COA No.35941-0-1

IN THE SUPREME COURT
THE STATE OF WASHINGTON

HEIDI SUE COOK, a single woman; and MARILYN and RONALD KEETON, wife and husband,

Appellants,

v.

AMERICAN STATES INSURANCE COMPANY,

Respondent.

BRIEF OF AMICI CURIAE THE FRESH AIR FUND AND UNITED POLICYHOLDERS

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PRELIMINARY STATEMENT

United Policyholders ("UP") and The Fresh Air Fund ("Amici Curiae") file this amici brief in support of Petitioners Heidi Sue Cook, Marilyn Keeton and Ronald Keeton, (collectively, the "Keetons"). American States Insurance Company ("AS") denied coverage under the pollution exclusion for injuries sustained by the Keetons when some sealant which was being applied to the outside of a building negligently came into their place of work. Amici contend that this exclusion does not relieve AS of its duty to indemnify the contractor in the Keetons' action.

The use of a sealant as a product on the walls of a building does not fall within the substances specifically enumerated in the exclusion.[1] As the inhalation of the sealant does not constitute injury resulting from the "discharge, dispersal, release or escape of" environmental pollution, this exclusion does not relieve AS of its duty to indemnify its policyholder.

ISSUE PRESENTED

Whether an insurance company has a duty to indemnify

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1. The language of this exclusion is substantially similar to the pollution exclusion contained in the standard-form Commercial General Liability policy. From 1986 onwards, liability insurance companies modified the terms contained in the standard-form Comprehensive General Liability ("CGL") insurance policy. When this revised standard-form policy was drafted, insurance companies signalled the modification with a name change, and identified the new policy form as the Commercial General Liability standard-form policy. See Hartford Fire Ins. Co. v. California, 509 U.S.764, 113 S. Ct. 2891, remanded sub nom., In Re Insurance Antitrust Litigation, 5 F.3d 1556 (9th Cir. 1993).

its policyholder in an action alleging injury from exposure to a concrete sealant where the insurance policy states:

> (f) This insurance does not apply to:
>
> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened 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. (CP243)

STATEMENT OF THE CASE

Amici adopt the statement of the Petitioners.

SUMMARY OF ARGUMENT

This is not a pollution case, the contractor is not a polluter, and the sealant is a product, not a "pollutant" as defined by the standard form insurance policy sold by AS. Coverage for claims arising from exposure to the use of ordinary products is not excluded by this exclusion. At a minimum, the exclusion is ambiguous and must be interpreted in favor of the policyholder, who was presented with a fully drafted policy.

The exclusion at issue is similar to a standard-form, non-negotiated provision that was drafted by the insurance industry in the 1980's, and added to standard-form policies, such as the contractors' policy. The exclusion does not expressly exclude sealant, paint, or any other kind of product. Many courts faced with the task of interpreting similar polluter's exclusions have found that liability from the exposure to products such as flooring fumes and muriatic acid is not excluded.

Amici maintain that the exclusion was intended to apply to intentional waste disposal practices that resulted in intentional environmental pollution. It never was intended to apply to the use of products which were perfectly legal when used. Under the interpretation urged by AS, virtually any substance, element, or object that causes harm could be considered a "toxic chemical," "irritant," "contaminant" or "pollutant" thus rendering illusory the insurance coverage countless policyholders purchased.

AS's position, if sustained by this Court, would strip policyholders of the protection they purchased for liability arising out of the use of ordinary products for which the contractor here, was required to purchase insurance.

ARGUMENT

I. THE LANGUAGE OF THE EXCLUSION DOES NOT INCLUDE ORDINARY PRODUCTS SUCH AS THE SEALANT AND WAS INTENDED TO BE APPLICABLE ONLY TO ENVIRONMENTAL POLLUTION.

The Commercial General Liability insurance policy, upon which the AS policy is based, was drafted in the early 1980's by the Insurance Services Office, Inc. ("ISO").[2] Identical policies have been sold to countless policyholders.

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2. ISO is an association of approximately 1,400 domestic property and casualty insurers and operates as the "almost exclusive source of support services in this country for CGL insurance." Hartford Fire Ins. Co. v. California, supra, at 2896. "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." Id. at 2896. See also In re Hoechst Celanese Corp., 184 A.D.2d 223, 584 N.Y.S.2d 805, 806 (1st Dep't 1992)

A senior analyst and representative of Aetna Casualty and Surety Company, has testified that the similarly worded so-called "absolute pollution exclusion" is an oxymoron, and is so characterized in company sponsored training programs for claims representatives, explaining:

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

The substances enumerated in the exclusion in the standard-form insurance policy sold to the contractor are not defined in the policy; moreover, the exclusion makes no reference to sealant. Nonetheless, AS incorrectly asserts that the sealant constitutes a "pollutant," or "toxic substance" within the meaning of the policy. The Supreme Judicial Court of Massachusetts addressed precisely this issue when it held that, under a virtually identical exclusion, dried, in-place lead-based paint, which was perfectly legal when applied to the walls, does not constitute a "pollutant." See Atlantic Mut. Ins. Co. v. McFadden, 413 Mass. 90, 595 N.E.2d 762 (1992) ("McFadden").

Appellate courts nationwide have followed the rationale of McFadden, holding that products, used or applied lawfully, can

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3. Deposition testimony of James G. King, Senior Analyst, Aetna Casualty & Surety Co., taken July 17, 1991 at 25-28, (App. at tab "1") Hi-Mill Mfg. Co. v. Aetna Casualty & Sur. Co., 884 F. Supp. 1109 (E.D. Mich. 1995), aff'd without op., 98 F.3d 1341 (6th Cir. 1996)

not be considered "pollutants" in the context of non-environmental claims. Sargent Constr. Co. v. State Auto Ins. Co., 23 F.3d 1324 (8th Cir. 1994) ("Sargent") (muriatic acid, used at a construction site, which corroded chrome fixtures, not a pollutant); Lumbermens Mut. Casualty Co. v. S-W Indus., 23 F.3d 970 (6th Cir.), cert. denied, 115 S. Ct. 190 (1994) ("Lumbermens") (factory fumes and dust, which allegedly injured worker who inhaled them, not pollutants); Regent Ins. Co. v. Holmes, 835 F. Supp. 579, 582 (D. Kan. 1993) (carpet cleaner spilled in home not a pollutant); Weaver v. Royal Ins. Co. of Am., 140 N.H. 700, 674 A.2d 975 (1996) (lead is not a pollutant); Sullins v. Allstate Ins. Co., 340 Md. 503, 667 A.2d 617 (1995) (polluters exclusion does not preclude coverage for lead based paint); Essex Ins. Co. v. Avondale Mills, Inc., 639 So. 2d 1339 (Ala. 1994) (asbestos released during building demolition not a pollutant); Contra, St. Leger v. American Fire and Casualty Ins. Co., 870 F. Supp. 641 (E.D. Pa. 1994), aff'd without opinion, 61 F.3d 896 (3d Cir. 1995) ("St. Leger")

In Continental Casualty Co. v. Rapid-American Corp., 177 A.D.2d 61, 581 N.Y.S.2d 669 (1st Dep't 1992), aff'd, 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506 (1993) ("Rapid-American"), the court examined whether a "sudden and accidental" polluter's exclusion precluded coverage for bodily injury

sustained by persons working with asbestos products.[4] The court held that the "sudden and accidental" exclusion did not relieve the insurance company of its duty to defend the underlying personal injury suits. 581 N.Y.S.2d at 674-75. The court found it:

> [E]xtends to environmental pollution occasioned by intentional discharge of a pollutant in the course of manufacturing or distribution activities by the producer of a product, but does not embrace the harm inflicted by a product fully and finally launched into the stream of commerce, and over which the manufacturer no longer exercises any control.

Id. at 673. The court found the exclusion does not afford insurance companies an escape hatch from coverage when the underlying complaints "do not allege environmental pollution . . . but simply bodily injury sustained by an ultimate user of a product." Id. at 672. The New York Court of Appeals, affirmed the decision emphasized that the exclusion is intended to:

> [E]xclude coverage for environmental pollution. The terms used in the exclusion to describe the method of pollution -- such as "discharge" and "dispersal" -- are terms of art in environmental law used with reference

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4. The "sudden and accidental" polluter's exclusion precludes coverage for:

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

Rapid-American, 609 N.E.2d at 508.

to damage or injury caused by disposal or containment of hazardous waste.

Rapid American, (citations omitted) 609 N.E.2d at 513. The latter exclusion had the requirement that the pollutants be discharged "into or upon land, the atmosphere or any water course or body of water." In West American Ins. Co. v. Tufco Flooring E., Inc., 104 N.C. App. 312, 409 S.E.2d 692, 700 (1991) ("Tufco"), the court found that the elimination of the language "into or upon land, the atmosphere or any water course or body of water" had no effect upon the requirement for environmental damage, stating:

> Because the operative policy terms "discharge," "dispersal," "release," and "escape" are environmental terms of art, the omission of the language "into or upon land, the atmosphere or any water course or body of water" in the new pollution exclusion clause is insignificant.

Tufco involved the release of styrene vapors from a flooring material which damaged claimant's inventory of chickens. The Tufco court held that the "polluters exclusion" applies only to a release into the environment. The court explained:

> Both the historical purpose underlying the pollution exclusion and operative policy terms indicate that a discharge into the environment is necessary for the clause to be applicable.
>
> * * *
>
> When the pollution exclusion was first instituted in the early 1970's, it applied, by its own terms, only to discharges of pollutants "into or upon land, the atmosphere or any water course or body of water. . . ." In 1985, the insurance industry amended the pollution exclusion clause in the standard commercial liability policy. . . . Even though the new pollution exclusion does omit language requiring the discharge to be "into or upon land, the atmosphere or any water course or body of water," [there is] no indication that the

> change in the language was meant to expand the scope of the clause to non-environmental damage. . . . The operative terms . . . of the pollution exclusion clause . . . are "discharge," "dispersal," "release," and "escape."

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

The exclusion here retains the terms "discharge," "dispersal," "release," and "escape" which Rapid-American, and McFadden, found to be environmental terms of art applicable to the disposal of hazardous waste and not applicable to bodily injury caused by products. In Karroll v. Atomergic Chemetals Corp., 194 A.D.2d 715, 600 N.Y.S.2d 101, 102 (2d Dep't 1993), mot. for leave to appeal dismissed, 82 N.Y.2d 920, 632 N.E.2d 465, 610 N.Y.S.2d 155 (1994) ("Karroll"), the court held that the "absolute pollution exclusion" does not exclude coverage for liability for injuries to a bulldozer operator who was sprayed accidentally with sulfuric acid. It held that the "polluters exclusion" can be interpreted to apply only to instances of environmental pollution. Id. at 102.

The Second Circuit in Stoney Run Co. v. Prudential-LMI Commercial Ins., Co., 47 F.3d 34 (2d Cir. 1995), held that the pollution exclusion contained in Commercial General Liability policy is ambiguous as to whether it may be applied to carbon monoxide poisoning from a faulty residential heating system. The court further held that the exclusion can reasonably be interpreted to apply only to environmental pollution, and not to all contact with substances which may be classified as pollutants, concluding that carbon monoxide poisoning in an

apartment was not the type of environmental pollution contemplated by the pollution exclusion.

In Thompson v. Temple, 580 So. 2d 1133 (La. Ct. App. 4th Cir. 1991) the Louisiana Court of Appeals reversed summary judgment for AS, holding a polluter's exclusion in a homeowner's policy, virtually identical to the exclusion here, does not exclude coverage for carbon monoxide injuries caused by a leaking gas heater in a residential rental property:

> Pollution exclusion clauses are intended to exclude coverage for active industrial polluters, when businesses knowingly emitted pollutants over extended periods of time.
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> * * *
>
> ... It seems that the intent of the insurance industry in adding pollution exclusion clauses to their policies was to exclude coverage for entities which knowingly pollute the environment over a substantial period of time. That situation is totally different from a leaking gas heater within a home. It is unlikely that the insurance industry intended such an exclusion to apply to this situation....

Id. at 1134-35. In Gamble Farm Inn, v. Selective Ins. Co., 440 Pa. Super. 501, 656 A.2d 142 (1995) ("Gamble Farm"), the court ruled the polluters exclusion was ambiguous, reasonably applied only to environmental contamination, and thus does not bar defense and indemnity for claims arising out of the release of carbon monoxide from a faulty water heater, in policyholder's inn.

In sum, Amici contend that the terms "discharge," "dispersal," "release," or "escape" contained in the exclusion are environmental terms of art intended only to exclude coverage for environmental pollution, and not for injuries arising out of

contact with products and do not exclude insurance coverage for the liability to the Keetons.

Another important issue is whether the substance is a "toxic chemical," "toxic liquid," toxic gas," "waste material," "pollutant," "contaminant," or "irritant." AS's interpretation of "pollutant," and other terms conflicts with many courts which have refused to give such terms an overly broad reading.

Products such as sealants are not pollutants, which refer to unwanted waste material. See, Tufco, 409 S.E.2d at 698 (flooring material is not a pollutant); A-1 Sandblasting & Steamcleaning Co. v. Baiden, 53 Or. App. 890, 632 P.2d 1377 (1981), aff'd, 293 Or. 17, 643 P.2d 1260 (1982) ("A-1 Sandblasting")(paint is not a pollutant). The AS insurance policy fails to provide a definition for any of the terms in the exclusion. Sealant for a building is not commonly understood to be a "waste material," "pollutant," "contaminant," or "irritant." Nor to be a "toxic chemical," "toxic liquid," or "toxic gas." Sealant is a useful product desirable as a wall-covering.

The exclusion was added to the contractors policy with AS's knowledge that the policy was insuring the contractor against the risk of liability for accidents occurring on the job of sealing the building. The policy was sold for the purpose of providing the contractor with liability coverage in case third parties made claims for bodily injury or property damage.

The exclusion in the insurance policy in American States Ins. Co. v. Kiger, 662 N.E.2d 945 (Ind. 1996) had a

definition of pollutants identical to the policy here. Id. at 947. Kiger was a Sunoco gas station sued for contamination from a gas tank leak. The court held the language of the exclusion is ambiguous and since it did not specify gasoline, was to be interpreted in favor of the policyholder. The court noted an "oddity" in the insurance company's position that it would sell a garage policy to a gas station "when that policy specifically excluded the major source of potential liability is, to say the least, strange". Id. at 948. To sell a policy to a sealant contractor which excludes liability for damage from the sealant is equally strange. The exclusion here does not list the sealant and is accordingly ambiguous.

AS chose not to draft the exclusion to include specific language barring coverage for a sealant. The more general, undefined terms set forth as a definition of "pollutant" , "toxic chemicals," "toxic liquids," "toxic gas," "waste materials," "contaminants," and "irritants," should be given their usual, ordinary, and accepted meaning. "[Insurance policies] are to be interpreted in accord with the understanding of the average purchaser of insurance." Queen City Farms, Inc. v. Aetna Casualty & Surety Co., 126 Wash. 2d. 50, 882 P.2d 703, 718 (1994). Amici submit that the average person would expect a contractor's insurance policy to cover any fumes from overspraying and the failure to cover the air intake vent. United Pacific Ins. Co. v. Vans Westlake Union, Inc., 34 Wash. App. 708, 664 P.2d 1262 (1983) held that the sudden and

accidental pollution exclusion is meant to deprive "active polluters" of insurance coverage. The contractor here, was not an "active polluter."

II. AMERICAN STATES ERRONEOUSLY ASSERTS THE SEALANT IS A "POLLUTANT." UNDER THE EXCLUSION

AS erroneously argues the sealant is a "pollutant." In Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992), reh'g denied en banc, No. 91-3285, 1993 U.S. App. LEXIS 1100 (Jan. 21, 1993) ("Pipefitters"), the court stated "there is virtually no substance" that could not conceivably be used to irritate or damage. But that does not mean that the same or a similar substance, when incorporated into a product as an ingredient, and used as a product, should be regarded as a "pollutant."

A substance cannot be termed a "pollutant," "contaminant," "irritant," or "toxic substance," solely because, under certain circumstances, it can cause bodily injury.

In Tufco, the court affirmed coverage for vapors released by a material used to resurface the floor since the flooring material was not a "pollutant" under the exclusion. Id. at 700. The court stated:

> [The] common understanding of the word "pollute" indicates that it is something creating impurity, something objectionable and unwanted. The flooring material (styrene monomer resin) brought upon the premises by [the policyholder] was wanted. It was not impure. When [the policyholder] purchased its CGL insurance, it understood "pollutant" in the same way that the Oxford English Dictionary defines "pollutant,"

> as an unwanted impurity, not as the raw materials which [the policyholder] purchased to do its job.

Tufco, 409 S.E.2d at 698. Here, the sealant was not a "pollutant" but a legal product that was wanted when it was used.

In Gamble Farm, the Pennsylvania Superior Court ruled that the so-called "absolute pollution exclusion" was ambiguous and did not bar coverage for carbon monoxide poisoning inside a restaurant, the Gamble Farm court cautioned:

> It is reasonable and understandable that, when issuing an ordinary commercial CGL policy, an insurer undertakes to cover the risks which may occur within a building -- a finite, measurable space with certain risks[.]
>
> * * *
>
> [T]he law does not permit the insurer, by hiding behind the language of its pollution exclusion, to eliminate its responsibility to its insured for the type of loss suffered by [the policyholder]. An attempt to apply the exclusion under these circumstances appears to be an afterthought, based on ambiguous language, rather than the express purpose for which the exclusion was drafted. In such cases, the insured must prevail.

656 A.2d at 146-47.

In A-1 Sandblasting, the court held a polluter's exclusion with terms similar to AS's was ambiguous as applied to passing cars damaged by the overspray of paint while the policyholder was spray-painting a bridge. The insurance company denied coverage contending that paint is either a liquid, or by its chemical composition, an acid or alkali, and thus excluded. Id. at 1379. The Oregon Supreme Court affirmed, stating that a reading of the list of substances "is not 'so clear as to cause a reasonable person in the position of the insured to believe that paint was one of the substances referred to' in the

exclusion. . . ." Id. at 1262. In Island Associates Inc. v. Eric Group Inc., (894 F.Supp. 200 (W.D. Pa. 1995), the court held the pollution exclusion is ambiguous and did not preclude coverage for employees of a medical center who were exposed to fumes from a cleaning compound. The court found:

> "A reasonable person in plaintiff's position could justifiably conclude that [the fumes are not pollutants, as that term is defined in the policy ... we conclude that the exclusion, if read broadly, would be 'virtually boundless' and thus, would impact the scope of coverage far beyond the reasonable expectations of the insured."

Amici recognize that some courts have applied the so-called "absolute pollution exclusion" to preclude coverage for product based injuries. See Oates v. State 157 Misc. 2d 618, 597 N.Y.S.2d 550 (Ct. Cl. 1993). Kaytes v. Imperial Casualty & Indemnity Co., No. 93-1573 (E.D. Pa. Jan. 7, 1994), reprinted in Mealey's Litig. Rep.-Ins. Jan 18, 1994 at G-1. (App. at tab "2") Amici contend that if the flawed logic applied in these cases is taken to its ultimate conclusion, the pollution exclusion would swallow up all coverage promised by the liability insurance policy.[5]

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5. Amici also note that the Oates and Kaytes cases were settled on appeal. Cf. Mount Vernon Fire Ins. Co. v. Valencia, No. 92 CV 1253(RR), 1993 U.S. Dist. LEXIS 13265 (E.D.N.Y. July 6, 1993)("Valencia") (App. at tab "3"). In dicta, the court speculated that a so-called "absolute pollution exclusion" arguably could preclude coverage for lead-based paint claims. That exclusion was not before the court, and this dicta is not controlling. The court held that the "sudden and accidental" polluter's exclusion applies only within the environmental context, and thus did not exclude coverage for lead-based paint claims.

III. THE EXCLUSION AT ISSUE DOES NOT EXCLUDE INSURANCE COVERAGE FOR LIABILITY ARISING OUT OF THE USE OF PRODUCTS

The exclusion does not apply to bodily injury claims arising out of contact with a product. Here, there was no "discharge," "dispersal," "release," or "escape" of a "pollutant" into the environment. The liabilities were caused by failure to cover a small fresh air intake in the course of applying sealant.

In Lumbermens, 23 F.3d 970 (1994), the Sixth Circuit refused to apply the "sudden and accidental" exclusion to a worker injured by highly volatile and toxic fumes caused by cementing strips of rubber on rotating drums. The court found it strains the plain meaning and obvious intent of "discharged," dispersed," "released," or "escaped" language when the fumes were confined to the portion of the plant where the employee worked.

Although the Pipefitters, court found that PCBs discharged from a transformer being readied for scrap are "pollutants," 976 F.2d at 1044. It endorsed a "common sense approach when determining the scope of pollution exclusion clauses":

> The terms "irritant" and "contaminant," when viewed in isolation, are virtually boundless, for "there is virtually no substance or chemical in existence that would not irritate or damage some person or property". Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that

> cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.

Pipefitters, 976 F.2d at 1043 (citation omitted). The Seventh Circuit cited McFadden, A-1 Sandblasting, and Westchester Fire Ins. Co. v. Pittsburgh, 768 F. Supp. 1463 (D. Kan. 1991), aff'd 987 F.2d 1516 (10th Cir. 1993) ("Westchester Fire") as examples of the "common sense" approach, stating:

> The bond that links these cases is plain. All involve injuries resulting from everyday activities gone slightly, but not surprisingly, awry. There is nothing that unusual about paint peeling off of a wall . . . or paint drifting off the mark during a spraypainting job. A reasonable policyholder, these courts apparently believed, would not characterize such routine incidents as pollution.

Pipefitters, 976 F.2d at 1044.

Insurance companies themselves have represented that products are exempted from the reach of polluter's exclusions, and that the exclusions should not apply in circumstances similar to this case. A letter, dated February 4, 1993, to Anthony Bonner of the New York State Insurance Department, from John J. Grody, Secretary, Filing and Regulation Department, the CIGNA Property and Casualty Companies, states:

> [T]he pollution exclusion typically would not rule out coverage for:
>
> > A "bodily injury" claim against a paint manufacturer for a five year old child inhaling or ingesting lead paint in his home; ...

CIGNA Letter, at 3 (App. at tab "4").

The Insurance Environmental Litigation Association ("I.E.L.A."), an insurance industry trade organization of which

AS is a member, submitted a position paper to the Washington Office of the Insurance Commissioner, advising that the operative terms of pollution exclusions contained in liability policies should not be misinterpreted to encompass all liability claims:

> The focus of the Commissioner's concerns in promulgating the proposed regulations has been to expedite cleanup of hazardous waste sites. The definition of environmental claim is intended to encompass such environmental problems. However, it is possible that the phrase "arising from a discharge of pollutants into land, air, or water" could be misused in an effort to reach asbestos or lead claims for example. Plainly, these were not intended to fall within the ambit of this regulation. To make this intent clear, the definition of an "environmental claim" should expressly exclude lead and asbestos claims.[6]

By seeking to escape its duty to indemnify, AS is engaging in the precise conduct which it warns against in the position paper.

IV. MANY COURTS HAVE FOUND THE SO-CALLED "ABSOLUTE POLLUTION EXCLUSION" TO BE AMBIGUOUS AND HAVE APPLIED THE RULES OF INSURANCE POLICY CONSTRUCTION FAVORING POLICYHOLDERS.

Amici urge this Court to follow the numerous courts nationwide that have found similarly worded polluter's exclusions to be ambiguous in the non-environmental context. Many courts have found the pollution exclusion to be ambiguous not

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6. Second Supplemental Comments on Insurance Commissioner Matter R. 94-30: Proposed Rule Making Regarding Environmental Claims Regulation, at 8-9, submitted by the I.E.L.A., the American Insurance Association, the Reinsurance Association of America, the Alliance of America Insurers and the National Association of Independent Insurers to the State of Washington Office of the Insurance Commissioner (Mar. 30, 1995)("Second Supplemental Comments") (App. at tab "5").

"absolute." "[T]he provision is ambiguous and the ambiguity must be resolved against the insurer." McFadden, 595 N.E.2d at 763.

In Sargent, the Eighth Circuit, found that muriatic acid is an irritant or contaminant, but held that the pollution exclusion is ambiguous and that muriatic acid as commonly used in the construction industry was not considered a "pollutant."

The court in Ekleberry, Inc. v. Motorists Mut. Ins. Co., No. 3-91-39, 1992 Ohio App. LEXIS 3778, at *7-8 (Ohio Ct. App. July 17, 1992) (App. at tab "6") found the pollution exclusion to be ambiguous when an ammonia leak inside a poultry processing plant injured a visiting inspector. The court criticized the language of the exclusion:

> [W]e believe the extremely broad language of the 1987 exclusion, in conjunction with the definition of a pollutant, raises an issue as to whether the exclusion is so general as to be meaningless. Clearly, the language of the policy exclusion on its face can be read to exclude any contact with any "chemical" on the subject premises. Thus, ... we believe there remains an issue of fact as to whether the contact with the chemical involved in this case constitutes excluded contact with a "pollutant" as intended by the policy.

Id. at *7-8.

The fact that many cases can be cited to support either side of the issue is itself evidence of the ambiguity of the exclusion. Cohen v. Erie Indem. Co., 288 Pa. Super. 445, 432 A.2d 596, 599 (1981) ("The very existence of two contrary schools of thought evidenced by the conflicting holdings in cases cited by both the Appellee and the Appellant is convincing in the conclusion that the clause in issue is ambiguous as to whether

coverage is to be afforded under the fact situation presented"); Alvis v. Mut. Benefit Health & Accident Ass'n, 201 Tenn. 1981, 297 S.W.2d 643, 645-46 (1956) ("If Judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it."). This reasoning is applicable here.

> In Washington, if there is any ambiguity, policy language should be interpreted to promote coverage. See, e.g., Phil Schroeder, Inc. v. Royal Globe Ins. Co., 99 Wash. 2d 65, 69, 659 P.2d 509 (1983).

Any ambiguity as to the meaning of this exclusion should be construed against the insurance company as the drafter of the instrument. See Cheney v. Bell Nat'l Life Ins. Co., 315 Md. 761, 556 A.2d 1135, 1138 (1989)

The exclusion at issue is ambiguous with respect to whether a sealant falls within proscribed words of the exclusion. This ambiguity was created by AS not by the contractor, who was presented with a standard form insurance policy. The Court should construe the exclusion in favor of the contractor, and against AS.

Here, the contractor purchased a standard form insurance policy to cover its sealing of the building. The contractor is not an industrial polluter, and would have no reason to expect that the exclusion at issue would apply to

injuries arising out of petitioner's contact with the sealant due to its negligence.

CONCLUSION

For the reasons set forth above, Amici Curiae The Fresh Air Fund and United Policyholders respectfully urge this Court to hold that the exclusion at issue does not relieve American States from its duty to indemnify the contractor for liability arising out of the Petitioner's claims.

Dated:
January 30, 1997

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