable for towing. Somewhere in the standard-form, multi-page, small-print, adhesion contract given to the consumer, the contract specifies that the Traveler to be delivered "may differ in some respects than as advertised...," a provision not read by the consumer at the time the contract was signed and not discussed with the purchaser by the car salesman. Would this Court have any hesitation in reviewing the advertising material under these circumstances? Is there a difference in this regard that justifies a different result for the sale of insurance policies which are highly tied with the public interest?

A closer parallel would be that the 1997 and prior year Travelers actually came with the 200 h.p. V-6 motor that was ideal for highway passing and towing. The sales brochure for the 1998 Traveler purports:

> Our new 1998 Traveler is as good as and even better than the last year's model. For instance, the Traveler's motor has been improved to offer greater fuel efficiency. The Traveler's seats are outfitted in stunning leather.

A consumer, who owned a 1997 Traveler, places an order for a 1998 Traveler, telling the salesperson, "My 1997 Traveler is great for towing, but I'd really like to have leather seats and greater fuel efficiency." The salesman smiles and has the consumer sign the standard, multi-page, adhesion contract. The vehicle is delivered and contains cloth seats and the 120 horsepower motor that is unsuitable for towing. The consumer files a lawsuit. In the litigation, the automobile company seeks to rely on its standard-form contract in which there is no mention of a 200 h.p. motor, leather seats, or that the Traveler can be used for towing or that it has passing power.

Under the doctrine urged by USAA, the court could not consider the sales brochure and the consumer would be stuck with a vehicle that it would never have purchased. This Court would never condone such sharp commercial practices in the sale of an automobile and would undoubtedly hold the automobile company to delivering the car it advertised. There should be no different result with respect to the sale of insurance policies. Indeed, insurance provides an important public purpose and is highly regulated by the government. Under such circumstances, insurance companies must be held to closer scrutiny and cannot be allowed to shield evidence of commercial misrepresentation. Oregon policyholders have a right and need to obtain the insurance coverage that is promised to them in promises that are made to the public at large or to insurance regulators. The Court of Appeals erred in failing to review the USAA policy brochure and the ISO Notice to Manual Holders.

IV. THE EMERGING JUDICIAL CONSENSUS CONCERNING THE HISTORY OF POLLUTION EXCLUSION CLAUSES WHOSE OPERATIVE LANGUAGE REQUIRES A "DISCHARGE, DISPERSAL, RELEASE, OR ESCAPE" OF "POLLUTANTS," IS THAT THESE TYPES OF EXCLUSIONS DO NOT EXCLUDE INSURANCE COVERAGE WHERE THE ALLEGED DISCHARGE OR DAMAGE IS CONFINED WITHIN A BUILDING OR OTHER STRUCTURE

Under the Moore methodology, the examination of the history of a policy provision is important, even dispositive of determining the intended meaning of the language. See, Moore, 317 Or. at 245-47, 855 P.2d 632-34. Although there has been a dearth of judicial precedent examining the history of the specific pollution exclusion at issue herein in the context of a homeowners policy, there has been substantial examination of the history of all of the terms such as "discharge, dispersal, release, or escape," and the definition of "pollutants" which are key to determining whether the resulting damage is or is not excluded. The overwhelming, current judicial consensus is that pollution exclusion terms such as those used in the USAA insurance are environmental "terms of art" and pollution exclusions containing such language are not intended to exclude insurance coverage where the alleged "pollutant" and resultant damages are confined, as here, within a building.

A. "Discharge, Dispersal, Release, or Escape" are Environmental Terms of Art Limiting the Exclusions to Those Situations Where there is a "Discharge, Dispersal, Release, or Escape" to the Environment-at-Large.

The pollution exclusion at issue in this case involves an exclusion whose operative clauses are identical or virtually identical to standard-form pollution exclusion clauses that have been used insurance industry-wide in CGL insurance policies over the past several decades.[3] Thus, the key clauses utilized by USAA have been the subject of

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3 The exclusion in this case provides that:

[W]e do not insure loss ... caused by:

* * *

(continued...)

considerable litigation and interpretation by the courts. There is an emerging consensus in the case law that the terms at issue herein do not exclude all injury or property damage merely because the damage is caused by a substance that appears, at first blush, to fall within the definition of pollutants. The emerging consensus is that pollution exclusion clauses identical or virtually identical to those at issue herein are only intended to exclude insurance coverage for traditional environmental pollution. See, e.g., Western Alliance Ins. Co. v. Gill, 426 Mass. 115, 118 (1997) ("Gill").[4]

3(...continued)

(5) discharge, dispersal, seepage, migration, release, or escape of pollutants.

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

Compare this exclusion with the standard form 1985 pollution exclusion which was drafted by the Insurance Services Office, Inc. ("ISO"), which has been used, with minor subsequent modifications, by virtually every property and casualty insurance company for more than a decade in commercial general liability insurance policies:

This insurance does not apply to:

(f)(1) "Bodily injury" or "property damage" arising out of the ... **discharge, dispersal, release, or escape of pollutants:**

* * *

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

Quoted in, Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34, 36 (2d Cir. 1995).

4 Amicus curiae filed a brief in Gill in which it discussed some of the same history of pollution of pollution exclusions as is discussed within this brief.

A significant number of courts have concluded that terms such as "discharge," "dispersal," "release," "seepage" and "escape" used in pollution exclusions such as USAA's are environmental terms of art and are not designed to exclude non-environmental pollution damages or injuries. See, e.g., West Amer. Ins. Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692, 700 (N.C. Ct. App. 1991) ("Tufco"); Center for Creative Studies v. Aetna Life and Casualty Co., 871 F. Supp. 941, 944-46 (E.D. Mich. 1994) ("Center for Creative Studies"). The insurance industry's use of these environmental terms of art signals the insurance industry's intent to only address traditional environmental pollution. Tufco, 409 S.E.2d at 699.

In its recent Gill decision, the Massachusetts Supreme Court noted that:

> In addition to the inclusion of the terms 'discharge,' 'dispersal,' 'release,' and 'escape,' the exclusion's definition of 'pollutants' endeavors to particularize the more general words "irritant or contaminant," by reference to "smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." Each of the latter words brings to mind products or by-products of industrial production that may cause environmental pollution or contamination.

426 Mass. at 118; See also, American States Ins. Co. v. Koloms, 177 Ill.2d 473, 1997 Ill. LEXIS 448, *27-29 (1997).

Accordingly, "the exclusion should not reflexively be applied to accidents arising during the course of normal business activities simply because they involve a 'discharge, dispersal, release or escape' of a contaminant." Gill, 426 Mass. at 118 (citing American States Ins. Co. v. Koloms, 1997 Ill. LEXIS 448 at *29).

Most importantly, numerous cases have found that pollution exclusions containing the clauses at issue herein do not exclude insurance coverage when the alleged pollutants, and resulting damages or injuries, are confined within a building or other enclosed

area. Some courts have reached this position by concluding that terms such as "discharge" "dispersal," "release," and "escape" are environmental terms of art and that pollution exclusions containing these terms of art not applicable to injuries or damage caused within a confined area. See, e.g., Lumbermans Mut. Cas. Co. v. S-W Industries, Inc., 39 F.3d 1324, 1336 (6th Cir. 1994) ("S-W Industries") (fumes contained inside rubber fabricating plant were not "discharged, dispersed, released, or escaped" "pollutants" within meaning of pollution exclusion); United States Fidelity & Guaranty Co. v. Wilkin Insulation Co., 578 N.E.2d 926, 933 (Ill. 1991) (pollution exclusion clause limited to discharges into the atmosphere and inapplicable to discharges within a building); United States Liab. Ins. Co. v. Bourbeau, 49 F.3d 786, 188 (1st Cir. 1995) (the terms dispersal, release or escape are terms of art in environmental law); Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762, 764 (Mass. 1992) (same); Western Alliance Ins. Co. v. Gill, 426 Mass. 115, 118 (1997) (same); Motorists Mut. Ins. Co. v. RSJ, Inc., 926 S.W.2d 679, 681 (Ky. Ct. App. 1996) ("[t]he drafters' utilization of environmental law terms of art ('discharge,' 'dispersal,' 'seepage,' 'migration,' 'release,' or 'escape' of pollutants) reflects the exclusion's historical objective -- avoidance of liability for environmental catastrophes related to intentional industrial pollution"); Continental Cas. Co. v. Rapid-American Corp., 609 N.E.2d 506 (N.Y. 1993) ("Rapid-American") (pollution exclusion not applicable to injuries from exposure to asbestos within a confined area); Center for Creative Studies., 871 F. Supp. at 945-46 (citations omitted); Tufco, 409 S.E.2d at 699-700; Calvert Ins. Co. v. S & L Realty Corp., 926 F. Supp 44, 47 (S.D.N.Y. 1996) ("S&L Realty") (terms used in exclusion are environmental terms of art and do not exclude injuries from chemical fumes released within a building). Some courts have reached a similar result by finding that the dictionary definitions of these terms do not

apply to fumes that are not actively released by active human agency. See e.g. Lumbermans Mut. Cas. Co. v. S-W Industries, Inc., 39 F.3d at 1336 (citing Webster's Third New International Dictionary 644, 653, 1917, 774 (1986)); Bituminous Cas. Corp. v. Advanced Adhesive Technology, Inc., 73 F.3d 335, 338 (11th Cir. 1996) (citing Webster's Third New International Dictionary (1976) 644, 653, 774, 1917; Funk and Wagnells Standard College Dictionary (1974) 378-79); Center for Creative Studies, 871 F. Supp. at 946 (fumes given off by chemicals do not constitute "'discharged, dispersed, released, or escaped' chemicals"); S & L Realty, 926 F. Supp. at 47 (fumes given off by cement being used to secure flooring do not constitute "the 'discharge,' 'disposal,' 'seepage,' migration,' 'release,' or 'escape' of a pollutant").

B. Courts Hold That Exclusions that Contain the Environmental Term of Art Language Do Not Apply Where the Pollutant and Injury or Damage are Confined Within a Structure.

Pollution exclusions containing the "discharge, dispersal, seepage, migration, release, or escape of a pollutant" language have been found to be inapplicable in the following situations:

-Fatal injuries caused by the release of poisonous fumes from an adhesive being applied to install carpet inside of a boat. Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc., 73 F.3d 335, 337-338 (11th Cir. 1996);

-Property damage caused by fumes released from muriatic acid used to etch a floor surface. Sargent Constr. Co. v. State Auto Ins. Co., 23 F.3d 1324, 1327 (8th Cir. 1994);

-Injuries resulting from chemical fumes emanating from cement used to install a plywood floor. S & L Realty Corp., 926 F. Supp. at 46-47;

-Injuries resulting from exposure to high levels of toxic fumes from a photographic chemical used in a photography class darkroom. Center for Creative Studies v. Aetna Life and Cas. Co., 871 F. Supp. 941, 946-47 (E.D. Mich. 1994) ("Center for Creative Studies");

-Injuries incurred from a failure of a gasket which caused the release of ammonia inside of a building. Ekleberry v. Motorists, No. App. 3-91-39, 1992 Ohio App. LEXIS 3778, at *4 (Ohio Ct. App. July 17, 1992) (summary judgment denied to insurance company);

-Injuries caused from carbon monoxide buildup resulting from inadequate ventilation of a commercial building. Donaldson v. Urban Land Interests, Inc., 564 N.W.2d 728, 730-31 (1997) ("Donaldson II");

-Injuries caused from buildup of carbon monoxide within a building caused by the release of carbon monoxide from a restaurant's ovens. Gill, 426 Mass. at 19-21;

-Injuries caused by chemical fumes released during the landlord-policyholder's installation of a carpet in its apartment building. Garfield Slope Housing. Corp. v. Public Serv. Mut. Ins. Co., 973 F. Supp. 326, 1997 U.S. Dist. LEXIS 11639, *28 (E.D.N.Y. 1997);

-Injuries caused by exposure to asbestos within a confined area. Rapid-American Corp., 609 N.E.2d 506 (N.Y. 1993);

-Carbon monoxide released from faulty heating and ventilation systems. Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34, 37-38 (2d Cir. 1995); Regional Bank v. St. Paul Fire and Marine Ins. Co., 35 F.3d 494, 497-98 (10th Cir. 1994); Thompson v. Temple, 580 So. 2d 1133, 1135 (La. Ct. App. 1991); American States Ins. Co. v. Koloms, 1997 Ill.LEXIS at *17;

-Injuries caused by lead paint released within landlord's building. Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762, 764 (Mass. 1992); United States Liab. Ins. Co. v. Bourbeau, 49 F.3d 786, 789 (1st Cir. 1995) (holding that injuries from lead paint in an apartment would not be excluded); Lefrak Org., Inc. v. Chubb Custom Ins. Co., 942 F. Supp. 949, 954 (S.D.N.Y. 1996) ("LeFrak");

-Injuries caused by the backup of sewage from a septic system which flooded the interior of a mobile home. Minerva Enters. Inc. v. Bituminous Casualty Corp., 851 S.W.2d 403, 404 (Ark. 1993).

These cases demonstrate that pollution exclusions whose operative clauses are identical to those at issue herein cannot be read to exclude insurance coverage where the release and resulting damage from an alleged pollutant is confined, as here, to an enclosed space. Furthermore, as a noted by the Massachusetts Supreme Judicial Court, a policyholder "would not expect a disclaimer of coverage for these type of mishaps even though they

involve 'discharges,' 'dispersals,' 'releases,' and 'escapes' of 'contaminants' and 'irritants.'" Accordingly, the Court of Appeals was in error when it concluded that USAA's pollution exclusion excluded insurance coverage for property damage to the interior of the residence caused by the chemical emissions within the building.

C. The Cases That USAA Successfully Relied Upon Below Are Older Cases That Were Decided Upon Prior to the Current Trend in Interpretation of Pollution Exclusions.

The cases that USAA successfully relied upon below are primarily older cases that were decided before the emerging trend. Furthermore, subsequent cases in the respective jurisdictions indicate that these cases no longer represent the viewpoints of those jurisdictions.

1. Demakos

In a one-page opinion that contains absolutely no analysis, the New York Appellate Division, Second Department, held that a pollution exclusion which excluded insurance coverage for damages caused by pollutants excluded insurance coverage for injuries caused by cigarette smoke seeping into an apartment from the basement below. Demakos v. Travelers Insurance Co., 613 N.Y.S. 2d 731, 732 (App. Div. 1994). Demakos was improperly decided. Prior precedent of New York's highest court established that pollution exclusions do not apply where the alleged pollutants are confined to the interior of a building. See, Rapid-American Corp., 609 N.E.2d 506 (pollution exclusion not applicable to injuries from exposure to asbestos within a confined area).

New York cases decided after Demakos reveal that pollution exclusions, whose operative clauses are identical or virtually identical to those at issue herein, do not exclude insurance coverage where the alleged pollutants are contained within a building. See e.g., S

& L Realty Corp., 926 F. Supp. at 47; LeFrak Org., Inc. v. Chubb Custom Ins. Co., 942 F. Supp. at 954 (pollution exclusion inapplicable to lead paint released within a building); Garfield Slope Housing. Corp. v. Public Serv. Mut. Ins. Co., 973 F. Supp. 326, 1997 U.S. Dist. LEXIS 11639, *28 (E.D.N.Y. 1997) (pollution exclusion inapplicable to chemical fumes contained within a building).

2. Hanover New England

In Hanover New England Insurance. Co. v. Smith, oil leaked within a building, causing damage to sheetrock and carpet. 621 N.E.2d 382 (Mass. App. Ct. 1993). The Massachusetts Court of Appeals held that insurance coverage was excluded under a clause which excluded losses "caused by . . . release, discharge, or dispersal or contaminants or pollutants." Id. at 382-383.[5] Like Demakos, the Hanover New England case contains virtually no analysis of the exclusion in question.

Two decisions of the Supreme Judicial Court reveal that Hanover New England was incorrectly decided and that, under Massachusetts law, pollution exclusions do not exclude insurance coverage when the alleged pollutants are confined within a building. In Atlantic Mutual Insurance Co. v. McFadden, a case which was decided prior to Hanover New England, the Supreme Judicial Court held that "the terms used in the pollution exclusion, such as 'discharge,' 'dispersal,' 'release,' and 'escape,' are terms of art in environmental law

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5 The exclusion in this case is distinguishable from the exclusion in Hanover New England. While the exclusion in this cases defines a "pollutant" as being "contaminant or irritant," the Hanover New England policy purported to exclude "contaminants or irritants." 621 N.E.2d at 382. Thus, Hanover New England Insurance Company apparently thought that "pollutants" and "contaminants" had different meanings, while USAA thinks that "pollutants" are "contaminants." This disagreement between two insurance companies on the meaning of "contaminants" in a pollution exclusion strongly suggests that the key term "contaminants" in the USAA insurance policy is capable of two meanings.

which generally are used with reference to damage or injury caused by improper disposal or containment of hazardous waste." 595 N.E. 2d at 764. Accordingly, the Supreme Judicial Court decided that the pollution exclusion did not exclude insurance coverage from injuries caused by the ingestion of lead paint within a building. Id.

Similarly, in the very recent decision in Gill, the Supreme Judicial Court held that a pollution exclusion did not exclude insurance coverage for injuries sustained from the release of carbon monoxide from a restaurant oven where the carbon monoxide caused injuries within the building. 426 Mass. at 120-121. The Massachusetts Supreme Judicial Court took pains to make clear that pollution exclusions, whose central terms are identical or virtually identical to those at issue herein, are only applicable to "classic ... environmental pollution," such as that involving a discharge to land or water. 426 Mass. at 121.[6]

3. Ace Baking

In United States Fire Insurance. Co. v. Ace Baking Co., 476 N.W.2d 280 (Wis. Ct. App. 1991), the Wisconsin Court of Appeals held that a pollution exclusion excluded insurance coverage for the contamination of baking products with a foreign substance. The pollution exclusion in Ace Baking differs substantially from the exclusion in this case as it "excluded losses 'caused by or resulting from ... [r]elease, discharge, or dispersal of pollutants,'" without defining the term "pollutants." See, 476 N.W.2d at 281.

Five years after Ace Baking, the Wisconsin Court of Appeals was called upon to interpret a pollution exclusion. Donaldson v. State of Wisconsin, 556 N.W.2d 100 (Wis. Ct.

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6 The Supreme Judicial Court criticized the decision in Essex Insurance Co. v. Tri-Town Corp., 863 F. Supp. 38, 39-41 (D. Mass. 1994) (coverage is excluded for injuries sustained from carbon monoxide released within an ice skating rink), pointing out that the court failed to take into consideration its McFadden decision. Gill, 426 Mass. at 121.

App. 1996) ("Donaldson I"). Unlike Ace Baking, Donaldson I involved a pollution exclusion whose definition of pollutants was identical to the one in USAA's exclusion. See 556 N.W.2d at 102. The issue in the case was whether the pollution exclusion excluded insurance coverage for injuries from a carbon monoxide buildup created by a faulty ventilation system. In an extensive discussion which solely relied upon its Ace Baking decision, a divided Court of Appeals determined that the built-up carbon monoxide was an excluded "pollutant." Donaldson I, 556 N.W.2d at 102-03. The divided Court of Appeals also rejected the argument that the pollution exclusion applied "only in situations of environmental injury or damage to soil, air or water [and] not to non-environmental injury situations such as the instance case," relying in part upon Ace Baking. Id. at 104.

The dissent disagreed with this conclusion and the majority's reliance upon Ace Baking. The dissent also cited approvingly, RSJ, Inc., 926 S.W.2d at 681, wherein the Kentucky Court of Appeals had noted that "the drafters' utilization of environmental law terms of art ('discharge,' 'dispersal,' 'seepage,' 'migration,' 'release,' or 'escape' of pollutants) reflects the exclusion's historical objective -- avoidance of liability for environmental catastrophes related to intentional industrial pollution." Donaldson I, 556 N.W.2d at 104-05 (Anderson, J., dissenting). The dissent further concluded that the exclusion was ambiguous because "it can be read to limit coverage to liability for industrial environmental damages...." Id.

The Wisconsin Supreme Court reversed, substantially for the reasons set forth in Judge Anderson's dissent. Donaldson II, 564 N.W.2d at 732. The Supreme Court specifically rejected the application of Ace Baking, noted that "unlike the Ace Baking policy, the policy at issue here provides a definition of 'pollutant.' We therefore conclude that the

gloss given to the term 'pollutant' in Ace Baking is not germane to the instance analysis." Id. at 731 n.4. Rather than following the Ace Baking approach, the Supreme Court adopted the current trend in which courts have construed pollution exclusions containing operative clauses identical or virtually identical to those herein to not apply where the alleged pollutants were confined within a building:

> Finally, our conclusion ... is supported by case law from foreign jurisdictions. Several courts have found coverage in the context of substances which arguably fit the broad definition of "pollutant".... See, e.g., ...; Atlantic Mut. Ins. Co. v. McFadden, 413 Mass. 90, 595 N.E.2d 762 (Mass. 1992) (lead-based paint); Minerva Enterprises, Inc. v. Bituminous Cas. Corp., 312 Ark. 128, 851 S.W.2d 403 (Ark. 1993) (raw sewage); Center for Creative Studies v. Aetna Life & Cas. Co., 871 F. Supp. 941 (E.D. Mich.) (photographic chemicals); West Am. Ins. Co. v. Tufco Flooring East, Inc., 104 N.C. App. 312, 409 S.E.2d 692 (N.C. Ct. App. 1991) (fumes from styrene monomer resin).

Donaldson II, 564 N.W.2d at 733.

4. American States

American States Ins. Co. v. F.H.S., Inc., is distinguishable from the present circumstances and is not inconsistent with the emerging consensus that pollution exclusions do not exclude insurance coverage where the alleged pollutants are confined within a building. 843 F. Supp. 187 (S.D. Miss. 1994). In American States, coverage was sought for an ammonia release which left the building, entered the general atmosphere, and injured residents in the surrounding neighborhood. 843 F. Supp. at 188. Thus, American States is not inconsistent with the modern trend holding that the scope of pollution exclusion is limited to exclude coverage for traditional environmental pollution. Compare, e.g., Ekleberry v. Motorists, No. App. 3-91-39, 1992 Ohio App. LEXIS 3778, at *4 (Ohio Ct. App. July 17, 1997) (pollution exclusion does not exclude insurance coverage for injuries incurred from a

failure of a gasket which caused the release of ammonia inside of a building).

5. Great Northern

In Great Northern Insurance Co. v. The Benjamin Franklin Federal S. & L. Association, the district court held that liability for the mere existence of asbestos-in-residence in a building was not a covered loss under a first party property policy where the asbestos had not been released, discharged, or dispersed and the policy only covered "named losses" from "1) aircraft; 2) explosion; 3) fire or lightening; 4) sprinkler leakage; 5) mine subsistence; 6) riot; 7) sinkhole; 8) smoke; 9) vandalism; 10) vehicles; 11) volcanic action; and 12) wind or hail." 793 F. Supp. 259, 263 (D. Or. 1990), aff'd without op., 953 F.2d 1387 (9th Cir. 1992) ("Great Northern"). The district court's sole discussion of the pollution exclusion in the property damage policy was: "'Pollution' is expressly excluded, and includes solid irritants. Asbestos is a solid irritant." 793 F. Supp. at 263. As this discussion contains no analysis nor cites to any relevant case law, one is left to guess as to how the district court reached its interpretation. Citing its earlier, two-line conclusion as its basis, the district court also held that asbestos was a "solid irritant" within the meaning of a pollution exclusion in a liability insurance policy whose operative clauses were similar to those at issue herein. 793 F. Supp. at 264. This holding, however, is apparently dicta as the court had previously concluded that there was no discharge, dispersal, or release of asbestos, and, therefore, the event would not have fallen within the terms of the pollution exclusion in question. See, 793 F. Supp. at 264 (express terms of exclusion requires an "actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants"). Most importantly, failing to contain any supporting analysis or case law, Great Northern simply offers no assistance to this Court in addressing the issues herein.

In sum, three of the major pollution cases that USAA relied upon below have turned out to be inaccurate expressions of the law of their jurisdictions. These jurisdictions now follow the modern trend recognizing that pollution exclusions identical or virtually identical to those herein employ environmental terms of art and are not designed to exclude insurance coverage where the alleged pollutants are confined within a building or structure. The fourth case is inapposite because it deals with a situation in which the alleged pollutant escaped from an industrial warehouse and, thus, is an example of classic environmental pollution. The final case, Great Northern, is inapposite as the court found that there was no dispersal, discharge, or release of a "pollutant" and its conclusion that asbestos was a "pollutant" is both dicta and is wholly unsupported by any rationale that would aid this Court.

D. Controlling Oregon Precedent is Consistent with the Conclusion that "Discharge," "Dispersal," "Release," or "Escape" Only Apply to Classic Environmental Pollution.

The Court of Appeals erred in relying upon its prior opinions in Sunnes and Mays. See, Fleming, 144 Or. Ct. App. at 5-6, 925 P.2d at 142 ("In those cases, we held that exclusions that were similar to the one at issue here were unambiguous....).

Although these Court of Appeals' decisions construed the standard form "sudden and accidental" pollution exclusion which contained some clauses similar to those at issue herein, their holdings are both inapposite and incorrect. Because both of those cases involved traditional environmental pollution damage, the Court of Appeals never construed the "discharge, dispersal, ..." language nor considered the key question of whether these environmental terms of art applied to damage caused by alleged pollutants confined within a structure. See Sunnes, 711 P.2d at 213 (coverage excluded for damages from policyholder's

long-term, intentional disposal of acid and caustic wastes into municipal sewer lines); Mays, 799 P.2d at 655-56 (coverage excluded for damages caused by policyholder's long-term, intentional disposal of used solvent, waste water and paint sludge on its property). As neither court was called upon to determine whether the pollution exclusion was intended to apply to situations where the substances causing harm were confined within a building, Mays and Sunnes offer no support for the Court of Appeals' holding that the non-environmental damages in this case are excluded under the USAA insurance policy exclusion. However, and perhaps more importantly, nothing in Mays and Sunnes is inconsistent with the view that the terms "discharge, dispersal, release, or escape" are environmental terms of art. Indeed, these cases involve the application of those terms, albeit incorrect, to classic environmental pollution and not to indoor damages.

Furthermore, the Court of Appeals' belief that Oregon law holds that the pollution exclusions addressed in Mays and Sunnes are unambiguous is demonstratedly incorrect. This Court has held that the pollution exclusion addressed in Mays and Sunnes is ambiguous. See, McCormick & Baxter, 923 P.2d at 1218 ("[W]e conclude that the pollution exclusion is ambiguous."). Thus, the Court of Appeals erred in holding that "exclusions [in Mays and Sunnes] that were similar to the one here were unambiguous and prevented recovery...." Fleming, 144 Or. App. at 5-6, 925 P.2d at 142. This holding is directly contrary to this Court's contrary determination in McCormick & Baxter and must be reversed.

In conclusion, the terms "discharge, dispersal, seepage, migration, release or escape," as used in USAA's policy, are environmental terms of art which are only intended to apply to situations in which the pollutant has been introduced into the environment at large and causes damage therein or thereto. As the alleged pollutants in this case were not

introduced into the environment at large, USAA's pollution exclusion is inapplicable to the circumstances herein.

V. THE DEFINITION OF "POLLUTANTS" IS SO BROAD AS TO BE MEANINGLESS

A. Numerous Courts have Recognized that the Definition of "Pollutants," is "Over broad," "Meaningless," and "Ambiguous".

The second operative clause of USAA's pollution exclusion contains a standard-form definition of "pollutants" that has been used by the insurance industry in a number of pollution exclusions, most particularly, the so-called "absolute" pollution exclusion. A number of courts have concluded that this definition of pollutants is so broad that it may be meaningless. See e.g., Donaldson II, 564 N.W.2d at 732 (reversing lower court holding that "exhaled carbon monoxide [is] unambiguously within the policy definition of 'pollutant'"); Ekleberry, 1992 Ohio App. LEXIS 3778, at *7 (definition of "pollutant" raises "issue as to whether the exclusion is so general as to be meaningless"); see, also, Center for Creative Studies., 871 F. Supp. at 947 (finding " discharge, dispersal, release or escape of pollutants" to be ambiguous); Sargent Construction, 23 F.3d at 1326 ("we hold that the policy's definition of 'pollutants' is ambiguous"); LeFrak, 942 F.Supp. at 956 ("the policy's definition of 'pollutants' is susceptible of [more than one] equally reasonable meaning"). The definition of "pollutants" contained in the USAA insurance policy is identical or virtually identical to the definition found to be ambiguous in the cases cited immediately above.

The Seventh Circuit held that the "the terms 'irritant' and 'contaminant,' [in the definition of 'pollutant'] 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." Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992). Thus, pollution exclusions containing this broad definition of pollutants found in the USAA exclusion, "require some limiting provision" to ensure that the clause does not "extend far beyond its intended scope, and lead to some absurd results." Id.

B. The Overbreadth of the Definition of "Pollutants" Requires That Some Limiting Principle Be Applied; Courts Have Found That Limiting Principle to Be the Restriction of the Exclusion to Traditional Environmental Damages; This Limitation is Consistent with USAA's Earlier Representations.

The limiting principle found in the case law, such as that cited immediately above and in Point II, is that pollution exclusions, containing identical or virtually identical definitions of "pollutants" to USAA's insurance policy, are to be applied only to traditional pollution cases arising from industrial operations in which the alleged pollutant has been introduced into the environment and has caused environmental damage. Indeed, this interpretation appears to be consistent with USAA's apparent, 1988 interpretation of its Homeowners Insurance Policy, where USAA represented to the Oregon public that:

> For quick reference, here are the dwelling and personal property coverages provided by our Homeowner policies:
>
> * * *
>
> -smoke from **other than** agricultural or **industrial operations.**

USAA, Homeowners Insurance (1988) at 1 (App.-44) (emphasis added). The pollution exclusion in USAA's homeowner's policy purports to include "smoke" in its definition of "pollutants." If USAA's proffered interpretation of its pollution exclusion is true and all damage from alleged pollutants such as "smoke" or "chemicals" are excluded, then its representation to the Oregon public is untrue. On the other hand, if its operative definition is

interpreted as numerous courts have interpreted it – to only apply to classic, industrial-type environmental pollution -- then the pollution exclusion becomes consistent with USAA's 1988 representation to the Oregon public that its homeowner's policy provides dwelling coverage for "smoke from other than agricultural or industrial operations." Id.

Amicus curiae respectfully urges that USAA's definition of pollutants is vague, overbroad and, hence, ambiguous. The only sensible interpretation of the definition of pollutants is to limit its application to traditional environmental, industrial-type pollution. For that reason, the decision of the Court of Appeals should be reversed.

C. USAA's Interpretation Renders a Portion of Its Own Policy "Meaningless".

The structure of USAA's exclusion reveals that at the time that USAA incorporated the pollution exclusion into its insurance policy, it could not have interpreted its pollution exclusion in the all-encompassing manner that it asserted below. The pollution exclusion purports to exclude loss caused by the "discharge, dispersal, seepage, migration, release or escape of ... smoke..." (5). Yet immediately preceding this exclusion is another exclusion which purports to exclude loss caused by "smoke from agricultural smudging or industrial operations." (4). If it understood its pollution exclusion to be all encompassing with regard to the exclusion of listed "pollutants" such as "smoke," USAA would have little need to include exclusion (4), which, under USAA's current interpretation, adopted by the Court of Appeals, is now rendered completely superfluous.

USAA's own policy reveals that its pollution exclusion is ambiguous and that there must be some limiting principle to resolve this ambiguity. Amicus curiae asserts that the reason that there is ambiguity in USAA's pollution exclusion is that ISO took the language of its revision of the "contamination" exclusion from that of the standard pollution

exclusions in Commercial General Liability insurance policies that were designed to exclude insurance coverage for traditional environmental liability from industrial waste handling and disposal, such as that imposed by the federal Superfund statute. These exclusions were designed to address environmental cleanup liability flowing from damage caused to the environment and, as a result, their language is ill-suited to first-party property damage policy or homeowners liability policy unless limited to traditional, industrial-type environmental polluting events. If the exclusion is interpreted to only exclude property damage that results from "discharges," "dispersals," "seepages," "migrations," "releases," or "escapes" of pollutants that also cause general environmental harm, then (4) can be harmonized with (5). Exclusion (4) excludes loss for property damage caused by smoke from agricultural smudging or industrial operations, whether or not that smoke causes any harm to the environment. On the other hand, exclusion (5) excludes loss for property damage caused by smoke or the additional listed "irritant[s]," or "contaminant[s]," only in circumstances in which the "irritants" or "contaminants" cause significant environmental pollution, which pollution also results in damage to the policyholder's own property. This reading harmonizes the two provisions, avoids an interpretation that would otherwise render an entire clause of the policy superfluous, is consistent with an reasonable reading of the exclusion and with USAA's and ISO's public interpretations, and with the emerging judicial consensus that pollution exclusions utilizing clauses identical to those herein do not exclude insurance coverage where the release and damage or injury is contained within a confined space.

D. Although the Court of Appeals Recognized the Ambiguity in the Exclusion, the Court of Appeals Erroneously Ignored the Effect of the Ambiguity.

The Court of Appeals erred in its treatment of the potential ambiguity in the USAA exclusion. Fleming argued below that the exclusion was ambiguous because, "read literally, it would exclude coverage for events that the policy does--and perhaps must--cover. Plaintiff [Fleming] points in particular to fire coverage and notes that the pollution exclusion expressly excludes damage from smoke and soot." 144 Or. App. at 5, 925 P.2d at 142.

This ambiguity, discussed at length above and recognized by many courts, was never resolved by the Court of Appeals. The Court of Appeals rejected USAA's attempt to explain away the ambiguity raised by Fleming. 144 Or. App. at 6, 925 P.2d at 142 ("defendant's argument is unpersuasive"). The Court of Appeals erroneously held, however, that the exclusion's obvious ambiguity with relation to fire-related losses was not material because this case does not involve a fire loss. Id.

As noted above, the exclusion is ambiguous because we know that, read literally, it would appear to exclude fire losses which were both intended by ISO and USAA to be covered and which coverage is mandated under the required fire insurance portion of the policy. See Moore, 317 Or. at 244-45, 855 P.2d at 632 (legislature mandated fire loss coverage). Thus, from looking at external sources, it is obvious that the language of the exclusion is broader than its intended scope.

Having been alerted that the language of the exclusion is broader than its intended scope in one scenario, the Court of Appeals should have recognized the very real potential that the exclusion was broader than its intended scope in other scenarios, such as the scenario herein. As a matter of law, once the language of an exclusion is shown to be ambiguous in

that it includes more than was intended, it should be recognized that the intent of the exclusion can only be obtained from looking at external evidence of intent. That is because the existence of the ambiguity, even though only apparent in a single context, means that the language of the exclusion is not a reliable indicator of the exclusion's intent. Once policy language has been shown to be too broad, it should become obvious to the court that its true meaning cannot be determined by reading its language.

This type of ambiguity has two consequences. The policyholder's interpretation must be given effect, if reasonable. And, two, the Court must look elsewhere in order to determine the intent and effect of the language. When an apparent ambiguity appears in a policy term or provision, the term "must 'reasonably be given a broader or narrower meaning, depending on the intention of the parties in the context in which such words are used by them." Hoffman, 313 Or. at 470 (citations omitted). The Court of Appeals failed to consider that the ambiguity of the exclusion meant that it could have a narrower meaning and the Court of Appeals also failed to make any determination of the parties' intentions as revealed in the USAA and ISO materials that were contained in the Record.

It is black letter law that "any reasonable doubt as to the intended meaning of [insurance policy] terms will be resolved against the insurance company and in favor of extending coverage to the insured." Shadbolt v. Farmers Ins. Exch., 275 Or. 407, 411, 551 P.2d 478, 480 (1976) (citation omitted); Totten v. New York Life Ins. Co., 298 Or. 765, 771, 696 P.2d 1082, 1086 (1985) (same). In ignoring the ambiguity in the exclusion and construing the ambiguity in favor of USAA, the Court of Appeals violated this fundamental provision of Oregon insurance law.

CONCLUSION

The Court of Appeals' opinion was in error. The Court of Appeals' opinion is inconsistent with the emerging judicial consensus, relies on demonstrably inapposite or incorrect holdings, is completely inconsistent with both the history of the provision at issue and with the intent of the drafter of the provision, and violates fundamental precepts of insurance coverage interpretation. If left to stand, this unprecedented reduction of insurance coverage that will result from the Court of Appeals' opinion will have devastating impact upon Oregon homeowners. Accordingly, it is respectfully urged that this Court must grant the Petition for Review in the interest of all Oregon policyholders.

DATED: January 15, 1998.

Respectfully submitted,

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APPENDIX - A

REPORT 20 SUMMARY

I.S.O. COMPANIES AFFILIATED FOR GENERAL LIABILITY IN ALPHABETICAL SEQUENCE

	ALA	ARIZ	COLO	DEL	FLA	IDA	IHD	KANS	LA	MD	MICH	MISS	MONT	NEV	N.J.	N.Y.	N.D.	OKLA	PENN	S.C.	TENN	UTAH	VA	W.VA	WYO	ALAS	PR
TRUCK INSURANCE EXCH	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z
TWIN CITY FIRE INS. CO.	H	H	H	A	H	H	H	H	H	E	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	A	H
U S LIABILITY INS CO			J		Q	Q	Q	Q	Q	Q			Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q		Q
UNDERWRITERS AT LLOYDS	Z	Z	Z	Z	Z	Z	Z	Z	Z		Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z
UNDERWRITERS INS. CO.	Q	Q	Q	J	Q		Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	
UNIGARD INDEMNITY INS CO		H		A	H				H	H	H							H			H	H	H	H	H	H	
UNIGARD INS. CO.	H	H	H	A	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	A	H
UNIGARD MUT. INS. CO.	H	H	H	A	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	A	H
UNION AUTO IND ASSOC									Q	Q	Q	Q						Q									
UNION INDEMNITY INS CO OF	H	H	H	A	H		H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	A	H
UNION INS CO A MUTUAL			Q						Q	Q				Q	Q	Q					Q				Q	
UNION MUT INS CO PROV				Q							Q		Q					Q		Q		Q		Q			
UNION MUT. FIRE INS. CO.										Z	Z							Z						Z			
UNION STANDARD INS CO		H																H			H						
UNITED FARM BUR MUT INS CO							Z																				
UNITED FIRE & CAS. CO.			Z			Z	Z	Z				Z	Z	Z							Z				Z	Z	
UNITED GENERAL INS CO		Q	Q					Q	Q		Q	Q	Q			Q		Q	Q		Q	Q	Q			Q	
UNITED MUT INS. CO										Z																	
UNITED NATIONAL INS CO LTD																										J	
UNITED OHIO INS CO																		Z									
UNITED PACIFIC INS. CO.	H	D	H	A	H	H	H	H	H	D	H	H	H	H	H	H	H	H	H	H	D	H	H	D	H	A	D
→ UNITED SERVICES AUTO. ASSOC	Q	Q	Q	J	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Z	Q	Q	Q	J	Q
UNITED STATES FID.&GUAR. CO	H	H	H	A	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	A	H
UNITED STATES FIRE INS. CO.	H	H	H	A	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	A	H
UNIVERSAL INS CO P R																											H
UNIVERSAL REINSURANCE CORP		Q		J				Q		Q				Q	Q		Q	Q		Q		Q		Q			
UNIVERSAL UNDERS INS CO	H	H	H	A	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	A	H
URDAN COMMUNITY INS. CO.																						Q					
→ USAA CAS INS CO	Q	Q	Q	J	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Q	Z	Q	Q	Q	J	Q
→ USAA GENERAL IND CO			J		Q	Q	Q		Q			Q		Q			Q	Q	Q	Q		Z	Q	Q			Q
UTICA FIRE INS CO ONEIDA CO	H			H		H	H				H	H		H				H	H	H							
UTICA MUT. INS. CO.	H	H	H	A	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	A	H

REPORT 20 SUMMARY

I.S.O. COMPANIES / AFFILIATED FOR / GENERAL LIABILITY / III ALPHADETICAL SEQUENCE	ALABAMA	ARKANSAS	COLORADO	DELAWARE	FLORIDA	IOWA	IDAHO	KANSAS	LOUISIANA	MAINE	MICHIGAN	MINNESOTA	MISSISSIPPI	MISSOURI	NEVADA	NEW JERSEY	NEW YORK	NORTH DAKOTA	OKLAHOMA	PENNSYLVANIA	SOUTH CAROLINA	TENNESSEE	UTAH	VERMONT	VIRGINIA	WASHINGTON	WISCONSIN	WYOMING
WHITING NATIONAL INS CO					Q												Q											
WISCONSIN FARMERS MUT. INS												Z															Z	
WISCONSIN HOSP OPT SEC ACCT																											Z	
WOLVERINE INS. CO.							H	H	H			H	H						A			H						
WORCESTER MUTUAL INS CO			Q							Q	Q	Q				Q	Q	Q	Q	Q	Q			Q				
YASUDA F&M INS CO OF AMERIC	H	A			A		H									H	H			H		H			H		A	H
YORK INS CO			H		H	H	H	H					H		H	H			H		H				H		H	
YOSEMITE INS CO	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z
ZURICH AMERICAN INS CO ILL							H																					
ZURICH INS CO	H	H	H	A	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H	H
ZZ ARKANSAS PROF LIAB REINS		Z																										
ZZ FLORIDA MED MALPRACTICE					J																							
ZZ MAINE MEDICAL&HOSP MALP											Q																	
ZZ MEDICAL MALPRACTIC JUA M												P																
ZZ MEDICAL MALPRACTICE JUA																					Z							
ZZ MISSISSIPPI TEMP J U A														J														
ZZ N H MEDICAL MALPRACTICE																J												
ZZ NY MED MALPRACTICE INS A																	K											
ZZ OHIO MED PROF LIAB UND A																			J									
ZZ PA PROFESSIONAL LIABILIT																				J								
ZZ TEXAS MEDICAL LIAB INS U																							J					
ZZ VIRGINIA MEDICAL MALPR																									J			
ZZ WISCONSIN HEALTH CARE LI																											J	

TOTAL COMPANIES 855

AFFILIATION FILING CODES

	AUTHORIZATION	MEMBER	SUBSCRIBER	SERVICE PURCHASER
→	NOT AUTHORIZED	A	J	Z
	RATES	B	K	.
	RULES	C	L	.
	RATES, RULES	D	M	NOT
	FORMS	E	N	APPLICABLE
	RATES, FORMS	F	O	.
	RULES, FORMS	G	P	.
→	RATES, RULES, FORMS	H	Q	.

CERTIFICATES OF SERVICE

CERTIFICATE OF FILING

I hereby certify that the foregoing **BRIEF OF AMICUS CURIAE IN SUPPORT OF TERRY FLEMING'S PETITION FOR REVIEW** was filed by first class mail by depositing the original and 20 copies in the United States Post office, with sufficient postage, addressed to the State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, Oregon 97310, on January 16, 1998, pursuant to ORAP 1.35.

RYCEWICZ & CHENOWETH, P.C.

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CERTIFICATE OF SERVICE TO COUNSEL

I hereby certify that I served two copies of the foregoing **BRIEF OF AMICUS CURIAE IN SUPPORT OF TERRY FLEMING'S PETITION FOR REVIEW** on:

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on January 16, 1998, by mailing to said attorneys two true and correct copies thereof. I further certify that said copies were placed in a sealed envelope, addressed as noted above, postage prepaid, and deposited in the United States Post Office at Salem, Oregon on said day.

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