IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 00249 2000

249 Allocatur Docket 2000

LITITZ MUTUAL INSURANCE CO,

v.

CLIFFORD STEELY and BARBARA STEELY, his wife,
STEVEN BROWN, a minor, by ETHEL BROWN, his guardian,
JACK YEAGER and SHIRLEY YEAGER, his wife.

BRIEF FOR AMICUS CURIAE, UNITED POLICYHOLDERS

Appeal from the Order dated December 28, 1999 in the Superior Court
at No. 1719HBG98 and 00028 MDA99 Reversing the Order of the Court of Common Pleas
Lancaster County, No. 1044-1997, dated October 21, 1998.

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STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders ("United Policyholders" or "Amicus Curiae") is incorporated as a not-for-profit educational organization and was granted tax exempt status under §501(c)(3) of the Internal Revenue Code. United Policyholders' mission is to educate the public on insurance issues and consumer rights thereto, and to assist policyholders to secure prompt, fair, insurance settlements. United Policyholders provides educational materials, provides speakers at community and government forums, organizes meetings in disaster areas, and acts as a clearing house for information on insurance issues.

United Policyholders also provides assistance in large catastrophes. After a disastrous firestorm that destroyed over three thousand structures in Oakland and Berkeley Hills in 1991, United Policyholders sponsored meetings, workshops, and seminars for the victims, and worked with local officials, insurers and relief agencies to facilitate claim settlements. United Policyholders has repeated this process in Florida for victims of Hurricane Andrew, in Texas, for victims of the Northridge Earthquake, and in Northern California after a wildfire.

United Policyholders also files amicus curiae briefs in insurance coverage cases of public importance. Filing amicus curiae briefs is a small, albeit important, part of United Policyholders' activities. United Policyholders' amicus curiae briefs have been accepted by courts throughout the country. See e.g., Humana, Inc. v. Forsyth, 119 S.Ct. 710, No. 97-303, 1999 U.S. LEXIS 744, at *27 (January 20, 1999) (citing to pp. 19-23 of Brief for United Policyholders as Amicus Curiae); Western Alliance Ins. Co. v. Gill, 426 Mass. 115, 1997 Mass. LEXIS 392 (Nov. 10, 1997). United Policyholders' activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae has a vital interest in seeing that standard form comprehensive general ("CGL) liability insurance policies sold to countless policyholders, in Pennsylvania and elsewhere, are interpreted properly and consistently by insurance companies and the courts. Amicus curiae has an interest in seeing that the so-called "absolute" pollution exclusion is not interpreted in a such a way as it extends far beyond its intended reach.

As many as fifty percent of the more than fifty-seven million multiple dwelling units in the United States contain lead-based paint. Evelyn Gilbert, "Lead-Based Paint Liability Prompts New Home Cover," National Underwriter, Property & Casualty/Risk & Benefits Management Section, October 3, 1994, at 46. In New York City alone, health experts have estimated that more than 50,000 children have potentially unhealthy levels of lead in their bloodstream. William Bunch, "Study Eases Up on Lead Cleanups," New York Newsday, July 12, 1995 at A-23. It is not surprising then that in recent years courts have become increasingly congested with lead poisoning lawsuits which often result in million dollar awards for plaintiffs. In Baltimore alone there were 1,140 lead cases filed in 1994. Id.

Lead liability has been estimated to cost $3 billion in claim settlements over the next decade. It is for that reason that United Policyholders believes that the interpretation of the "absolute" pollution exclusion, a standard exclusion in Pennsylvania insurance policies since the late 1980s, is of great importance to thousands of relatively small Pennsylvania policyholders. If their insurance policies are interpreted to provide insurance coverage for lead paint injuries and damage, as they were intended to, this risk will be spread over all policyholders. If, however, this risk is deemed uninsured, surely large numbers of small policyholders will face financial devastation and, in many cases, innocent victims will go uncompensated.

ORDER IN QUESTION

The Superior Court of Pennsylvania issued its Opinion reversing the decision and Order of the Court of Common Pleas of Lancaster County dated October 21, 1998, on December 28, 1999. A true and correct copy of the Superior Court's Opinion and Order are attached hereto and made a part hereof as Appendix A.

STATEMENT- OF QUESTIONS INVOLVED

United Policyholders adopts the Counter-Statement of Policyholder Appellee Steven Brown.

STATEMENT OF THE CASE

United Policyholders adopts the Counter-Statement of the Policyholder Appellee Steven Brown.

I. SUMMARY OF ARGUMENT

This case involves the application of the so-called "absolute" pollution exclusion to the regrettably common bodily injury that results when a child ingests or is otherwise exposed to lead paint inside a residence. The four-hundred-plus-word exclusion purports to exclude:

> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
>
> (a) At or from premises you own, rent or occupy;
> (b) At or from any **site or location used by you or others for the handling, storage, disposal, processing or treatment of wastes;**
> (c) Which are at any time **transported, handled, stored, treated, disposed of, or processed as waste** by or for you or any person or organization for whom you may be legally responsible; or
> (d) **At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:**
> (I) **if the pollutants are brought on or to the site or location in connection with such operations;** or
> (II) **if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.**
>
> (2) 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.

(Emphasis added).

The exclusion begins by purporting to exclude coverage for "pollutants." It then moves on to discuss the various locations or circumstances to which the exclusion applies. Significantly, their description continues to focus on traditional locations and activities associated with environmental pollution.

If the insurance companies' interpretation is accepted, the "absolute" pollution exclusion is misleading both in title and in substance. It is both ambiguous and contrary to

policyholder's reasonable expectations that a pollution exclusion would only exclude coverage for injuries or damages that result from pollution. Ingestion of lead paint is not commonly considered to be pollution.

The focus of this so-called "absolute" pollution is that it purports to exclude damage or injury, in enumerated circumstances, that result from a pollutant. Its first 350 words describe circumstances and uses terms such as "pollutant," "handling, storage, disposal, processing or treatment of wastes," and "operations. . . to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants" that create the unmistakable impression that the exclusion is addressed to environmental-type liability.

The key provisions of the exclusion rely heavily on terms that are commonly-recognized terms of art. Viewed in its entirety, the absolute "pollution" exclusion applies only to pollution-related injuries.

The appellant, however, wishes to extend the reach of the exclusion beyond pollution and "pollutants," to all injuries from substances that cause injury or damage, i.e., are potential or actual "irritants or contaminants." It does so by focusing solely at the very end of the exclusion, where the definition of "pollutants" is buried.

This definition has been widely-recognized as "overbroad" and "ambiguous" by state and federal courts across the country. Numerous courts have also recognized that the "absolute" pollution exclusion can only be meaningfully interpreted as applied to injuries resulting from pollution.

The "context" of this case is an injury that was caused indoors by exposure to a substance that did not pollute the environment. The growing consensus is that the "absolute" and similar pollution exclusions do not apply to injuries indoors, i.e., a residence or workplace. Additionally, the overwhelming majority of courts have held that the exclusion does not apply to ingestion or exposure to lead in a residence.

II. ARGUMENT

A. The Standards Governing Insurance Policy Interpretation

The Pennsylvania standards which govern the interpretation of insurance policies are oft-repeated:

> The interpretation of an insurance contract is a matter of law for the court. The primary objective of contract interpretation is to ascertain and effectuate the intent of the parties as it is reasonably manifested by the language of their written contract. Toombs NJ Inc. v. Aetna Casualty & Surety Co., 404 Pa. Super. 471, 476-477, 591 A.2d 304, 307 (1991); J.H. France Refractories Co. v. Allstate Insurance Co., 396 Pa. Super. 185, 193, 578 A.2d 468, 472 (1990) (en banc), affirmed in part, reversed in part, 534 Pa. 29, 626 A.2d 502 (1993). The words of an insurance policy which are unambiguous should be construed according to their plain and ordinary meaning. Hartford Mutual Insurance Co. v. Moorhead, 396 Pa. Super. 234, 240, 578 A.2d 492, 495 (1990), allocatur denied, 527 Pa. 617, 590 A.2d 757 (1991). The court must assess the writing as a whole, and not in discrete units, when determining whether a writing is ambiguously drafted. Ready Food Products, Inc. v. Great Northern Insurance Co., 417 Pa. Super. 643, 646, 612 A.2d 1385, 1387 (1992). A contract term or provision may properly be deemed ambiguous if reasonable minds can differ as to its meaning. Id. While the court will not allow an overly-subtle or technical interpretation to defeat the reasonable expectations of the insured, it will not convolute the plain meaning of a writing merely to find an ambiguity. Id.

O'Brien Energy Sys., Inc. v. American Employers Ins. Co., 427 Pa. Super. 456, 461, 629 A.2d 957, 960 (1993), alloc. denied, 537 Pa. 633, 642 A.2d 487 (1994).

Most relevant here, an insurance company bears the burden of proving that a relied upon exclusion applies unequivocally. Erie Ins. Exch. v. Transamerica Ins. Co., 516 Pa. 574, 580-81, 533 A.2d 1363, 1366-67; Miller v. Boston Ins. Co., 420 Pa. 566, 218 A.2d 275, 280 (1966); Armon v. Aetna Cas. & Sur. Co., 369 Pa. 465, 469, 87 A.2d 302 (1952).

B. The Policyholder's "Reasonable Expectations" Of Coverage Are The Focal Point Of Insurance Policy Interpretation

A policyholder's "reasonable expectations" of coverage is the "focal point" of insurance policy interpretation under Pennsylvania law. Tonkovic v. State Farm Mut. Auto. Ins. Co., 513 Pa. 445, 456, 521 A.2d 920, 926 (1987); Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 594, 388 A.2d 1346, 1353, cert. denied, 439 U.S. 1089 (1979); see also O'Brien Energy Sys., Inc. v. American Employers Ins. Co., 427 Pa. Super. 456, 462, 629 A.2d 957, 960 (1993), alloc. denied, 537 Pa. 633, 642 A.2d 487 (1994); Dibble v. Security of Am. Life Ins. Co., 404 Pa. Super. 205, 211, 590 A.2d 352, 354-55 (1991); J.H. France Refractories Co. v. Allstate Ins. Co., 396 Pa. Super. 185, 194-95, 578 A.2d 468, 472-73 (1990), aff'd in part, rev'd in part on other grounds, 534 Pa. 29, 626 A.2d 502 (1993); Winters v. Erie Ins. Group, 367 Pa. Super. 253, 257-58, 532 A.2d 885, 887 (1987); State Auto. Ins. Ass'n v. Anderson, 365 Pa. Super. 85, 89-95, 528 A.2d 1374, 1377-79 (1987).[1]

[1] A contrary decision was reached in Gamble Farm Inn, Inc. v. Selective Insurance Co., 440 Pa. Super. 501, 656 A.2d 142 (1995), which opined in a footnote that "the 'reasonable expectations' analysis for the interpretation of insurance policies does not command a majority of our Supreme Court." See, e.g., Gamble Farm, 440 Pa. Super. at 505-06 n.1, 656 A.2d at 144 n.1 (citing Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs. Ass'n Ins. Co., 512 Pa. 420, 426, 517 A.2d 910, 913 n.1 (1986)). The reliance upon Gene and Harvey Builders is misplaced, for two reasons. First, as reflected in Tonkovic, O'Brien, Dibble, J.H. France, and Winters, courts have consistently continued to apply the "reasonable expectations" doctrine long after the Gene & Harvey Builders decision. Second, the Gene and Harvey Builders decision never rejected the "reasonable expectations" doctrine.

1. Under The "Reasonable Expectations" Doctrine A Court Must Examine The Dynamics Of The Insurance Transaction, - Regardless Of Any Ambiguity In The Insurance Policy

It is important to examine the "reasonable expectations" doctrine and its significance in insurance policy interpretation. The Supreme Court has explained the "reasonable expectations" doctrine in the following way:

> The reasonable expectation of the insured is the focal point of the insurance transaction involved here. E.g. Beckham v. Travelers Insurance Co., 424 Pa. 107, 117-18, 225 A.2d 532, 537 (1967). Courts should be concerned with assuring that the insurance purchasing public's reasonable expectations are fulfilled. Thus, regardless of the ambiguity, or lack thereof, inherent in a given set of insurance documents (whether they be applications, conditional receipts, riders, policies, or whatever), the public has a right to expect that they will receive something of comparable value in return for the premium paid. Courts should also keep alert to the fact that the expectations of the insured are in large measure created by the insurance industry itself. Through the use of lengthy, complex, and cumbersomely written applications, conditional receipts, riders, and policies, to name just a few, the insurance industry forces the insurance consumer to rely upon the oral representations of the insurance agent. Such representations may or may not accurately reflect the contents of the written document and therefore the insurer is often in a position to reap the benefit of the insured's lack of understanding of the transaction.
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> * * * *
>
> Courts must examine the dynamics of the insurance transaction to ascertain what are the reasonable expectations of the consumer. See, e.g., Rempel v. Nationwide Ins. Co., 471 Pa. 404, 370 A.2d 366 (1977). Courts must also keep in mind the obvious advantages gained by the insurer when the premium is paid at the time of application. An insurer should not be permitted to enjoy such benefits without giving comparable benefit in return to the insured.

Tonkovic, 513 Pa. at 456-57, 521 A.2d at 926 (quoting Collister, 479 Pa. at 594-95, 388 A.2d at 1353-54) (emphasis added).

As described by an en banc panel of the Superior Court, the "reasonable expectations" doctrine springs from the law's recognition that a contract, such as an insurance

policy, inevitably fails to evince a true "meeting of the minds" as to all possible factual contexts which could arise:

> [T]here is an implicit recognition in law that even the most carefully drafted document and extensively bargained contract will not provide a true proverbial "meeting of the minds" as to all possible, or even likely, scenarios of application. In such cases, contract law requires that the reasonable expectation of the parties be, in essence, imputed as the intent of the parties and, perhaps as important, acquiesced to by the parties to the contract.

J.H. France, 396 Pa. Super. at 194, 578 A.2d at 472. As further explained by the Superior Court, an examination of the policyholder's "reasonable expectations" of coverage "should clearly incorporate an understanding of the general relationship between the parties, the purpose behind their entering a contractual relationship and the relative position of each." J.H. France, 396 Pa. Super. at 195, 578 A.2d at 473.[2]

In the present instance, the insurance policy does not represent a written expression of a contract "extensively bargained" between the policyholder and the insurance company. The Commercial General Liability insurance policy and the exclusion at issue herein was drafted in the 1980s by the Insurance Services Office, Inc. ("ISO"), an insurance industry trade organization which drafts and revises standard-form liability insurance policies.[3] The

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[2] As such, the "reasonable expectation" doctrine is really an application of a long-established rule governing the interpretation of contracts in general: "[I]n construing a contract we seek to ascertain what the parties intended and, in so doing, we consider the circumstances, the situation of the parties, the objects they have in mind and the nature of the subject matter of the contract." United Refining Co. v. Jenkins, 410 Pa. 126, 138, 189 A.2d 574, 580 (1963); see also, In re Estate of Herr, 400 Pa. 90, 93, 161 A.2d 32, 34 (1960) ("The Court in interpreting a will or contract can always consider the surrounding circumstances in order to ascertain the intention and the meaning of the parties."). Indeed, an examination of the "dynamics of the insurance transaction" under the "reasonable expectations" analysis is synonymous with an examination of the "surrounding circumstances" under general rules of contract interpretation.

[3] 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, 509 U.S. 764, 772 (1993). "ISO develops standard policy forms and files or

insurance policy at issue and the particular language was drafted by the Insurance Services Office, Inc. on behalf of hundreds of insurance companies long before the first policyholder was sold an insurance policy containing this exclusion. Since the mid-1980s, identical or virtually identical insurance policies containing this exclusion have been sold to millions of policyholders — from the local florist to Fortune 500s.[4]

It is important to recognize that the required examination of a policyholder's "reasonable expectations" of coverage is not predicated upon an initial finding of ambiguity in the policy language. The Supreme Court has directed that an examination of the policyholder's "reasonable expectations" of coverage must be undertaken, "regardless of ambiguity, or lack thereof, inherent in a given set of insurance documents." Tonkovic, 513 Pa. at 456, 521 A.2d at 926 (quoting Collister, 479 Pa. at 595, 388 A.2d at 1353-54); see also Dibble, 404 Pa. Super. at 210-11, 590 A.2d at 354; Winters, 367 Pa. Super. at 258, 532 A.2d at 887.[5] In so doing, courts,

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lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms." Id. See also In re Hoechst Celanese Corp., 584 N.Y.S.2d 805, 806 (N.Y. App. Div. 1st Dep't 1992) (ISO is "the principal rating, statistical and drafting organization for the general liability insurance industry in the United States, whose primary function is to draft standard-form comprehensive general liability ("CGL") insurance policy language for the industry. . . .")

[4] The undeniable fact is that this policy language was not crafted by the policyholder and likely not provided to the policyholder after the policyholder purchased paid for the insurance policy and received its copy in the mail. United Policyholders asks how, under these circumstances, the policyholder's intent can be ascertained by merely looking at the policy language?

[5] This is a common sense interpretation of the doctrine of reasonable expectations. The essence of the doctrine, first established by Professor Keeton is that:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

> Robert E. Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harv. L. Rev. 961, 967 (1970). If the doctrine of reasonable expectations did not apply unless there is an ambiguity in the language, then the doctrine of reasonable expectations is a nullity. Once there is an ambiguity in the language, the interpretation of the ambiguous language is governed by the doctrine of construing ambiguities against the insurance company drafter. The doctrine of reasonable expectations serves little, if any function in the case of the ambiguity. The doctrine of reasonable expectations provides that the policyholder's reasonable expectations of insurance

however, must examine "the totality of the insurance transaction involved to ascertain the reasonable expectations of the insured." Dibble v. Security of Am. Life Ins. Co., 404 Pa. Super. 205, 210, 590 A.2d 352, 354 (1991). As a result, even the most clearly written exclusion will not bind the policyholder in circumstances in which the policyholder has a reasonable expectation of coverage. See, Bensalem Twp. v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1311 (3d Cir. 1994) (Pa. law); see also Tonkovic, 513 Pa. at 455, 521 A.2d at 926 (citing Collister, 479 Pa. at 594-95, 388 A.2d at 1353-54) Regardless of the ambiguity or lack thereof, inherent in a conspicuous exclusion provision, courts should assure that the policyholder's "reasonable expectations are fulfilled.") As one Pennsylvania federal court has summarized expressed the reasonable expectations principle adopted by the Pennsylvania Supreme Court, "where unambiguous terms do not support the reasonable expectations of the insured, that expectation prevails over the language of the policy." Island Assocs., Inc. v. Erie Group, Inc., 894 F. Supp. 200, 203 (W.D. Pa. 1995) (citing Bensalem Twp., 38 F.3d at 1311.) Thus, the issue before this Court can be framed, in part, does a policyholder have a reasonable expectation that injuries caused by a child's ingestion of dry paint would not be excluded by a provision entitled a "pollution exclusion" whose language purported to address the "discharge, dispersal, release or escape of pollutants. . . .?"

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coverage will be fulfilled although a painstaking study of a portion of the policy language, such as the painstaking study that the parties and this Court is currently undertaking, might reveal that coverage is excluded.

2. The So-called "Absolute" Pollution Exclusion Is Misleading

The so-called "absolute" pollution exclusion, common to general liability policies sold after 1985, states that coverage 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:
>
> (a) At or from premises you own, rent or occupy;
> (b) At or from any site or location used by you or others for the handling, storage, disposal, processing or treatment of wastes;
> (c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or
> (d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:
> (I) if the pollutants are brought on or to the site or location in connection with such operations; or
> (II) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.
>
> (2) 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.

If the intent of the exclusion goes beyond injuries or damage from environmental pollution, then both the title and structure of the exclusion are misleading. The exclusion begins by purporting to exclude coverage for "pollutants." It then moves on to discuss the various locations or circumstances to which the exclusion applies. Significantly, the description continues to focus on traditional locations and activities associated with environmental pollution:

> (a) At or from premises you own, rent or occupy;
> (b) At or from any site or location used by you or others for the handling, storage, disposal, processing or treatment of wastes;

(c) Which are at any time **transported, handled, stored, treated, disposed of, or processed as waste** by or for you or any person or organization for whom you may be legally responsible; or

(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(I) if the pollutants are brought on or to the site or location in connection with such operations; or

(II) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

(emphasis added). Having read the bulk of the exclusion one still gets no hint of the broad scope of exclusion that is argued for by Lititz and the Insurance Environmental Litigation Association.

It is only after painstakingly reviewing the very last part of the exclusion, the definition of "pollutants," that one can begin to get any sense of the true scope of the exclusion. Only after engaging in informed speculation about the potentially broad scope of "pollutants or contaminants" does one begin to get a hint of the potentially broad application of some of its terms, particularly if those terms are taken out of environmental context.

How far can the grasp of a so-called pollution exclusion reach? If the ingestion of paint containing lead in a residence is excluded from coverage because the paint contained a lead constituent is an "irritant" or "contaminant," then what about other non-pollution injuries? If a worker carelessly leaves a bottle of clorox and a young child ingests it, is coverage excluded because the chlorine is a liquid irritant? If a plumber improperly solders a connection on a residential space heater and a child is scorched by escaping steam, is coverage excluded for the property owner or plumber because the steam is a "thermal irritant"?

If soap accidentally spills into a vat of a caterer's soup and a $25,000 wedding reception is ruined because numerous people become sick to their stomachs shortly after the soup

is served, is coverage excluded because the soap is a liquid irritant or contaminant? What if the soup was contaminated with fine debris released because of a roofing company nailing down roofing felt above? If one were to ask the proverbial man in the street, would he think that any of these were examples of injuries caused by pollution? Not likely. More particularly, how many of us read our insurance policies end-to-end, word-by-word? If we were reviewing an insurance policy for provisions of interest, how many of us would think something entitled a "pollution exclusion" was sufficiently relevant to our personal situations as professionals, shopkeepers, small landlords, etc., that we would take time to review its language in depth.[6] Even if we did, how many of us would conceive that the language was intended to apply to any of the above situations?

The exclusion is absolutely misleading. It purports to be a pollution exclusion. The title would cause an ordinary person would thus perceive that the primary focus of the exclusion is directed towards pollution. A property owner would have little reason to critically read an exclusion dealing with pollution. But close attention to what the insurance industry is saying to this Court reveals that what they are trying to foist on this Court, as they have sometimes successfully foisted on other courts, is actually a substance exclusion, i.e. an exclusion that excludes insurance coverage if the substance that causes injury is "any solid, liquid, gaseous or thermal irritant or contaminant..., including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste," regardless of circumstances. Indeed, if the word "pollutants" is not there to provide some limiting principal (i.e., that the exclusion is only intended to apply to true pollution scenarios), it can be eliminated entirely from the exclusion, leaving the exclusion worded to exclude:

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[6] For that matter, how many insurance agents or brokers would even think to discuss a pollution

> bodily injury or property damage arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of ... any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste) at or from premises, owned, rented, by the insured.

The common sense meaning of "pollutant" and "pollution" is something harmful that enters the external environment. If a gasoline leak enters the water supply, and then injures property or persons, the resulting injury or damage is commonly understood to be caused by pollution. However, if, due to some plant mixup, a food product becomes contaminated with gasoline, no reasonable person would understand this to be "pollution," let alone expect the resulting injuries to be excluded by a "pollution exclusion" which purports to exclude injuries from "pollutants."[7]

Indeed, Lititz itself argues that the real purpose of the exclusion is not to address "pollution," but to exclude injuries from all, so-called "hazardous substances," excluding anything that irritates or contaminates, regardless of whether the method of contact with the substance is through pollution or through an indoor, non-polluting, routine, household, commercial, or industrial accident.

No property owner purchasing CGL insurance coverage, particularly for a residential building, would reasonably expect that something entitled a pollution exclusion, purporting to deal with "pollutants," would exclude insurance coverage for all injuries caused within the building by non-polluting substances.

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exclusion with most of their non-industrial, non-manufacturing clients?

[7] A comparison would be if an insurance policy contained an exclusion entitled "industrial building exclusion," which purports to exclude all injuries that occur in "industrial buildings." Buried at the very end of the exclusion, some 350 words later, however, appears the following: "'industrial building' is defined as any permanent structure with a roof." This example of an "industrial building" exclusion with

In J.H. France Refractories Co. v. Allstate Insurance Co., 396 Pa. Super. 185, 578 A.2d 468 (1990), aff'd in part, rev'd in part on other grounds, 534 Pa. 29, 626 A.2d 502 (1993), the Superior Court confirmed that interpreting a policy in light of the nature of the policyholder's business and the insurance purchased to protect that business is mandatory:

> We believe that any manufacturer who is operating with liability coverage has a reasonable expectation that any liability, reasonably encompassed within the policy, which is tied to that manufacturing and distributing process will be covered. After all, that is the primary reason the policy was purchased in the first place.

Id. 396 Pa. Super. at 200-01, 578 A.2d at 476. Residential property owners are no less entitled to have their reasonable expectations than are large manufacture policyholders.

After extensive analysis of the history of contract law and the "absolute" pollution exclusion, Professor Jeffrey Stempel recently observed with respect to lead paint claims that:

> [M]ost property owners sued by tenants because of the condition of the property held a reasonable expectation that this would be covered under a CGL, a view consistent with the purpose of commercial liability insurance and the intent of insurers and policyholders alike.

Stempel, Reason and Pollution Construing the "Absolute" Pollution Exclusion in Context and in Accord with its Purpose and Party Expectations. 34 Tort & Ins. L.J. 1, 48 (Fall 1998) ("Construing the 'Absolute' Pollution Exclusion"). Professor Stemple also wrote that:

> Although lead is a "contaminant" when ingested, the nature of the lead poisoning claims seems a world away from pollution as we normally envision it. Most claims arise because of paint dust from sanding or paint chips ingested by children. This is not much of a "discharge" or "release" of the material, particularly if the child has been peeling paint chips off the wall. Furthermore, lead as a paint additive is not a "contaminant" until ingested by a human.

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its overbroad definition of an "industrial building" is no more extreme than the "pollution exclusion" with its overbroad definition of "pollutants."

> Consequently, the lead claims are in the main claims for injury from improper operation of the property rather than "pollution" claims, as recognized by a majority of courts considering the issue.

Id. at 48-49 (footnote omitted).

The insurance industry should not be allowed to interpret the so-called "absolute" pollution exclusion in a way that is grossly contrary to the reasonable expectation of residential property-owning policyholders.

> [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 appellee [liabilities sustained in connection with the release of carbon monoxide within a building]. An attempt to apply the exclusion under these circumstances appears to be an afterthought, based upon ambiguous language, rather than the express purpose for which the exclusion was drafted.

Gamble Farm, 440 Pa. Super. at 511, 656 A.2d at 147.

C. The Definition Of "Pollutants" Is So Broad As To Be Meaningless

1. Numerous Courts have Recognized that the Definition of "Pollutants," is "Overbroad," "Meaningless," and "Ambiguous

The operative clause of Lititz's pollution exclusion contains a standard-form definition of "pollutants" that is a standard-form definition in 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 v. Urban Land Interest, 564 N.W.2d 728, 732 (Wisc. 1997) ("pollutant" ambiguous when applied to "exhaled carbon monoxide within a building"); Ekleberry, Inc. v. Motorist Mut. Ins. Co., No. 3-91-39 1992 Ohio App. LEXIS 3778 (Ohio Ct. App. July 17, 1992), 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 v. Aetna Life & Cas. Co.,

871 F. Supp. 941, 947 (E.D. Mich. 1994) (finding " discharge, dispersal, release or escape of pollutants" to be ambiguous); Sargent Constr. Co. v. State Auto. Ins. Co., 23 F.3d 1324, 1327 (8th Cir. 1994) ("we hold that the policy's definition of 'pollutants' is ambiguous"); LeFrak Org. v. Chubb Custom Ins. Co., 942 F. Supp. 949, 956 (S.D.N.Y. 1996) ("the policy's definition of 'pollutants' is susceptible of [more than one] equally reasonable meaning").

The Seventh Circuit held that the "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 irritant or damage some person or property.'" Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992) (citation omitted); accord, Island Assocs., 894 F. Supp. at 203 (Pa. law).

2. The Overbreadth of the Definition of "Pollutants" Requires That Some Limited Principle Be Applied; Courts Have Found That Limiting Principle to Be the Restriction of the Exclusion to Traditional Environmental Damages

The "absolute" pollution exclusion with its overbroad definition of pollutants "require[s] some limiting provision" to ensure that the clause does not "extend far beyond its intended scope, and lead to some absurd results." Id.; Center for Creative Studies, 871 F. Supp. 941 (E.D. Mich. 1994).

It is not hard to find absurd consequences. The "absolute" pollution exclusion or a variant is found in virtually all liability insurance policies. Imagine a doctor that is sued for malpractice in treating a child suffering from lead poisoning from paint. The doctor's insurance policy contains an "absolute" pollution exclusion (doctors generate medical waste). The last part of the exclusion purports to exclude coverage: "(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing

operations: ... (II) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants." If the exclusion is not interpreted to be intended to address environmental pollution, but rather, as Lititz suggests, to exclude any bodily injury from an irritant or contaminant, then the doctor has no malpractice insurance because he was treating, detoxifying, or neutralizing a "pollutant."

The limiting principle found in the case law, as will be seen, is that pollution exclusions containing identical or virtually identical definitions of "pollutants" are to be applied only to traditional pollution cases, most typically industrial operations in which the alleged injurious pollutant has been introduced into the environment and then causes injury or damage.

D. The Structure of the "Absolute" Pollution Exclusion Reveals That It Was Patterned After Environmental Liability Statutes; Numerous Courts Have Agreed That The Absolute Pollution Exclusion Only Applies To Pollution Related Injuries

In Madison Construction the policyholder argued that the "true public policy behind a pollution exclusion provision is to prevent the escape of pollutants "into the environment." Madison Constr. Co. v. Harleysville Mut. Ins. Co., 451 Pa. Super. 136, 144, 678 A.2d 802, 806 (1996). This Court rejected that public policy argument. Id.

United Policyholders does not repeat the public policy argument advanced in Madison Construction. Instead, United Policyholders suggests that the language of the absolute pollution exclusion reveals that it was intended by the insurance industry drafters to apply to Superfund-type environmental liability. A comparison of the key concepts in the "absolute" pollution exclusion and language of the exclusion with the environmental terms of art in the Superfund statute, 42 U.S.C. §9601 et seq. (West 1995 and Supp. 1998), reveals that the

definition of "pollutants" in the exclusion is based upon key terms drawn from the environmental liability concepts and terms of art contained in Superfund statute.

Most tellingly, one of the key concepts in the "absolute" pollution exclusion is its purported application to "bodily injury" or "property damage" that "aris[es] out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants..." The inclusion of the modifying word "threatened" provides unmistakable evidence that the exclusion was drafted with the Superfund statute as its primary focus. That the CGL insurance policy would include an exclusion for liability for a threatened damage is, to say the least, unusual. Its purpose in the exclusion only becomes clear when one recognizes that the concept of liability for a threatened release of pollutants is found in the Superfund statute, which creates liability for "a release or threatened release." See, e.g., 42 U.S.C. 9607(a) (emphasis added). Among other things, the Superfund statute creates liability for a government's or third-party's cleanup costs that are incurred in addressing such a release or threatened release. 42 U.S.C. 9607(a)(4)(A).

Other key terms in the absolute pollution exclusion are also found in the Superfund statute. A Superfund "release" means any ... discharging, ... escaping, ... into the environment." 42 U.S.C. 9601(22). As the Illinois Supreme Court has noted, "discharge, dispersal, release, or escape ... add contours to the general concept of a release of an environmentally toxic pollutant." Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1220 (ILL. 1992). Numerous courts have agreed with this interpretation.[8] These courts

[8] See, Continental Cas. Ins. Co. v. Rapid-American, 609 N.E.2d 506, 513 (1993) (the terms "discharge," "dispersal," "release," and "escape" are environmental terms of art); Atlantic Mut. Ins. Co. v. McFadden, 90, 595 N.E.2d 762, 764 (Mass. 1992); Sullins v. Allstate Ins. Co., 667 A.2d 617, 623 (Md. 1995); Essex Ins. Co. v. Avondale Mills, Inc., 639 So. 2d 1339, 1341 (Ala. 1994); West American Ins. Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692, 699 (N.C. Ct. App. 1991); Thompson v. Temple, 580 So.2d 1133 (La. App. 4th Cir. 1991); Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995) (a reasonable interpretation of the pollution exclusion clause is that it applies only to

have recognized that the insurance industry's use of these terms of art evidences an intent that the exclusion is directed to environmental pollution. Indeed, why did the insurance industry name the exclusion a "pollution exclusion" if not because it was intended to address liability caused by pollution of the environment?[9]

It is instructive although hardly surprising, that in order to justify their view that the alleged "plain meaning" of "pollutant" includes lead paint, the IELA insurance companies resort to a page-long reference to environmental statutes, session laws, regulations and the like. As Professor Stempel has noted, even "a holistic view of the exclusion, one that does not focus hyperliterally on a term like arising out of or the laundry list definition of 'pollutant' seems to shout from that page that the exclusion is designed to avoid coverage for what one normally thinks of as pollution (environmental degradation) and Superfund Liability." "Correctly Construing the 'Absolute' Pollution Exclusion in Context" at 41.

Professor Stempel makes his point thusly:

> The pollution exclusion comprises nearly a page of the standard form CGL. It initially lists four subclasses of incidents that are excluded from coverage: (1) discharge at the insured's premises; (2) discharge at premises used for processing or storage of waste; (3) pollution resulting from transport or handling of waste matter by the insured or those for whom the insured is legally responsible; and (4) pollution resulting from subcontractor activity, including cleanup or remediation operations. A second segment of the exclusion, paragraph (2) is focused specifically on excluding coverage for testing or remediation of polluted property or for any government actions seeking cleanup or reimbursement for cleanup.

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environmental pollution); Westchester Fire Ins. Co. v. Pittsburgh, Kansas, 768 F. Supp. 1463, 1468 (D. Kan. 1991), aff'd, 937 F.2d 1516 (10th Cir. 1993) (substances must generally be recognized as polluting the environment); LeFrak Org., Inc. v. Chubb Custom Ins. Co., 942 F. Supp. 949, 955 (S.D.N.Y. 1996) (insurance company argument ignores that "'discharge,' 'dispersal,' 'release,' and 'escape' are environmental terms of art, regardless of the language that follows").

[9] Is it not curious that the litigation machine that the insurance industry has assembled to fight policyholders over the meaning of the various pollution exclusions calls itself the "Insurance Environmental Litigation Association"?

> Only after this approximately 350 words of the exclusion so heavily trained on the Superfund problem does the exclusion include its thirty-one-word laundry list definition of "pollutant."
>
> Today, of course, insurers have asserted that any liability claim against an insurer is excluded if it involves "vapor," "fumes," or "chemicals." But if the entire exclusion is read fairly, is the insurers' position not the hyperliteral "tail" of the exclusion wagging the "dog" of the exclusion's thrust of excluding environmental damage and Superfund claims?

Id. at 41-42.

Perhaps the clearest indication that "pollutant" was intended to apply to environmental pollution can be found in provision (d)(11):

> (d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations: ... (II) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants."

This section of the exclusion reveals that "pollutant" can only be meaningfully understood to be something that first pollutes the environment.

As this Court has noted, "[t]he primary objective of contract interpretation is to ascertain and effectuate the intent of the parties as it is reasonably manifested by the language of their written contract." O'Brien Energy Sys., Inc. v. American Employers Ins. Co., 427 Pa. Super. 456, 461, 629 A.2d 957, 960 (1993) (citations omitted). The title of the exclusion, the language of its key operative terms, and the overall thrust of the exclusion reveal an insurance industry intent to address environmental pollution.

The "absolute" pollution exclusion has been the subject of considerable litigation and interpretation by the courts. There is an emerging consensus in the caselaw that terms at

issue herein do not exclude all injury or property damage merely because the damage is caused by a substance that appears, at least at first blush, to fall within the definition of "pollutants." The emerging judicial consensus is that pollution exclusion clauses identical or virtually identical to those at issue herein were intended by the insurance industry to only exclude insurance coverage for injuries of damages resulting from environmental pollution. See, e.g., Western Alliance Ins. Co. v. Gill, 426 Mass. 115, 118 (1997).

A significant number of courts have concluded that terms such as "discharge," "dispersal," "release," "seepage" and "escape" are environmental terms of art and are not designed to exclude non-environmental pollution. 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 Cas. 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).

E. The Emerging Judicial Consensus That The "Absolute" Pollution Exclusion Does Not Exclude Insurance Coverage Where The Alleged Release Or Damage Is Confined Within A Building Or Other Structure

The judicial consensus is that pollution exclusion terms such 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.

Numerous cases have found that the pollution exclusion 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. 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 Fid. & Guar. 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") (prior version of 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). Similarly, in Gould, Inc. v. Continental Cas. Co., No. 3529 (Pa. Ct. C.P. Phila. Cty. July 26, 1991), reprinted in Mealey's Litig. Rep. Ins. Vol. 5, No. 37 at A-1 (Aug. 6, 1991), the court held that the so-called "sudden and accidental" pollution exclusion did not bar coverage for a claim involving workplace exposure to lead fumes and dust because the exclusion applied only to occurrences outside the workplace.[10]

The so-called "absolute" pollution exclusion has been found to be inapplicable in situations in which the injury occurred from a substance that was confined indoors:

> -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);
>
> --Injuries to a mechanic sustained from pesticide dripping from the policyholder's pesticide container when the container fell off a

[10] Courts have also reached a similar result by finding that the dictionary definitions of these terms do not apply to fumes that are not released by active human agency. See e.g., Lumbermans Mut. Cas. Co. v. S-W Indus., Inc., 39 F.3d at 1336 (citing Webster's Third New International Dictionary 644, 653, 1917, 774 (1986)); Bituminous Cas. Corp. v. Advanced Adhesive Tech., 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").

truck and lodged on an automobile the mechanic subsequently hoisted up on a lift. Red Panther Chem. Corp. v. ICSOP 43 F.3d 514 (10th Cir. 1994);

-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, 871 F. Supp. at 946-47;

-Injuries incurred when 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 (Wisc. 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. (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. Gamble Farm Inn Inc. v. Selectine Insurance Co. 440 Pa. Super 501, 656 A2d 142; 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 the backup of sewage from a septic system which flooded the interior of a mobile home. Minerva Enters., Inc. v. Bituminous Cas. 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 should not be read to exclude insurance coverage where the release and resulting damage from an alleged pollutant is confined, as here, to an enclosed space.

F. The Majority of Courts Hold That the "Absolute Pollution Exclusion Does Not Exclude Indoor Lead –Pigmented Paint Injuries.

To the above list must be added the majority of cases dealing with injuries caused by lead paint released within landlord's building. See, e.g., United States Liab. Ins. Co. v. Borbeau, 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); Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762, 764 (Mass. 1992). As noted by the Massachusetts Supreme Judicial Court in a case virtually identical to this one, 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." Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d at 764.

In McFadden, the Supreme Court of Massachusetts held that in-place lead paint is not a "pollutant" under the so-called "absolute" pollution exclusion. Indeed, the McFadden lower court had ruled that, "there is no language in the policy which even suggests that lead in paint, putty, or plaster is a 'pollutant' within the meaning of the provision." 595 N.E.2d at 763. The Massachusetts Supreme Court similarly rejected the insurance company's argument. The court concluded:

> There simply is no language in the exclusion provision from which to infer that the provision was drafted with a view toward limiting liability for lead paint-related injury. The definition of "pollutant" in the policy does not indicate that leaded materials fall within its scope.

595 N.E.2d at 764.

In Mount Vernon Fire Insurance Co. v. Valencia, No. 92 CV 1253, 1993 U.S. Dist. LEXIS 13265 (E.D.N.Y. July 6, 1993), the judge awarded sanctions and attorney's fees to the policyholder on the ground that the insurance company had asserted an insupportable claim that a so-called absolute pollution exclusion barred coverage for claims arising from lead poisoning. The judge stated that "had [Mount Vernon's] counsel made the required inquiry into the law surrounding the pollution exclusion, he could not have come to the conclusion, consistent with minimal standards of professional competence, that the pollution exclusion would operate to exclude coverage of the [defendants in the underlying claim]." Id. at *16.

The federal district court, interpreting New York law, denied an insurance company's motion to amend its complaint to add a count that insurance coverage is precluded under the so-called "absolute" pollution exclusion in a case seeking coverage for liability involving lead-based paint. Mount Vernon Fire Ins. Co. v. Valentin, No. 91-CV-0909, slip op. at 2 (E.D.N.Y. Mar. 29, 1994) ("Valentin").

The Valentin court denied leave to amend because, under New York law, that policy provision could not be invoked to deny coverage for a claim involving lead-based paint:

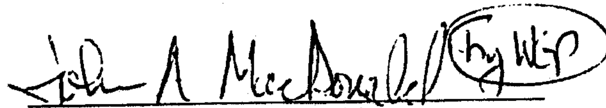
> because plaintiff's proposed amendment lacks any merit under the law of the state [sic] of New York. The New York Court of Appeals recently ruled that a pollution exclusion clause substantially identical to the clause in the contract at issue in this case does not preclude liability for injuries sustained indoors,

III. CONCLUSION

It is respectfully asserted that the so-called "absolute" pollution exclusion does not exclude insurance coverage for the defense and indemnity of the underlying action.

Respectfully submitted,

December 26, 2000
DATED



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