IN THE SUPREME COURT OF FLORIDA

DEN1 ASSOCIATES OF FLORIDA, INC.,

Petitioner,

vs.

CASE NO.: 89,115

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

Respondent.

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

AMICUS BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND FACTS

The Academy relies on the statements of the facts as set forth in the Fourth District opinion and the briefs of the parties.

This Court's order of November 8, 1996 granted the Academy's motion to appear as an amicus on behalf of the policyholder in this proceeding. In light of the Court's order declining to consolidate the *Deni* appeal (Case No. 89,115) and the Fogg appeal (Case No. 89,300), the Academy has filed the same substantive amicus brief in both cases.

CERTIFIED QUESTION ON APPEAL

WHERE AN AMBIGUITY IS SHOWN TO EXIST IN A CGL POLICY, IS THE COURT LIMITED TO RESOLVING THE AMBIGUITY IN FAVOR OF COVERAGE, OR MAY THE COURT APPLY THE DOCTRINE OF REASONABLE EXPECTATIONS OF THE INSURED TO RESOLVE AMBIGUITIES IN CGL POLICIES?

SUMMARY OF ARGUMENT

The facts of these cases illustrate the Academy's concern that some insurers are attempting to expand the scope of the pollution exclusion typically found in today's comprehensive general liability (CGL) policies far beyond what a "pollution" exclusion should address. While the exclusions at issue here are not ambiguous as applied to the typical disposal of waste material that damages the environment, they **are** ambiguous when applied to the facts of these cases.

If construed in the fashion these insurers urge, the pollution exclusion would render CGL coverage illusory for risks for which policyholders bought such coverage, including for many insureds, the key risks in their businesses. In order to restore reason and predictability to the process of obtaining commercial liability insurance coverage, the Academy urges this Court (1) recognize the ambiguities in the pollution exclusion as applied to certain factual occurrences, or (2) adopt the doctrine of objective reasonable expectations of the insured to provide coverage if the Court concludes the literal language of the CGL policy might not otherwise provide it.

ARGUMENT

WHERE AN AMBIGUITY IS SHOWN TO EXIST IN A CGL POLICY, THE COURT SHOULD RESOLVE THE AMBIGUITY IN FAVOR OF COVERAGE. IF THE COURT CONCLUDES THE LITERAL LANGUAGE OF THE CGL POLICY WOULD NOT PROVIDE COVERAGE IN A SITUATION WHERE THE REASONABLE EXPECTATIONS OF THE OBJECTIVE INSURED WOULD PROVIDE COVERAGE, THE COURT SHOULD FOLLOW THE DOCTRINE OF REASONABLE EXPECTATIONS TO FIND COVERAGE.

A. THE POLLUTION EXCLUSION AT ISSUE.

The Fourth District majority opinion does not quote the full pollution exclusions in the two policies at issue, but notes they are "substantively identical." ***State Farm Fire*** & Casualty ***Insurance Company v.*** *Deni* ***Associates of*** Florida, ***Inc., 678 So.*** 2d 397, 399 (Fla. 4th DCA 1996). The opinion indicates the policies at issue exclude coverage for personal injuries caused by the "discharge, dispersal, release or escape of pollutants." The majority states the policies define "pollution" as:

> any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

678 So. 2d at 399 (actually, if consistent with the standard IS0 language, the policies probably define "pollutants" and not pollution in this manner; see also Judge Klein's dissent, 678 So. 2d at 406).

The Academy notes the insurance industry revised the 1985 version of the pollution exclusion in 1988. The Insurance Services Office (ISO) is an entity through which insurance industry representatives, among other things, draft policy language which insurers may choose to use in their policies.[1] The industry typically refers to the 1985 exclusion as the "absolute pollution exclusion" and the 1988 exclusion as the "total pollution exclusion."

While the definitions of "pollutants" in the 1985 and 1988 exclusions are nearly identical, there are differences in other portions of the exclusions.[2] These wording differences mean there could be some situations where coverage may vary under the different exclusions and where the exclusions may not apply for reasons not addressed by the Fourth District. However, the Academy will limit its argument to the language of the exclusion the Fourth District addressed.

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[1] See Lathrop, Insurance **Coverage for Environmental Claims,** § 25.05[2][a]. p. 25-50 (1993).

[2] The insurance industry highlighted the 1988 changes in the settlement of major litigation against IS0 and several insurers which **was** based in large part on the insurance industry's domination of ISO. A key allegation by several states charged the insurers forced IS0 to rewrite the then-new 1985 pollution exclusion to the 1988 form. Judy Greenwald, "Antitrust Settlement To Alter ISO, Industry, " ***Business Insurance,*** p. 1 (October 10, 1994).

B. APPLICABLE STANDARDS OF CONSTRUCTION.

"Where there are two interpretations which may fairly be given the language used in a policy, the one that allows the greater indemnity will govern." *Ward v. Nationwide Mutual Fire Insurance Company,* 364 So. 2d 73, 77 (Fla. 2d DCA 1978). "That rule is particularly applicable in the case of exclusions, since the burden rests on the insurer to phrase exceptions in clear and unmistakable language." *Id.* "Terms of exclusion in an insurance policy, however, are to be narrowly construed and uncertainties are to be resolved in favor of coverage." *Kirsch v. Aetna Casualty & Surety Company, 598 So. 2d 109, 112* (Fla. 2d DCA 1992), *review denied, 613* So. 2d 1 (Fla. 1992).

As *Green* Lawn *Systems, Inc. v. American Economy Insurance Company,* 620 So. 2d 1290 (Fla. 2d DCA 1993), observed, where a policy term is ambiguous, the court will construe it in different ways in different situations in order to resolve the ambiguity in favor of the policyholder and against the insurer.[3]

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[3] Although perhaps not directly on point in this case, because coverage disputes often arise in the context of the insurer's duty to defend, the Academy notes that under Florida law, if the allegations of the complaint leave any doubt as to the insurer's duty to defend, the question must be resolved in favor of the policyholder. See, e.g., *Baron Oil Company v. Nationwide Mutual Fire Insurance* Co., 470 So. 2d 810, 814 (Fla. 1st DCA *1985); Lime Tree Village Ccxnrnunity Club Association, Inc. v. State Farm General Insurance Company, 980* F.2d 1402, 1405 (11th Cir. 1993). If the complaint alleges facts showing two or more grounds for liability, one being within the insurance coverage and the other not, the insurer is obligated to defend the entire suit. Baron, at 813-814.

The majority opinion in *Deni* referred to what it called the "objective" theory of contractual intent. With **all** due respect, this ignores established Florida law on the construction of exclusions and the reality that these CCL policies are form contracts promulgated by the insurance industry. Most insureds will have no bargaining power and no choice but to accept the forms dictated by the industry. See, e.g., *Pasteur Health Plan, Inc. v. Salazar, 658 So.* 2d 543, 544 (Fla. 3d DCA 1995) ("Such insurance policies are known in law as 'contracts of adhesion,' meaning 'a standardized contract, which, imposed and drafted by the party of superior bargaining strength [insurer], relegates to the subscribing party [insured] only the opportunity to **adhere** to the contract or reject it'"; emphasis supplied by court).

C. THE ABSOLUTE POLLUTION EXCLUSION IS AMBIGUOUS WHEN APPLIED TO THE FACTS OF THESE CASES.

Although the *Deni* majority described the terminology used in the definition as "clear, simple, non-technical language," Judge Stone and Judge Klein observed the definition of "pollutants" at issue in *Deni* is ambiguous as applied to the ammonia in that case. *Deni*, 678 So. 2d at 404, 408.

The majority noted this Court has found the form of the pollution exclusion containing the "sudden and accidental" exception unambiguous. *Dimrnitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation, 636* So. 2d 700 (Fla. 1993). It

expressed the opinion it could not find the absolute pollution exclusion ambiguous with the "sudden and accidental" exception removed. *Deni, 678 So.* 2d at 400. *Dimmitt,* however, did not address the definitional ambiguity of "pollutants."

No one in *Dimmitt* disputed that waste oil sludge placed in unlined storage ponds which leached into the soil and groundwater causing environmental contamination was in fact a pollutant. Id., *636 So.* 2d at 701. Unlike the cases now before the Court, *Dimmitt* did not confront a factual situation involving substances that (1) are not clearly "pollutants," (2) caused no environmental contamination, and (3) objective insureds would not have considered "pollutants."

Thus, *Dimmitt* does not dictate the result here because it did not address the question presented here: the portion of the exclusion defining pollutants. Put another way, as Judge Stone's dissent observes, *Dimmitt* is inapposite. *678 So.* 2d at 406.

The Second District, for example, has held language in a homeowner's policy excluding damage resulting from "water" or from "pollutants or contaminants" was ambiguous as applied to the facts of the case, and found in favor of the insured. *Florida Farm Bureau Insurance Company* v. Birge, 659 So. 2d 310 (Fla. 2d DCA 1994), *review denied,* 659 So. 2d 271 (Fla. 1995). In *Birge,* the damage was caused by raw sewage which had filled the insured's house. Id., at 311. The court noted the "average homeowner's

examination of the insurance contract would not reveal the applicability of these exclusions to this type of disaster." ***Id.***

The insurers urge a broad interpretation of the definition of "pollutants" which could encompass almost every substance used on a daily basis, no matter how benign under normal circumstances, such as soap and hot water. However, as the Florida cases hold, exclusions are not to be interpreted broadly, but construed narrowly.

Judge Klein observes, "I quite frankly do not think that even State Farm intended this exclusion to leave its insured without coverage for the type of accident which occurred here." ***678 So.*** 2d at 406. The insurance industry's own comments confirm Judge Klein's suspicions.

The insurance industry acknowledges it intended this pollution exclusion to be read more narrowly than these insurers now argue. See, Richard Levy, "Avoid the Exclusions," ***Business Insurance,*** March 1, 1993, p. 19. In his article, Levy quotes a transcript of an October, 1985, Texas insurance hearing in which the 1985 pollution exclusion was discussed. When asked about the breadth of scope of the definition of "pollutants," an insurance industry spokesman admitted they "overdrafted it":

> We have overdrafted the exclusion. We'll tell you, we'll tell anybody else, we overdrafted it. But anything else puts us back where we are today.

Id.

In that same discussion, a questioner gives an example of an acid spill in a grocery store where a child falls in the acid and

is disfigured. The questioner says his reading of the exclusion is that pollution is excluded from the policy and there is no coverage. Id. The industry representative responded, "That is a reading yeah," but then admitted, "our insureds would be at the State Board. . . quicker than a New York minute if, in fact, every time a bottle of Clorox fell off a shelf at a grocery store and we denied the claim because it's a pollution loss." Id. (emphasis added).

When then questioned if the courts would refuse to read the policy that way if the insurance company attempted to, the representative asserted, "Nobody would read it that way." *Id.* Apparently this insurance representative did not figure on the positions of State Farm and Farm Bureau here.

Consistent with the narrower meaning IS0 indicates was intended, many courts confronted with the above definition of pollutant have recognized the danger of a broad construction:

> [T]here is virtually no substance or chemical in existence that would not irritate or damage some person or property. The terms "irritant" and "contaminant," however, cannot be read in isolation, but must be construed as substances generally recognized as polluting the environment.

Westchester Fire Insurance Company v. City of Pittsburg, Kansas, 768 F. Supp. 1463, 1470 (D.Kan. 1991), *affirmed, 987* F.2d 1516 (10th Cir. 1993) *("Westchester Fire I").* *Westchester Fire I* gave the following examples of everyday substances which could fall within this definition:

> If a child at a city pool complains about the chlorine in his or her eyes, the causative factor is a chemical but the city has not polluted the environment. If a fire

> hydrant sprays water on a passer-by, that water may be an "irritant" to the person, but again the municipality responsible for the fire hydrant has not polluted the environment.

Id. Similarly, every container of Coca-Cola, indicates it contains phosphoric and citric acids, thus bringing it within the literal definition of pollutant which includes "acids." Coca-Cola could cause property damage if spilled on sensitive computer equipment. Yet, it would be ridiculous to suggest such an occurrence would be excluded by arguing Coca-Cola is a "pollutant."[4]

Like Fogg, *Westchester Fire I* involved injuries allegedly sustained when individuals were sprayed with an insecticide called malathion. *Id.,* at 1465. The court found the policy language ambiguous and denied the insurer's motion for summary judgment. *Id.,* at 1471. On rehearing, the court held material issues of fact as to whether malathion was a "pollutant," precluded summary judgment on the issue of coverage. *Westchester Fire Insurance Company v. City of Pittsburg, Kansas, 794* F. Supp. 353, 355 (D.Kan. 1992), *affirmed,* 987 F.2d 1516 (10th Cir. *1993) ("Westchester Fire II").*

At trial, the court determined malathion was not a "pollutant" for purposes of the pollution exclusion:

> The evidence adduced at trial established that malathion is widely used throughout the United States and has been approved by the EPA as a method of mosquito control. If used properly, at the right concentrations and with minimal exposure to humans, it is a safe and effective

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[4] The trial court in *Fogg* observed, "'milk is an irritant to persons allergic to it,' and reasoned that the broadness of the definition 'would swallow the coverage of the policy.'" *Deni, 678 so.* 2d at 400.

> method of mosquito eradication. . . . Although any pesticide is potentially harmful to humans, under normal circumstances the use of malathion as a pesticide does not pose a danger to humans or the environment. Therefore, the court concludes that the mixture of malathion and diesel fuel at issue is not a "pollutant" under the terms of the insurance policy.

Westchester Fire Insurance Company v. City of Pittsburg, Kansas, 791 F. Supp. 836, 837 (D.Kan. 1992) ("*Westchester Fire III*").

Numerous courts agree IS0 and the insurers chose ambiguous terms to define pollutant. *Regent Insurance Company v. Holmes, 835* F. supp. 579, 581 (D.Kan. 1993), noted the exclusion does not define the terms "irritant" or "contaminant." It further recognized the terms "irritant" and "contaminant":

> admit of no natural or ordinary interpretation, however, because it is unclear whether they refer to substances which ordinarily irritate or contaminate, substances which have in fact irritated or contaminated under these particular circumstances, regardless of theirtendencyto irritate or contaminate under most circumstances, or both.

Id., at 582.[5]

The court observed the ambiguity caused by failing to define those terms and went on to hold that formic acid which severely burned a child with no discernable injury to the environment was not a "pollutant" within the meaning of the definition even though acid is specifically mentioned in the definition of "pollutants." *Id.* Like the injury to the child in *Regent* caused by the formic

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[5] *Regent* quoted definitions of "irritant" and "contaminant" from *Webster's Third New International Dictionary (1986).* **It** defines an irritant as "something that irritates or excites" and as "an agent by which irritation is produced." Similarly, *Regent* notes a contaminant is "something that contaminates," again noting the ambiguity in whether it was required to be harmful to the environment generally. *Id.*

acid spill, the injuries in *Deni* and *Fogg* caused by the ammonia spill and the sprayed insecticide were discrete injuries which inflicted no discernable injury to the environment. Thus, the substances in question are not "pollutants" for which the CGL policies exclude liability. *See Id.*

Regent also noted that by referring to the acid's effect as an irritant in that particular case, the insurer sought to avoid the ordinary meaning of "pollutant." "This it may not do," held the court. Because the spilled acid was not a pollutant under the policy, the court did not even reach the issue of how the terms "irritant" and "contaminant" might further limit that definition. 835 F. Supp. at 582, n.6.

By arguing ammonia spilled from a piece of office equipment or insecticide routinely and lawfully sprayed on orange groves are pollutants, the insurers are asking this Court to stretch the definition of "pollutant" beyond what a reasonable person placed in the position of the insured would have understood it to mean, and beyond what the insurance industry intended it to mean. See *Security Insurance Company of Hartford v. Commercial Credit Equipment Corporation,* 399 So. 2d 31, 34 (Fla. 3d DCA 1981), *review denied,* 411 *So.* 2d 384 (Fla. 1981); *see also Weldon v. All* American *Life Insurance Company, 605 So.* 2d 911, 915 (Fla. 2d DCA 1992); *Ward, supra; Westchester Fire I, supra; Regent, supra.*

Courts across the country have adopted a common sense approach when determining the scope of pollution exclusion clauses, and have interpreted "pollutant" as a "substance that is particularly

harmful or toxic to persons or the environment generally, and **not merely those substances harmful to particular persons or property due to special circumstances."** *Westchester Fire II, 794* F. Supp. at 355 (D.Kan. 1992), *affirmed, 987* F.2d 1516 (10th Cir. 1993) (emphasis added).

In *Deni,* the ammonia spilled from the blueprint machine only caused injury because of the closed-in nature of the building. The same would be true if the ammonia had spilled onto and damaged a piece of computer equipment. As noted above, a computer could also be damaged by spilled Coca-Cola, yet no reasonable person would consider Coca-Cola a "pollutant" simply because of its acid content.

Similarly, insecticide routinely sprayed on orange trees is not harmful or toxic to persons or the environment generally. The individuals in *Fogg* were injured because they were accidently sprayed directly with the insecticide. Under the factual situations now before this Court, neither the ammonia nor the insecticide can unambiguously be interpreted as "pollutants."

In *A-l Sandblasting & Steamcleaning Co., Inc. v. Baiden, 53* Or. App. *890, 632* P.2d 1377 (1981), *affirmed, 293* Or. 17, 643 P.2d 1260 (1982), the court illustrated this common sense approach in interpreting pollution exclusion language. There, **a** bridge painter brought a coverage action against his insurer for overspray damage

to passing cars. In rejecting the insurer's broad interpretation of the exclusion[6], the court held:

> Defendants further argue that because of the chemical composition of paint, it is included within the excluded class of **acids or alkalis. While it may be technically true that paint could fall within these classes, we do not believe that that meaning is so clear as to cause a reaaonable person in the position of the insured to believe that paint was one of the substances referred to in exclusion (h).**

Id., at 1379 (emphasis added).

Island Associates, Inc. v. Eric Group, Inc., 894 F. Supp. 200 (W.D.Pa. 1995), likewise used **a** common sense approach to find the absolute pollution exclusion did not bar **coverage** for harm caused by exposure to fumes from **a** cleaning compound used by an asbestos abatement subcontractor.

Similarly, ***Consolidated American Insurance Company v. Ivey's Steel Erectors, Inc.,*** M.D. Fla. Case No. 90-205-CIV-ORL-19 (J. Fawsett Mar. 11, 1991 order) (**Mealey's Litigation Reports, Insurance,** Vol. 5, #28) denied the insurer's motion for summary judgment on the duty to defend and granted the policyholder's motion.

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[6] The exclusion provided:

> (h) For damage to property 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 watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id., at 1378.

In Ivey's *Steel,* individuals alleged they were injured from exposure to toxic levels of lead while welding on steel which had been painted with a lead-based paint. Employing an analysis similar to above, the court found the pollution exclusion ambiguous: "It is unclear whether the pollution exclusion clause was intended to apply to dangerous work environments where the conditions within the work area may be toxic but once disbursed into the atmosphere the smoke, fumes or vapors do not reach a toxic level." *Id.,* **at** p. 5.

Ivey's Steel noted the **case** differed from cases involving damage or clean-up resulting from environmental pollution, distinguishing, among others, the trial court decision in *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., 636 So.* 2d 700 (Fla. 1993).[7]

The Arkansas Supreme Court addressed the same "pollutants" ambiguity in the 1988 pollution exclusion in *Minerva Enterprises, Inc. v. Bituminous Casualty Corp.,* 312 Ark. 128, 851 S.W. 2d 403, 406 (1993). Citing numerous cases, including several cited herein, the court concluded: "We are persuaded by these cases and their rationale and find the pollution exclusion in the **case** before us is, at least, ambiguous."

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[7] The policy in Ivey's *Steel* used the same exclusion as in A-l *Sandblasting.* However, the case did not turn on the "sudden and accidental" portion of the exclusion, which **was** the portion addressed in *Dimmitt.* The definitional ambiguity Ivey's addressed continues to exist, as reflected in the decisions discussed herein on the 1985 and 1988 exclusions. As discussed above, *Dimmitt* did not address this issue.

The court reached a similar result in West *American Insurance* ***Company v. Tufco Flooring East, Inc., 104*** N.C. App. 312, 409 S.E.2d 692 (N.C. App. 1991), ***review denied, 332 N.C. 479, 420*** S.E. 2d 826 (N.C. 1992). ***Tufco*** affirmed the trial court's summary judgment in a declaratory judgment action in favor of the insured, Tufco Flooring East, Inc. ("Tufco"), and Perdue Farms, Inc. ("Perdue") on the following facts.

Perdue hired Tufco to resurface the floors in one of its chicken processing facilities. While the work was being done, chicken products stored in a cooler adjacent to one of the areas being resurfaced came into contact with styrene vapors or fumes released from the chemicals used by Tufco during the resurfacing work. Contact with the fumes rendered the chicken unfit for human consumption, forcing Perdue to dispose of $500,000 worth of chicken parts.

West American denied coverage for the contaminated chicken on the ground the vapors emanating from the flooring material constituted a "pollutant." The court disagreed even though the definition of "pollutants" expressly includes "fumes" and "vapors."

Sargent Construction Company, Inc. v. State Auto Insurance Company, 23 F.3d 1324, 1327 (8th Cir. 1994), stated the application of the 1985 pollution exclusion to the facts of a particular case depends on whether the substance can be classified as an "irritant or contaminant." There, the insured used muriatic acid to etch a concrete floor in a building which emitted fumes that damaged

chrome fixtures. The Eighth Circuit held the term "irritant or contaminant" is susceptible of more than one meaning:

> A substance could be described as an "irritant or contaminant" because it **in** fact has caused physical irritation, resulting in bodily injury, or contaminated the environment, causing property damage. The same substance could also be deemed an "irritant or contaminant" because it has the **capability** of causing physical irritation or contaminating the environment, regardless of whether the accident giving rise to the specific claim involved such harm. Accordingly, we hold that the policy's definition of "pollutants" is ambiguous.

Id. (emphasis supplied by court).'

While the pollution exclusion is ambiguous when applied to the factual scenarios in *Deni* and Fogg, the Academy recognizes there will be situations such as the waste oil sludge in *Dimmitt* in which the absolute pollution exclusion is not ambiguous. *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Company*, 976 F.2d 1037 (7th Cir. 1992), held the absolute pollution exclusion barred coverage for environmental damage caused by 80 gallons of PCB-laden oil discharged into the soil Even so, the court recognized that without some limiting principle:

> [t]he 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."

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[8] The undersigned represented the contractor/policyholder in **a** suit nearly identical to *Sargent* in which the trial court determined the absolute pollution exclusion did not preclude coverage. *U.S. Fire Ins. Co. v. Barger Interests,* Pinellas Circuit Court Case No. 93-1576-CI-8 (December *5,* 1994), *per curiam affirmed, 659 So.* 2d 1096 (Fla. 2d DCA 1995). Reflecting the different approaches insurers take, another insurer for the subcontractor in *Barger* who actually applied the acid did not contest coverage for its insured in the face of the same pollution exclusion.

Id., at 1043 (quoting from *Westchester Fire I,* *768* F. Supp. at *1470).* The Seventh Circuit observed that cases in which courts found coverage, the absolute pollution exclusion notwithstanding, had a common theme: All involve "everyday activities gone slightly, but not surprisingly, awry." Id., at 1044. *Pipefitters Welfare Education Fund,* however, determined no reasonable policyholder would consider 80 gallons of PCB-laden oil discharged onto the land as anything but pollution. *Id.*

By contrast, the activities in *Deni* and *Fogg* are those everyday activities gone slightly, but not surprisingly, awry. See *Pipefitters* Welfare *Educational Fund, supra.* In *Deni*, it was the use of a blueprint machine. In *Fogg*, it was the routine spraying of an approved insecticide on an orange grove. Neither would be considered pollution by a reasonable policy holder.

To the extent there may be cases which conflict with the cases cited above finding coverage under certain scenarios, that conflict emphasizes the ambiguity in the exclusion as applied in those situations, as does the deep split in the Fourth District opinions. *See Deni*, J. Klein dissenting, 678 So. 2d at 407-08. In light of the extensive disagreement this exclusion has generated, there is simply no way nonlawyer policyholders should have expected not to be covered in these cases.

D. NEITHER THE SPILLED AMMONIA NOR THE SPRAYED INSECTICIDE CONSTITUTE AN EXCLUDED DISCHARGE.

Even if the insurers could prove the spilled ammonia and the sprayed insecticide were pollutants, they would also have to prove there was a "discharge, dispersal, seepage, migration, release or escape". These terms, as applied to the facts of *Deni* and *Fogg*, are ambiguous because the terms can reasonably be interpreted to apply only to environmental pollution.

Tufco, *supra*, found the pollution exclusion did not bar coverage to Tufco for Perdue's claims because the pollution exclusion applies only to discharges into the environment. Recognizing this new pollution exclusion differs from the older version in that it omits language requiring the discharge to be "into or upon land, the atmosphere or any water course or body of water," the court stated there was no indication this change was meant to expand the scope of the clause to non-environmental damage. The court quoted from the International Risk Management Institute, Inc., Commercial Liability Insurance, Volume I, Section V, Annotated CGL Policy (1985), which stated the 1985 amendment to the pollution exclusion clause **was** "intended by the insurance industry to exclude governmental clean up costs from coverage." ***Tufco***, 409 S.E. at 699. ***Tuf*** co concluded:

> 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" . . . is insignificant.

Id., at 700 (emphasis added) . The court, therefore, refused to change the historical limitation that the pollution exclusion clause does not apply to non-environmental damage. See *Calvert Insurance Company* v. S & *L* Realty *Corp., 926* F. Supp. 44, 47 (S.D.N.Y. 1996) ("discharge, disposal, seepage, migration, release or escape" are terms of art in environmental law); see also *Center for Creative Studies v. Aetna Life and Casualty Company, 871* F. Supp. 941 (E.D. Mich. 1994) (adopting *Tufco* reasoning and holding ambiguous absolute pollution exclusion did not apply to student injured from exposure to photographic chemical).

Similarly, *Stoney Run Company v. Prudential-LMI Commercial Insurance Company,* 47 F.3d 34 (2d Cir. 1995), also looked to the general purpose of the pollution exclusion clause -- the exclusion of coverage for environmental pollution. *Id.,* at 37. The court held the absolute pollution exclusion clause was ambiguous because an insured could reasonably interpret the clause as applying only to environmental pollution, and not to all contact with substances that can be classified as pollutants. *Id.,* at 38. There, tenants in an apartment building were killed or injured by the inhalation of carbon monoxide emitted from a faulty heating and ventilation system. *Id.,* at 35. See also S.N. *Golden Estates, Inc. v. Continental Casualty Company,* 680 A.2d 1114 (N.J.Super.A.D. 1996) (exclusion meant to apply to traditional environmental type damages) ; *Regional Bank of Colorado, N.A. v. St. Paul Fire and Marine Insurance Company,* 35 F.3d 494, 498 (10th Cir. 1994) (reasonable policy holder would understand pollution exclusion as

being limited to irritants and contaminants commonly thought of as environmental pollution).

In a case similar to *Fogg, Karroll v. Atomergic Chemetals Corp.,* 600 N.Y.S. 2d 101, 102 (A.D. 2 Dept. 1993), *leave to appeal dismissed, 82 N.Y.* 2d 920, 632 N.E. 2d 465, 610 N.Y.S. 2d 155 (N.Y. 1994), held the pollution exclusion did not exclude coverage for liability caused by injury to a worker accidentally sprayed with sulfuric acid because the exclusion applies only to environmental pollution. *See Sullins v. Allstate Insurance Company, 667* A.2d *617, 622* (Md. 1995) (insurance industry's intention was to exclude only environmental pollution damage); *Atlantic Mutual Insurance Company v. McFadden, 413* Mass. 90, 595 N.E. 2d 762 (1992) (lead in paint not a "pollutant" for purpose of pollution exclusion because not related to improper disposal or containment of hazardous waste); *Ivey's Steel, supra.*

Because there was no environmental damage alleged in either *Deni or Fogg,* the pollution exclusion does not bar coverage in either case. *See Tufco, supra; Stoney Run, supra; Center for Creative Studies, supra; McFadden, supra.* Without accompanying environmental damage, neither ammonia spilled from a piece of office equipment nor insecticide sprayed on an orange grove in a routine and lawful manner should be considered a "discharge," etc. of "pollutants" subject to the pollution exclusion.[9]

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[9] The Eleventh Circuit recently interpreted the absolute pollution exclusion under Georgia law and determined the term "discharge, dispersal, release or escape of pollutants" was ambiguous as applied to the emission of fumes from a carpet (continued...)

E. THE MAJORITY'S APPLICATIONOF THE ABSOLUTE POLLUTION EXCLUSION CLAUSE IN DEN1 VIOLATES THE **REASONABLE** EXPECTATIONS OF **THE** INSURED.

Based on the foregoing, the Academy believes the quoted pollution exclusions are ambiguous in the context of these cases and should be construed in favor of coverage. However, if this Court were to determine the pollution exclusion clause is not ambiguous when applied to the facts of these cases, this Court should still find coverage because the objectively reasonable expectations of the insureds were that their CGL policies provided coverage for these accidents.

Unlike other types of contracts, insurance policies are contracts of adhesion which are highly technical and difficult to understand. As such, insurance policies have always been subject to heightened judicial scrutiny to avoid injury to the public, See ***Sparks v. St. Paul Insurance Co., 495*** A.2d 406, 412 (N.J. 1985); ***see also Pasteur, supra.***

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[9](...continued)
adhesive because none of these words "precisely describe the chemical process in controversy." ***Bituminous*** Casualty ***Corporation v. Advanced Adhesive Technology, Inc., 73*** F.3d 335, 338 (11th Cir. 1996). The Northern District of Florida followed ***Bituminous*** in holding the absolute pollution exclusion ambiguous as applied to fumes from a roof coating material. ***Technical Coating Applicators, Inc. v. United*** States ***Fidelity & Guaranty Company,*** Case No. 5:96cv221-RH (N.D.Fla. November 1, 1996). The Northern District distinguished the Fourth District's holding in *Deni* on the basis that *"Deni* did not address the ambiguity in the application of this clause in these circumstances -- the critical issue in ***Bituminous*** -- and *Deni* thus provides no basis for me to refuse to follow the Eleventh Circuit's decision." Id., at p. 8.

As discussed above, courts have devised rules of construction to protect insureds from overreaching and injustice such as construing ambiguous policy language against the insurer and in favor of coverage. However, even unambiguous policy language may not be sufficiently clear to justify depriving the insured of coverage under circumstances in which the insured reasonably expected **coverage** would be provided. *See Sparks,* 495 A.2d at 413. Recognition of this principle has led courts to construe even unambiguous **insurance policies** in accordance with the reasonable expectations of the insured. *See Regional Bank of Colorado v. St. Paul Fire &Marine Insurance Company, 35* F.3d 494 (10th Cir. 1994); *Bering Strait School District v. RLI Insurance Company, 873* P.2d 1292 (Alaska 1994); *see also Fire Insurance Exchange v. Diehl, 545* N.W.2d at 602 (Mich. 1996).

Robert Keeton, professor at Harvard Law School and later federal judge, explained the reasonable expectations doctrine as follows:

> 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 Keeton, *Basic Text on Insurance Law,* § *6.3* **(a)** at 351 (1971) **(emphasis added).**

Thus, the **reasonable** expectations doctrine applies in construing the terms of an insurance policy **regardless of whether the policy is found to** be **ambiguous.** *See Regional Bank of Colorado, supra; Bering Strait School District v. RLI Insurance*

Company, supra; Fire Insurance Exchange v. Diehl, supra; Sparks, *supra.*

Judge Stone noted the concept of reasonable expectations is not entirely foreign to Florida. 678 So. 2d at 397. Other Florida decisions have used the phrase "reasonable expectations" in insurance cases, including cases where they cited to the law of other states.[10] The Academy recognizes the Court has not explicitly applied the doctrine in the manner the Academy urges here.

The majority of courts across the country have adopted variations of the reasonable expectations doctrine.[11] See Max *True Plastering Company v. United* States *Fidelity and Guaranty Company,* 912 P.2d 861, 863, fn.5 (Okl. 1996).

Some courts apply the reasonable expectations doctrine only when the policy language is found to be ambiguous. With all due respect, this approach does not address the problems faced by policyholders when their insurers urge expansive applications of the pollution exclusion they unilaterally drafted. And such an

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[10] *McDaniel v. Lawyers' Title Guaranty Fund, 327 So.* 2d 852, 856 (Fla. 2d DCA 1976) (J. Grimes: "One of the reasonable expectations of a policyholder who purchases title insurance is to be protected against defects in his title which appear of record."); *See* also, *e.g., Spengler v. State Farm Fire and Casualty Company, 568 So.* 2d 1293, 1295 (Fla. 1st DCA 1990), review *denied, 577 So.* 2d 1328 (Fla. 1991); *Galinko v. Aetna Casualty and Surety* Co., 432 So. 2d 179, 182 (Fla. 1st DCA 1983); *Valdes v. Smalley, 303 So.* 2d 342, 345 (Fla. 3d DCA 1974).

[11] According to the Oklahoma Supreme Court, of the thirty-six jurisdictions which have addressed the reasonable expectations doctrine, only four have rejected the rule. *See Max True Plastering v. U.S. Fidelity and Guaranty Company,* 912 P.2d 861, 866 (Okl. 1996).

approach would conflict with the established rule construing ambiguities against the insurer. That is, if the exclusion is ambiguous as applied to a particular situation, then the insured is already entitled to the most favorable construction. There is no reason to consider the reasonable expectations doctrine when one of the constructions provides coverage."

The insurers who drafted and insisted on the form exclusion should not be able to benefit from an ambiguity by advancing the reasonable expectations doctrine. It is only when the court feels no construction of the exclusion provides for coverage that the court should resort to the reasonable expectations doctrine.

The *Deni* majority begins by noting the doctrine of reasonable expectations considers objectively reasonable expectations. 678 So. 2d at 401. However, it soon lapses into referring to the insured's subjective expectations. 678 So. 2d at 402. The courts that have adopted the version of the reasonable expectations doctrine the Academy urges base the doctrine on the policyholder's objectively reasonable expectations. See, e.g., ***Sparks, 495*** A. 2d at ***414; Bering, 873*** P. 2d at ***1295; Regional Bank,*** 35 F.3d at 497 (reasonable expectation of an ordinary policyholder).

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[12] It would assist policyholders to apply the doctrine in the ambiguity situation to provide more favorable coverage than the alternatives derived solely from considering the different interpretations of the ambiguity. In other words, if once an ambiguity were detected, then the insured would be entitled to the most favorable coverage based on any interpretation of the language and the objective reasonable expectation.

Limiting the doctrine to objectively reasonable expectations insures a reasonable application of the doctrine. For example, the court in Bering found a policyholder had a reasonable expectation that a "replacement cost" policy would cover the cost of building a replacement building, including expenditures attributable to building code changes. In *Deni*, Judge Klein observed these insurance policies "are not called comprehensive general liability policies for nothing." 678 So. 2d at 406. The insurers selling such policies should be required to specifically disclose to their policyholders that they intend to argue against comprehensive coverage, and to deny coverage for many traditionally covered accidents.

As the cases discussed above demonstrate, some insurers are urging readings of the absolute pollution exclusion to exclude claims which traditionally would have been covered under CGL policies, thereby frustrating the reasonable expectations of their insureds. Many courts have resisted these attempts. Others have been reluctant to reign in the potentially unlimited scope of the absolute pollution exclusion because they feel constrained by "unambiguous" policy language -- language which incorporates undefined terms like "irritant" and "contaminant." Applying the terms of the absolute pollution exclusion without reference to the reasonable expectations of the insured has the potential result of excluding coverage for almost every conceivable accident.

For example, consider if during a storm a policyholder's tree fell and punctured a hole in a neighbor's roof, which then allowed

rain to damage the inside of the structure. Under the interpretation the insurers urge, the tree is a pollutant because it is an irritant or contaminant with respect to the hole it made in the roof. The pure rainwater would be a pollutant with respect to the interior and contents of the structure because it would also be a contaminant. That some insurers might take such a position is a real possibility, as demonstrated by the example of the child slipping on bleach and the facts of many of the actual cases discussed in this brief.

In ***Regional Bank of Colorado, N.A.,*** tenants of the bank were injured when they were exposed to carbon monoxide emitted from a faulty heater. 35 F.3d at 496. The Tenth Circuit interpreted the terms of the policy in light of the reasonable expectation of an ordinary policyholder and determined the absolute pollution exclusion did not bar coverage for these injuries. ***Id.,*** at 497. The Court noted it did not have to determine whether the policy was ambiguous because it would have reached the same result regardless of ambiguity. ***Id. See also Chacon v. American*** Family ***Mutual Insurance Company,*** 788 P.2d 748 (Colo. 1990) (interpreting unambiguous insurance policy in light of what a reasonable insured would have understood contract to mean).

In so doing, the Tenth Circuit used an example to illustrate the absurdity of interpreting the policy to exclude coverage in that circumstance. If the malfunctioning heater had caused a fire rather than emitted noxious fumes, the policy would have provided coverage for the injured tenants. ***Regional Bank of Colorado,*** at

498. The court agreed with *Pipefitters Welfare Educational Fund, supra,* and *Westchester Fire I, supra,* that the terms of the absolute pollution exclusion are "virtually boundless," curbed only by limiting principle of the reasonable expectations of the insured.

> A reasonable policy holder would not understand the policy to exclude coverage for **anything** that irritates. "Irritant" is not to be read literally and in isolation, but must be construed in the context of how it is used in the policy, i.e., defining "pollutant."
>
> While a reasonable person of ordinary intelligence might well understand carbon monoxide is a pollutant when it is emitted in an industrial or environmental setting, an ordinary policyholder would not reasonably characterize carbon monoxide emitted from a residential heater which malfunctioned as "pollution." It seems far more reasonable that a policyholder would understand the exclusion as being limited to irritants and contaminants commonly thought of as pollution and not as applying to every possible irritant or contaminant imaginable.

Regional Bank of Colorado, supra.

Insurers could argue that every impure food or product case was excluded from coverage because the problem stems from a "contaminant" (such as the recent occurrences of apple juice contaminated with E. coli bacteria).

The insurance industry should not be heard to object to a "reasonable expectations" approach to interpreting its pollution exclusion. The industry argued, including in insurance hearings where it sought and obtained approval for these exclusions, that no one would interpret the absolute pollution exclusion in such a **way** as to deny coverage every time a bottle of Clorox fell off a shelf at a grocery store and someone was injured by the acid. See Richard Levy, "Avoid the Exclusions ," *supra.*

The court in Bering observed that the reasonable expectations doctrine contemplated looking to "relevant extrinsic evidence" to determine reasonable expectations. 873 P. 2d at 1292. Such extrinsic evidence would include the representations the insurance industry made when obtaining approval for these exclusions.

The insureds here had objectively reasonable expectations the CGL policies they purchased would protect them from damages arising from these business accidents. In *Deni*, the insured was entitled to reasonably expect its CGL policy could provide coverage for accidents involving its office equipment. If an individual had been injured by the blueprint machine falling over rather than by the machine leaking ammonia, the CGL policy would in all likelihood have provided coverage.[13] This was not a situation where the policyholders were disposing of ammonia into the environment.

The insured in Foggwas also justified in reasonably expecting his CCL policy to provide coverage for liability arising out of the everyday operation of its orange grove. If the helicopter spraying the insecticide had crashed and injured bystanders, instead of spraying them with insecticide, there would have been coverage. The precise manner in which the injuries occurred does not affect the reasonable expectations of the insured for "everyday activities

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[13] This assumes the individual was not barred from suing Deni because he or she was an employee. In such circumstances one would anticipate a workers' compensation bar to suits for the ammonia spill or the falling machine (and perhaps a separate exclusion in the CGL policy for such suits).

gone slightly, but not surprisingly, awry." ***See Pipefitters Welfare Educational Fund, 976*** F.2d at 1044.

Neither insurer informed its insured the policy would not provide coverage for this type of injury. Indeed, reasonable policyholders would not purchase a CGL policy knowing coverage for damages arising out of one of their central business activities would be eviscerated by an exclusion. If the insurers did not wish to cover these normal aspects of their insureds' operations, they should have specifically informed them so they could have purchased insurance elsewhere.[14] ***See also American States Insurance Company v. Kiger, 662*** N.E.2d 945 (Ind. 1996) ("pollutant" did not obviously include gasoline in CGL policy sold to gas station; literal reading of absolute pollution exclusion would virtually negate all coverage).

A final point on the reasonable expectations doctrine that should be self-evident from the origin of the doctrine and the cases cited above: the reasonable expectations to be considered are those of the policyholder, the intended beneficiary of the adhesion contract, and not the professed expectations of the drafter of the policy who is trying to deny coverage. See, e.g., ***Sparks; Bering; Regional Bank; Vargas v. Hudson County Board of Elections,*** 949 F.2d 665, 672 (3d Cir. 1991).

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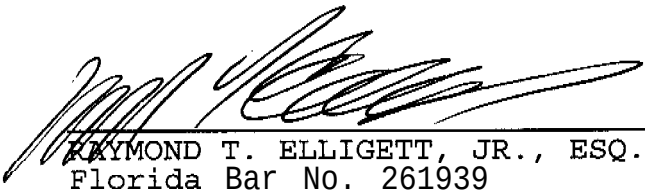
[14] Or, at least tried to purchased other coverage if it were available. See Judge Stone's dissent. *Deni,* ***678 So.*** 2d at 405.

CONCLUSION

The insurers should be required to do what Florida law requires: give their policyholders the benefit of the doubt on coverage. The Academy respectfully requests this Court reverse the Fourth District's decisions in *Deni* and *Fogg*, and affirm the trial courts' determinations that the pollution exclusion is ambiguous when applied to the particular facts of these cases and does not operate to exclude coverage for the underlying injuries. In addition, the Academy requests this Court adopt the reasonable expectations doctrine to provide coverage consistent with the objectively reasonable expectations of the insured, where courts determine the policy language is not ambiguous.

Respectfully submitted,



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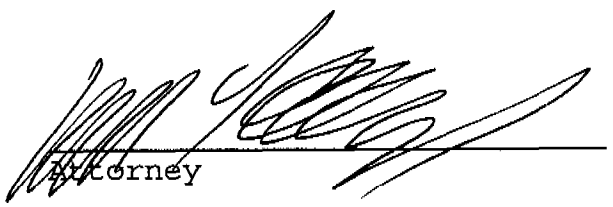

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