In The
Supreme Court
Of
Florida

No. 89,115

DEN1 ASSOCIATES OF FLORIDA, INC.,

Petitioner,

v.

STATE FARM FIRE & CASUALTY INSURANCE CO.,

Respondent.

On Appeal From The Fourth District
Court Of Appeal (En *Banc*) of Florida
4th DCA No. 94-2354

BRIEF OF *AMICUS CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION

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INTEREST OF AMICUS CURIAE

The Insurance Environmental Litigation Association ("IELA") is a trade association of major property and casualty insurers. IELA was formed, in part, to appear as amicus curiae in environmentally related insurance coverage cases and to assist courts in the determination of important insurance coverage questions presented in such litigation. IELA's member companies have extensive experience with the issues before this Court, and have entered into insurance contracts containing provisions similar to those at issue in this case in Florida and throughout the nation. IELA believes that the proper interpretation of these insurance contracts is essential to the public interest, because it preserves the integrity of the insurance underwriting process and promotes long-term environmental goals.[1/]

STATEMENT OF THE CASE

This case arises out of an en banc decision from the Florida District Court of Appeal for the Fourth District, which held -- in an appeal consolidating two cases -- that the pollution exclusion unambiguously bars coverage for injury arising out of all pollution-related injuries. State Farm Fire & Cas. Ins. Co. v.

1/ IELA's member companies are Allstate Insurance Company, AIG Insurance Companies, American States Insurance Company, Chubb & Son, Inc., CIGNA Property & Casualty Companies, CNA Insurance Companies, Envision Claims Management Corporation, Fireman's Fund Insurance Companies, Hanover Insurance Company, Hartford Insurance Group, Liberty Mutual Insurance Company, Royal Insurance Group, St. Paul Companies, Selective Insurance Group of America, The Travelers Indemnity Company, United States Fidelity & Guaranty Company, and Zurich-American Insurance Group. IELA member State Farm Fire & Casualty Company is the Respondent in this appeal; therefore, this brief is not filed on its behalf.

Deni Assocs. of Florida, Inc., 678 So. 2d 397, 399 (Fla. 4th DCA 1996) (en banc). In this appeal, the en banc court ruled that the exclusion was applicable to preclude coverage for alleged bodily injuries arising out of the release of fumes and vapors from an ammonia spill from a blueprint machine.[2/] The Petitioner, Deni Associates of Florida, Inc. ("Deni"), was moving its office equipment into new offices within the building when ammonia from a blueprint machine was spilled, causing ammonia fumes and vapors to be released throughout the building. Id. The fire department removed carpeting, broke a window to ventilate the interior atmosphere, and ordered the building evacuated until the air was safe to breathe. Id. Nearly six hours later, the building was deemed safe for occupancy. Id. As a result of the fumes and vapors released from the ammonia spill, several individuals asserted bodily injury claims against Deni. Id. Deni then sought coverage from its insurer, State Farm Fire & Casualty Insurance Company ("State Farm"). Id.

The insurance contract between State Farm and Deni contains a pollution exclusion, which bars coverage for any:

> a. bodily injury, property damage, personal injury or advertising injury arising out of the actual, alleged or threatened discharge, seepage, migration, dispersal, spill, release or escape of pollutants:

[2/] The other case that was consolidated at the intermediate appellate court level is before this Court in the appeal captioned Fogg v. Florida Farm Bureau Mutual Insurance Co., No. 89,300 (Fla.).

> (1) at or from any premises, site, or location which is or was at any time owned or occupied by or rented or loaned to any insured[.]

(R. 43). The contract defines "pollutants" as:

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

(R.46). Based on this exclusion, State Farm disclaimed coverage.[3/]

The Florida Circuit Court, Broward County, granted summary judgment in favor of Deni. The trial court found that the definition of "pollutant" contained in State Farm's policy "stretch[ed] the definition of 'pollutant' beyond what a reasonable person placed in the position of the insured would have understood the word to mean." Deni, 678 So. 2d at 399 (quoting trial court decision). Instead of applying the plain language, the trial judge thus found coverage based on the purported "reasonable expectations" of the policyholder. Specifically, the trial court ruled that a policyholder would reasonably expect the exclusion to be applicable only for "long-term environmental degradation or, at the very least, an environment-wide exposure to extremely hazardous or toxic substances." Id.

The en banc Florida District Court of Appeal reversed. Reviewing the plain language of the exclusion, the court stated that: "We find but one message in these exclusions, and it is apparent: no personal injury claims resulting from the discharge,

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[3/] Interestingly, Deni completely fails to cite to the language of this exclusion in its entire brief.

dispersal, release or escape of liquid irritants or chemicals are covered." Id. at 400. The majority opinion rejected the argument that the "'absolute pollution exclusion' . . . is not triggered by nonenvironmental, routine accidents." Id. at 403. Instead, the court stated that " [w]hile the exclusion certainly entails 'environmental pollution-related activities,' there is not a single word in the text that suggests an intent to cover claims arising from more isolated incidents of pollution." Id. Thus, the court found that the plain language of the pollution exclusion was clear and unambiguous. Accordingly, the court enforced the exclusion as written, and found no need to resort to any further rules of contract interpretation.

The District Court of Appeal also held that the trial court erred by applying a "new doctrine of reasonable expectations" as a basis for finding coverage. Id. at 402. Specifically, after reviewing Florida decisions addressing general rules of insurance contract interpretation, the majority concluded that "the Florida Supreme Court has not adopted the doctrine of reasonable expectations." Id. "It is thus foreign to our law to find the meaning of contractual language from the subjective understanding of one of the parties." Id. at 400. The court also noted that even authorities embracing this doctrine "make[] clear that the doctrine of reasonable expectations is usually applied only where the court finds the policy language ambiguous." Id. at 402. As such, the doctrine was inapplicable. "[T]here is no ambiguity in these exclusions and thus no occasion, even if the doctrine were

adopted in Florida, for any analysis of the subjective expectations of the insured." Id.

Nevertheless, even though it was unnecessary to reach the issue, the intermediate appellate court agreed to certify to this Court the question whether Florida should adopt a doctrine of reasonable expectations to resolve ambiguities in general liability insurance contracts. Apparently in recognition of contrary holdings from courts in other jurisdictions, the majority certified the following question to this Court:

> 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?

Id. at 404.

SUMMARY OF ARGUMENT

This case raises important legal issues regarding the interpretation of insurance contracts. Courts of this state enforce the terms of private contracts as written. Failure to adhere faithfully to contract terms would undermine the settled expectations of those who do business within the state, resulting in commercial uncertainty, and, ultimately, harm to the ability of companies to do business in Florida.

The adoption of a "reasonable expectations" doctrine to construe insurance contracts is contrary to well-settled Florida rules. As the en banc District Court of Appeal properly found, where the terms of an insurance contract are plain and unambiguous,

the court should apply the terms as written. If the terms are ambiguous, the court should discern the mutual intent of the parties. The doctrine of "reasonable expectations" violates this rule by focusing -- unilaterally and in hindsight -- on the unstated expectations of the policyholder.

The pollution exclusion in the insurance contract between Deni and State Farm is clear and unambiguous. "Pollutants" are specifically defined in the contract to include "[a]ny solid, liquid, gaseous or thermal irritant or contaminant." Thus, attempts by the policyholder and its amici to limit the exclusion to claims involving toxic waste or industrial pollution are unfounded. The District Court of Appeal correctly enforced the exclusion as written, and rejected these attempts to engraft additional restrictions on the exclusion's application.

Because the exclusion is unambiguous, any attempt to rely on extrinsic evidence to circumvent its plain language is improper. Even if an ambiguity existed, only extrinsic evidence to show the mutual intent and understanding of the parties would be admissible. There is no suggestion that, at the time of contracting, Deni had knowledge of, much less relied on, any of the materials now proffered by the policyholder and its amici. In any event, a full and fair consideration of these materials do not support the construction of the pollution exclusion that they advocate.

Adopting the method of policy construction propounded by Deni and its amici would violate established rules of contract law and the functioning of the insurance mechanism generally. Distortions

of policy language undermine the vital risk-spreading function of insurance by creating uncertainty as to the scope of an insurer's obligations. IELA appears before this Court to urge that it give effect to the plain meaning of the insurance contract and thereby safeguard the integrity of the underwriting process that is vital to the public, as well as policyholders and insurers alike.

ARGUMENT

I. THE PLAIN LANGUAGE OF CONTRACTS MUST BE GIVEN EFFECT IN ORDER TO PROTECT THE INSURANCE MARKET AND OTHER COMMERCIAL INTERESTS.

Longstanding principles of Florida law mandate that the terms of a contract must be enforced in accordance with their plain language in order to effectuate the parties' intent. The failure to do so undermines the important reliance interests of business and industry within this state. More specifically, the failure to enforce the plain language of the terms of an insurance contract undermines stability and predictability in the insurance market. Such uncertainty, in turn, adversely affects underwriters' efforts to generate meaningful actuarial estimates, and hinders insurers' efforts to provide customers with affordable insurance coverage.

The recognition of any principle of contract interpretation based on a policyholder's so-called "reasonable expectations" threatens this delicate but vital insurance mechanism. The District Court of Appeal properly rejected the policyholder's attempt to upset these longstanding principles of insurance contract interpretation. This Court should affirm these holdings.

A. Failing To Give Effect To The Plain Language Of A Contract Undermines Important Commercial Reliance Interests.

Under Florida law, where the provisions of an insurance contract are **clear** and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement. See, e.g., Prudential Prop. & Cas. Ins. Co. v. Swindal, 622 So. 2d 467, 472 (Fla. 1993) ("[c]ourts are to give effect to the intent of the parties as expressed in the policy language"); Rigel v. National Cas. Co., 76 So. 2d 285, 286 (Fla. 1954) ("if the language is plain and unambiguous, there is no occasion for the court to construe it"); Heritase Ins. Co. v. Cilano, 433 So. 2d 1334, 1335 (Fla. 4th DCA 1983) ("[w]hen the terms of an insurance policy are clear and unambiguous the terms must be applied as written, the court not being free to reshape the agreement of the parties"); see also Dimmitt Chevrolet, Inc. v. Southeastern Fidelitv Ins. Corp., 636 So. 2d 700, 706 (Fla. 1993) (Grimes, J., concurring) ("the basic rule of interpretation [is] that language should be given its plain and ordinary meaning"). This Court has instructed that "[e]quivocality arises only when the terms of a contract present a genuine inconsistency, uncertainty, or ambiguity." Travelers Ins. Co. v. Bartoszewicz, 404 So. 2d 1053, 1054 (Fla. 1981); accord Qtate Farm Mut. Auto. Ins. Co. v. Pridsen, 498 So. 2d 1245, 1248 (Fla. 1986); Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979); Southeastern Fire Ins. Co. v. Lohrman, 443 So. 2d 408, 409 (Fla. 4th DCA 1984).

Florida courts "recognize also that insurance contracts are complex instruments and that 'ambiguity is not invariably present when analysis is necessary to interpret the policy."' Travelers Ins. co. v. C.J. Gayfer's & Co., 366 So. 2d 1199, 1201 (Fla. 1st DCA 1979) (quoting Blue Shield of Florida, Inc. v. Woodlief, 359 so. 2d 883, 884 (Fla. 1st DCA 1978)); accord Alpha Therapeutic Corp. v. St. Paul Fire & Marine Ins. Co., 890 F.2d 368, 370 (11th Cir. 1989) ("When determining whether a policy is ambiguous, we must bear in mind that insurance contracts are complex instruments. Consequently, 'the fact that analysis is required for one to fully comprehend them does not mean the contracts are ambiguous."') (quoting State Farm Fire & Cas. Co. v. Oliveras, 441 So. 2d 175, 178 (Fla. 4th DCA 1983)); American Motorists Ins. Co. v. Farrey's Wholesale Hardware Co., 507 So. 2d 642, 645 (Fla. 3d DCA 1987) (same). "[T]he mere fact that a provision in an insurance policy could be more clearly drafted does not necessarily mean that the provision is otherwise inconsistent, uncertain or ambiguous." Pridsen, 498 So. 2d at 1248.

In addition, it is well-established in Florida that "insurers have the right to limit their liability and to impose such conditions as they wish upon their obligations, . . . and the courts are without the right to add to or take away anything from their contracts." France v. Liberty Mut. Ins. Co., 380 So. 2d 1155, 1156 (Fla. 3d DCA 1980). Through the use of exclusions, insurers limit the risks that are assumed. Thus, "the fact that coverage is described in a policy which does not apply to an

insured's particular situation neither renders the policy ambiguous nor a nullity." Dick Courteau's GMC Truck Co. v. Comanche-Colon, 498 So. 2d 1023, 1025 (Fla. 2d DCA 1986).

The consistent application of these well-settled rules of contract interpretation are vital to commercial law. Parties expect that courts, if called upon to resolve a dispute, will follow these rules in interpreting private contracts. People conduct their business based on the understanding that they are free to contract in any manner, and that such contracts will be enforced as written. See, e.g., Bituminous Cas. Corp. v. Williams, 17 So. 2d 98, 101 (Fla. 1944) ("it is a matter of great public concern that freedom of contract be not lightly interfered with"); accord Pizza U.S.A. of Pompano Inc. v. R/S Assoc. of Florida, 665 so. 2d 237, 239 (Fla. 4th DCA 1995); France, 380 So. 2d at 1156. For this reason, even if "the result in [al case appears inequitable, [the court] cannot substitute what [it] perceive[s] to be a more desirable policy for a clear and unambiguous . . . directive." Savona v. Prudential Ins. Co., 648 So. 2d 705, 708 (Fla. 1995); accord Dimmitt, 636 So. 2d at 706 (Grimes, J., concurring) (recognizing that a court is not entitled to rely on any "social premise that [it] would rather have insurance companies cover the [] losses").[4/] Judicial fidelity to these basic

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[4/] See also Bituminous Cas. Corp. v. Williams, 17 So. 2d 98, 101-02 (Fla. 1944) (courts generally "should refuse to strike down contracts involving private relationships" because of "the fundamental public policy of the right to freedom of contract between parties").

principles is vital in order to retain confidence of the business community at **large** that the bargain made will be the bargain enforced.

The en banc District Court of Appeal therefore properly rejected the policyholder's attempt to create an ambiguity in the pollution exclusion. The arguments offered by policyholder advocates have no textual basis. Likewise, the arguments of the policyholder and its amici concerning the use of a "reasonable expectations" doctrine and imposition of unexpressed terms are contrary to well-settled Florida law. That approach is undesirable because it would have adverse repercussions on all business interests that rely on contractual language. This Court should firmly reject any principle that upsets the reliability and enforceability of plain and unambiguous private contracts.

B. The So-Called Doctrine Of "Reasonable Expectations" Violates Florida Rules Of Contract Interpretation By Unduly Focusing On The Expectations Of The Policyholder.

Notwithstanding the numerous arguments asserted by the policyholder and its amici concerning the pollution exclusion,[5/]

[5/] In fact, the question certified by the District Court of Appeal seeks an advisory opinion. Specifically, because the District Court of Appeal held that the absolute pollution exclusion was unambiguous, it was unnecessary to reach the certified question posed by the Court. See Deni, 678 So. 2d at 402 ("there is no ambiguity in these exclusions and thus, no occasion, even if the doctrine were adopted in Florida, for any analysis of the subjective expectations of the insured"). Rather, the question is relevant only if the court had found that the exclusion was ambiguous. Thus, this Court may decline jurisdiction because the certified question, "though of interest to the bench and bar, is (continued...)

the actual question certified by the District Court of Appeal is simple and straightforward:

> 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?

Deni, 678 So. 2d at 404. Policyholder advocates contort the question certified to propose a new principle of insurance contract construction that would allow a policyholder to rely unilaterally on its own expectation of coverage, as asserted in hindsight, regardless of whether the contract itself is first found to be ambiguous. Such a principle would unsettle numerous basic principles of Florida law regarding contract interpretation.

First and foremost, under Florida law, a court may consider extrinsic evidence only if the contract language is ambiguous; otherwise, the words of the contract must be given effect. See, e.g., Dimmitt, 636 So. 2d at 705 ("Because we conclude that the policy language is unambiguous, we find it inappropriate and unnecessary to consider the arguments pertaining to the drafting history of the pollution exclusion clause."); Swindal, 622 So. 2d at 472 ("[c]ourts are to give effect to the intent of the parties

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[5/](...continued)
not dispositive of the particular case before the court." Marion County Hosp. Dist. v. Akins, 435 So. 2d 272, 273 (Fla. 1st DCA 1983); accord Walker v. State 459 So. 2d 333, 335 (Fla. 3d DCA 1984); see also Interlachen Lakes Estates, Inc. v. Brooks, 341 So. 2d 993, 994 (Fla. 1976) (finding it unnecessary to answer the certified questions because the case had been resolved on other grounds); Dobson v. Crews, 164 So. 2d 252, 255 (Fla. 1st DCA 1964) (courts "are not designed to render advisory opinions on abstract questions of law"), aff'd, 177 So. 2d 202 (Fla. 1965).

as expressed in the policy language" (emphasis added)); Cilano, 433 So. 2d at 1335 ("When the terms of an insurance policy are clear and unambiguous the terms must be applied as written, the court not being free to reshape the agreement of the parties." (emphasis added)).

Ignoring this well-established principle, the policyholder and its amici nevertheless contend that extrinsic evidence of a policyholder's "reasonable expectations" of coverage is allowed even in the absence of ambisuity. In other words, they argue for an interpretation of the insurance contract based on the policyholder's own currently asserted understanding of the contract -- independent of the parties' mutual understanding. This Court has previously rejected such a rule and should do so again.

For example, in Gendzier v. Bielecki, 97 So. 2d 604 (Fla. 1957), the Court stated that:

> It should be remembered that we are here dealing with an effort by one party to a writing to testify as to his own personal mental attitude with regard to the writing rather than an effort to show the mutual intent of the parties by surrounding facts and circumstances. . . . The appellees concede that they signed the instrument and attempt merely to support their position by testifying as to their uncommunicated intention. . . . [C]ourts will undertake only to determine what a reasonable man would believe from the outward manifestations of the consent of the parties as evidenced by the language of the written document. . . . "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs -- not on the parties having meant the same thing but on their having said the same thing."

Id. at 608 (emphasis added) (quoting Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1928)); accord Camden Fire Ins. Ass'n v. Daylight Grocery Co., 12 So. 2d 768, 770 (Fla. 1943) ("we have no evidence before us by which to arrive at the object of the contract, or the purpose which the parties had in mind, except the language of the contract itself" (emphasis added)); Horton v. American Home Assurance Co., 245 So. 2d 136, 138 (Fla. 3d DCA 1971) ("A contract should be construed to carry out the expressed intention of the parties." (emphasis added)).

Nor should this Court adopt a "reasonable expectations" doctrine. As the Utah Supreme Court recognized in rejecting the doctrine: "[A]fter more than twenty years of attention to the doctrine in various forms by various courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application." Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798, 803 (Utah 1992).[6/] Moreover, as the Florida Department of Insurance concedes, "Florida's longstanding rules of [contract] construction enable this Court to evaluate the language in insurance policies without considering the doctrine of reasonable expectations." Amicus Brief of the Florida Department of Insurance at 13 (filed Dec. 10, 1996). Indeed, Florida's rules of contract interpretation are sufficiently defined such that "[t]his Court should not resort to the reasonable

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[6/] The fact that the policyholder amici themselves cannot agree on the applicability and scope of this so-called doctrine demonstrates that it is vague and ill-defined.

expectations doctrine because it will only spawn more litigation to determine the parties' expectations." Id. at 15.

Policyholder advocates are wrong in suggesting that their version of the "reasonable expectations" doctrine commands an "overwhelming majority" of states nationwide. Rather, most courts that have adopted any version of "reasonable expectations" still require a finding that the policy language is ambiguous, or, at a minimum, is "masked by technical or obscure language or which are hidden in a policy's provisions." Max True Plasterins Co. v. United States Fidelity & Guar. Co., 912 P.2d 861, 870 (Okla. 1996); accord National Union Fire Ins. Co. v. Reno's Executive Air Inc., 682 P.2d 1380, 1383-84 (Nev. 1984); see also DO1 Brief at 13 ("The Fourth District Court of Appeal correctly states that to apply the doctrine of reasonable expectations, the court must find an ambiguity. If this Court does not find an ambiguity, there is no occasion to apply the reasonable expectations doctrine."). These courts recognize that "[i]f the doctrine is not put in the proper perspective, insureds could develop a 'reasonable expectation' that every loss will be covered by their policy and courts would find themselves engaging in wholesale rewriting of insurance policies." Max True, 912 P.2d at 868; accord Darner Motor Sales, Ltd. v. Universal Underwriters Co., 682 P.2d 388, 395 (Ariz. 1984) (recognizing that the doctrine must have limits because "most insureds develop a 'reasonable expectation' that every loss will be covered by their policy"). Thus, policyholders must demonstrate

that an ambiguity exists in the contract before there is any resort to this doctrine.

Moreover, the version of the reasonable expectations doctrine advanced by policyholder advocates necessarily would evaluate the policyholder's current belief concerning coverage after a loss has already taken place. This approach is fundamentally at odds with Florida rules of contract interpretation. See, e.g., Swindal, 622 So. 2d at 472; Gendzier, 97 So. 2d at 608; Risel, 76 So. 2d at 286; Daylight Grocery, 12 So. 2d at 770; Cilano, 433 So. 2d at 1335. Instead of determining the mutual intent of the parties at the time of contracting, policyholders ask the court to focus only on their own expectations as asserted long after the contract has been executed.

The "reasonable expectations" doctrine advocated by Deni and its amici is unnecessary and would merely complicate and contradict existing Florida rules governing contract interpretation. If a court finds ambiguity, then it must determine the mutual intent or expectations of the parties. See, e.g., Bunnell Medical Clinic, P.A. v. Banera, 419 So. 2d 681, 683 (Fla. 5th DCA 1982) (finding ambiguity and allowing parol evidence limited to the parties' knowledge of and dealings with each other); Drisdom v. Guarantee Trust Life Ins. Co., 371 So. 2d 690, 693 (Fla. 3d DCA 1979) (admitting testimony by the insurance agent after finding latent ambiguity in the meaning of a term). "[T]he unilateral secret intent of a party to a written instrument is in and of itself immaterial to the actual creation of a contract." Gendzier, 97 So.

2d at 609; accord Davlisht Grocery, 12 So. 2d at 770-71 ("Whatever the undisclosed object or purpose of the parties may have been, we do not see how we can read into them any coverage [for the loss at issue]."). .

To return to the question posed to this Court -- whether the doctrine of reasonable expectations should be adopted by Florida -- based on the version of the doctrine advanced by the policyholder and its amici -- but not the Florida Department of Insurance -- the answer is no. Where the contractual language is unambiguous, this Court should continue to adhere to the long-standing principle that unambiguous language be enforced as written. If the language is ambiguous, however, a court should not be "limited to resolving the ambiguity in favor of coverage." Deni, 678 So. 2d at 404. Rather, a court must then determine the mutual expectation and intent of the contracting parties to determine the proper interpretation of the contract. By adhering to these general rules of contract interpretation, Florida courts will ensure certainty and predictability to policyholders and insurers alike.

II. THE FLORIDA DISTRICT COURT OF APPEAL PROPERLY RULED TEAT THE POLLUTION EXCLUSION AT ISSUE IS CLEAR AND UNAMBIGUOUS IN BARRING COVERAGE.

Even though the District Court of Appeal did not certify any question concerning the interpretation or application of the pollution exclusion, the policyholder and its amici have devoted substantial space and argument contending that the exclusion is ambiguous. The pollution exclusion clause contained in the

insurance contract between State Farm and Deni bars coverage for all "bodily injury . . . arising out of the actual, alleged or threatened discharge, seepage, migration, dispersal, spill, release or escape of pollutants . . . at or from any premises, site, or location which is or was at any time owned or occupied by or rented or loaned to, any insured." (R.43) (emphasis added). The contract defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." (R.46) (emphasis added).

The factual allegations underlying the coverage claim are largely undisputed. Deni admits in its complaint against State Farm that the underlying claims arose when "chemicals from the blueprint machine spilled, causing the necessity of evacuation of the building in which plaintiff, Deni Associates, leases premises." (R.2) (emphasis added); see also Initial Brief of Appellant at 1 (stating that the underlying claim involved an "ammonia spill out of a blueprinting machine located in the office building the insured occupied" (emphasis added)). Moreover, it is undisputed that the alleged bodily injuries resulted from the release of ammonia fumes and noxious gases. (R.36); see also Initial Brief of Appellant at 1 ("[s]everal people felt ill from the fumes" (emphasis added)).

This simple comparison of the allegations surrounding the claim and the clear language of the pollution exclusion demonstrates that the exclusion plainly applies to bar coverage.

Thus, the District Court of Appeal was correct in enforcing the exclusion as written.

A. The Pollution Exclusion Is Clear And Unambiguous On Its Face.

The pollution exclusion at issue in this case bars coverage for any harm arising out of the release or escape of pollutants at or from premises leased by or rented to the policyholder.[7/] Under any fair reading, this policy language is unambiguous. Thus, the District Court of Appeal's decision was correct and should be affirmed.

courts interpreting identical or substantially similar pollution exclusions under Florida law have enforced them to bar coverage for claims such as those at issue here. Thus, the absolute pollution exclusion has been found to bar **coverage** for

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7/ Provisions employing the language at issue here are sometimes referred to as "absolute pollution exclusions." This term -- which has been used by courts, commentators, policyholders, and insurers alike -- distinguishes these exclusions from pollution exclusions found in many insurance contracts in the 1970s and early 1980s, which contain a narrow exception restoring coverage for "sudden and accidental" events. See, e.g., Essex Ins. Co. v. Tri-Town Corp., 863 F. Supp. 38, 39 (D. Mass. 1994) (noting that Massachusetts courts "have long wrestled with pollution exclusion clauses that were not 'absolute' in that they excluded coverage only for pollution that was not 'sudden and accidental'"); Bernhardt v. Hartford Fire Ins. Co., 648 A.2d 1047, 1052 (Md. Ct. Spec. App. 1994) (same); McGuirk Sand & Gravel, Inc. v. Meridian Mut. Ins, Co., No. 183051, 1996 WL 705497, at *3 (Mich. Ct. App. Dec. 6, 1996) (same). This Court has previously interpreted the pollution exclusion with the "sudden and accidental" exception and held that it was unambiguous. See Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700, 704-05 (Fla. 1993); Liberty Mut. Ins. Co. v. Lone Star Indus., Inc., 648 So. 2d 1148 (Fla. 1994).

claims arising from indoor pollution,[8] bodily injury **arising out** of construction mishaps," and chemical oversprays.[10]

For example, in Band & Desenberg, the United States District Court for the Middle District of Florida held that a pollution exclusion virtually identical to the one in the Deni/State Farm contract was unambiguous and barred coverage for indoor air pollution claims. Band & Desenberg, 925 F. Supp. at 762. In that case, the policyholder sought coverage for claims arising out of air-borne contaminants dispersed through the policyholder's building by a defective air conditioning system. Granting summary

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[8] See West Am. Ins. Co. v. Band & Desenberg, 925 F. Supp. 758, 760 (M.D. Fla. 1996) (holding pollution exclusion to be plain and unambiguous and granting summary judgment to insurer for claims arising out of indoor pollution); American Home Assurance Co. v. Devcon Int'l, Inc., No. 92-6764-CIV, 1993 WL 401872, at *6 (S.D. Fla. Sept. 28, 1993) (pollution exclusion precludes coverage for claim arising out of indoor exposure to "silica dust, carbon dust, and other dusts"), aff'd mem., 28 F.3d 118 (11th Cir. 1994).

[9] City of St. Petersburg v. United States Fidelity & Guar. Co., No. 92-1224-CIV-T-23C, slip op. at 11 (M.D. Fla. July 11, 1994) (Ex. 1) (plain and unambiguous terms of absolute pollution exclusion bar coverage for bodily injury claims arising out -of construction workers' exposure to hazardous substances in the course of digging up pipes and underground storage tanks); International Recovery Corp. v. National Union Fire Ins. Co., No. 93-16803CA27 (Fla. Cir. Ct., Dade County June 7, 1995) (Ex. 2) (holding that pollution exclusion bars coverage for bodily injury caused by sodium hydroxide).

[10] Gilmore v. Chennault, No. 90-3121-CA-01 (Fla. Cir. Ct., Sarasota County Aug. 7, 1991) (Ex. 3) (absolute pollution exclusion bars coverage for bodily injury resulting from exposure to paint fumes); State of Florida Department of Environmental Regulation v. Chemairspray, Inc., No. CL-85-5527 AA, slip op. at 2 (Fla. Cir. ct., Palm Beach County Oct. 2, 1990) (Ex. 4) (granting insurer's motion for summary judgment precluding **coverage** for alleged liabilities arising out of crop dusting sprayings), aff'd sub nom. Montalvo v. State, 667 So. 2d 816 (Fla. 4th DCA 1995).

judgment for the insurer, the Court held that "there is no ambiguity in the . . . pollution exclusion." Id. "Under the clear language of the policy, there is no coverage for bodily injury due to release or dispersal of contaminants" within the policyholder's building. Id.

Likewise, in Devcon International, the United States District Court for the Southern District of Florida held that the absolute pollution exclusion unambiguously barred coverage for a wrongful death claim, where the claimant alleged exposure to "silica dust, carbon dust, and other dusts." Devcon, 1993 WL 401872, at *3. The court recognized that, although silica dust was not specifically included in the definition of "pollutant" in the exclusion, the definition plainly encompassed "dusts" because they were "solid . . . irritant[s] or contaminant[s]." Id. Moreover, the court noted that silica and carbon dusts were air contaminants that were regulated by the federal government. Id. Thus, the court ruled that the insurer properly denied coverage.

The District Court of Appeal's decision is consistent with these numerous Florida decisions finding the absolute pollution exclusion unambiguous. In fact, the Deni court repeatedly emphasizes the principal conclusion reflected by these decisions: "We find but one message in [the pollution exclusion], and it is apparent: no personal injury claims resulting from the discharge, release or escape of liquid irritants or chemicals are covered." Deni, 678 So. 2d at 400; accord id. at 403 ("To repeat ourselves, the express language of this exclusion is to exclude all pollution

bodily injury claims from coverage."); id. ("As we have already said, the obvious meaning of the words in these categorical exclusions is that no pollution claims will be covered."). This Court should affirm that holding.

B. The Overwhelming Majority Of Courts That Have Interpreted Substantially Similar Exclusions Have Concluded That The Exclusion Is Unambiguous.

Not surprisingly, an overwhelming majority of courts have concluded that the absolute pollution exclusion unambiguously precludes coverage for a wide variety of injuries arising from the discharge, release or escape of pollutants, contaminants, or irritants.[11/] Over 180 courts across the country, including at least 60 appellate court decisions, have enforced the exclusion as written. see, e.g., McGuirk Sand & Gravel, Inc. v. Meridian Mut. Ins. Co., No, 183057, 1996 WL 705497, at *3 (Mich. Ct. App. Dec. 6, 1996) ("[t]here is a definite national trend [and] [t]he vast majority of courts asked to interpret absolute pollution exclusions have concluded that the exclusions are unambiguous and operate to bar coverage"); Economy Preferred Ins. Co. v. Grandadam, 656 N.E.2d 787, 789 (Ill. App. Ct. 1995) (same); Tri County Serv. Co. v. Nationwide Mut. Ins. Co., 873 S.W.2d 719, 721 (Tex. Ct. App. 1993)

[11/] These include courts applying the law of Alabama, Arizona, California, Connecticut, Colorado, Delaware, District of Columbia, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. For a list of cases applying the plain language of the absolute pollution exclusion to deny coverage, see Addendum A.

("Virtually all courts in other jurisdictions which have considered such an exclusion have found that it precludes all coverage for any liability arising out of the release of pollutants" (emphasis in original)).

For example, the Texas Supreme Court, in National Union Fire Insurance Co. v. CBI Industries, Inc., 907 S.W.2d 517 (Tex. 1995), unanimously held that a policyholder is not entitled to insurance coverage arising out of a release of hydrofluoric acid fumes which allegedly caused bodily injuries. In that case, the policyholder was engaged in the maintenance and cleaning of a refinery in Texas City, Texas, when employees dropped a heater unit from a crane. The unit fell onto a pipe connected to a storage tank containing hydrofluoric acid. The acid was released and formed a cloud that migrated over the Texas City area, and approximately 60 lawsuits were filed against the policyholder alleging bodily injury arising out of the release of hydrofluoric acid. Finding that "[t]he language in this pollution exclusion is clear and susceptible of only one possible interpretation," that state supreme court concluded that coverage was plainly barred. Id. at 522.

Similarly, in American States Insurance Co. v. Zippro Construction Co., 455 S.E.2d 133 (Ga. Ct. App. 1995), the Georgia Court of Appeals ruled that the absolute pollution exclusion unambiguously bars coverage for a complaint alleging bodily injury arising out of the inhalation of asbestos fibers at a building where the policyholder was performing operations. Rejecting the policyholder's argument that the exclusion is inapplicable where

the injuries were "unintended or unanticipated," the court found that there was "no coverage as a matter of law." Id. at 134-35.

Indeed, several courts have applied the exclusion to bar coverage in factual settings almost identical to this case. See Bituminous Cas. Corp. v. RPS Co., 915 F. Supp. 882 (W.D. Ky. 1996); American States Ins. Co. v. F.H.S., Inc. 843 F. Supp. 187 (S.D. Miss. 1994); Terramatrix, Inc. v. United States Fire Ins. Co., No. 94-CV-6531 (Colo. Dist. Ct., Denver County Oct. 27, 1995) (Ex. 5). In all three cases, an ammonia spill allegedly caused bodily injury when bystanders were overcome by the fumes. RPS, 915 F. Supp. at 882-83; F.H.S., 843 F. Supp. at 188. The court in those cases recognized that ammonia was a pollutant and that the alleged injuries were the result of the release or spill. RPS, 915 F. Supp. at 884; F.H.S., 843 F. Supp at 188. Thus, "the pollution exclusion construed as a whole is clear and unambiguous. Moreover, the claims that have been asserted against [the insured1 fall well within the exclusion." F.H.S., 843 F. Supp. at 190; accord RPS, 915 F. Supp. at 884 ("the exclusion is not ambiguous and by its express terms excludes coverage for the damages concerned in this action"); Terramatrix, slip op. at 1 ("property damage and bodily injury [claims] as a result of anhydrous ammonia . . . are precisely the kinds of losses that the absolute pollution exclusion was designed to exclude from coverage").

C. The District Court of Appeal Properly Rejected Attempts To Engraft Limitations On The Exclusion That Are Not Found In The Exclusion Itself.

Unwilling to stand or fall on the plain language of the exclusion, the policyholder and its amici seek to limit the exclusion only to situations involving industrial toxic waste or long-term "environmental"[12/] pollution. Quite simply, no such limitation appears in the language of the policy. Where, as here, the term "pollutant" is unambiguously **defined** to include **any** "contaminant" or "irritant," rules of contract interpretation "do[] not allow courts to rewrite contracts [or] add meaning that is not present." Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979); accord Riselv. National Cas. Co., 76 So. 2d 285, 286 (Fla. 1954) ("the Court should not extend strictness in construction to the point of adding **a meaning to** language that is clear"); Bradlev v. Associates Discount Corn., 58 so. 2d 857, 858-59 (Fla. 1952) ("We cannot stretch the rule of strict construction of insurance contracts in favor of the insured to mean that where the language is plain and unambiguous it **may be** given an added meaning.").

Under the terms of the absolute pollution exclusion, the status, mental state, or conduct of the policyholder is irrelevant. As long as the injury arises out of the discharge, release or

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12/ As the District Court of Appeal noted, the policyholder advocates' reference to "environmental" pollution is really a reference to outdoor pollution on a large or catastrophic scale, or pollution related to CERCLA-type liabilities. Deni, 678 So. 2d at 403 n.6.

escape of a pollutant, the absolute pollution exclusion bars coverage. Courts have repeatedly and consistently rejected similar efforts by policyholder advocates to graft unilaterally this type of limitation onto a clear and unambiguous pollution exclusion. See, e.g., Park-Ohio Indus., Inc. v. Home Indem. Co., 975 F.2d 1215, 1222 (6th Cir. 1992) (concluding that any limitation on the scope of the pollution exclusion to "active" polluters was untenable because it went "outside the clear and plain language of the pollution exclusion"); Zippro, 455 S.E.2d at 135 ("there is no limitation in the exclusion based on intent or foreseeability"); Crescent Oil Co. v. Federated Mut. Ins. Co., 888 P.2d 869, 873 (Kan. Ct. App. 1995) ("Limiting the definition of pollution to intentional industrial pollution has no basis in the language of the policy."); Bernhardt v. Hartford Fire Ins. Co., 648 A.2d 1048, 1051 (Md. Ct. Spec. App. 1994) (rejecting the policyholder's argument that the court should "judicially draft limitations" on the exclusion to limit it to "'industrial or 'industry-related' activities" because "nowhere in this exclusion does the word 'industry' or 'industrial' appear. There simply is no such limitation."); Cook v. Evanson, 920 P.2d 1223, 1226 (Wash. Ct. App. 1996) ("The exclusion makes no exception for pollutants used in the insured's business operation. Nor does the exclusion limit its application to classic environmental pollution.").

Indeed, in this case, limiting the breadth and scope of the pollution exclusion is particularly inappropriate because the exclusion expressly defines "pollutant" as any "contaminant" or

"irritant." The meaning of the term and the exclusion is properly determined by reference to the definition provided within the contract. See, e.g., Dorrell v. State Fire & Cas. Co., 222 So. 2d 5, 6 (Fla. 3d DCA 1969) (court should "follow[] the definitions given in the policy itself").[13/] Applying this principle, numerous courts have enforced the definition of "pollutants" contained in the absolute pollution exclusion. See, e.g., American States Ins. Co. v. Netherv, 79 F.3d 473, 475-76 (5th Cir. 1996) ("'Pollutant' is a defined term in the policy. Whether the policy definition comports with the court's notion of the usual meaning of 'pollutants' is not the issue."); Cook, 920 P.2d at 1226 ("[The policyholders] suggest that we interpret the clause to apply to traditional environmental pollution but not to injuries arising from business operations. This might be a reasonable interpretation if the policy simply precluded coverage for "pollution". Here, however, it specifically defines 'pollutants."'); Donaldson v. Urban Land Interests, Inc., 556 N.W.2d 100, 103 (Wis. Ct. App. 1996) ("In the instant case, we need not search for a definition of 'pollutant,' since the [insurer's] policy defines it as 'any solid, liquid, gaseous or thermal irritant or contaminant . . . . "). As a defined term, the word "pollutant" encompasses any irritant or contaminant, which would include the release of ammonia fumes.

[13/] Even if the terms had not been defined, "the mere failure to provide a definition for a term does not render the term ambiguous." Old Dominion Ins. Co. v. Elvsee, Inc., 601 So. 2d 1243, 1245 (Fla. 1st DCA 1992).

Attempting to limit the exclusion to "intentional" or industrial polluters is similarly flawed, and courts have overwhelmingly rejected such distinctions. For example, less than two months ago, New York's highest court unanimously rejected a policyholder's argument that the absolute pollution exclusion bars **coverage** only for "actual polluters." See Town of Harrison v. National Union Fire Ins. Co., No. 246, 1996 WL 726781, at *1 (N.Y. Dec. 18, 1996). In that case, the policyholder was a municipality that operated a landfill. An excavation contractor allegedly illegally disposed of noxious waste on the policyholder's site without the policyholder's knowledge. When neighboring landowners sued the policyholder for personal injuries, property damage, environmental costs and cleanup costs, the policyholder sought coverage. The court rejected the policyholder's argument that the exclusion was inapplicable because it did not actively engage in the polluting conduct:

> [I]t is evident that coverage is unavailable for any claim involving the discharge or dispersal of any waste, pollutant, contaminant or irritant regardless of the cause or source of that claim. Therefore, coverage is unambiguously excluded for claims generated by the dumping of waste materials onto complainants' properties as asserted in all of the underlying complaints, irrespective of who was responsible for these acts.

Id. at *2 (emphasis added).

Similarly, in Madison Construction Co. v. Harleysville Mutual Insurance Co., 678 A.2d 802 (Pa. Super. Ct. 1996) (en banc), an en banc Pennsylvania intermediate appellate court rejected the policyholder's argument that the absolute pollution exclusion

should be limited to bar coverage only for "the escape of pollutants 'into the environment."' Id. at 806. Instead, the court stated that, "because the [exclusionary] provision contains no such 'into the environment' language, we, as a court, will not 'convolute the plain meaning of a writing merely to find an ambiguity."' Id. (citing O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957, 960 (Pa. Super. Ct. 1993)).

Notably, courts have also repeatedly rejected the suggestion that the policyholder could have had a "reasonable expectation" of pollution-related coverage under a policy containing an absolute pollution exclusion. See, e.g., Constitution State Ins. Co. v. Iso-Tex Inc., 61 F.3d 405, 410 n.4 (5th Cir. 1995) ("This court needs not address [the insured's] 'reasonable expectations' argument in light of the absence of ambiguity."); Park-Ohio, 975 F.2d at 1223 (same); Resure, Inc. v. Chemical Distributors, Inc., 927 F. Supp. 190, 194 (M.D. La. 1996) (same); RPS, 915 F. Supp. at 884 ("Inasmuch as the exclusion is not ambiguous and by its express terms excludes coverage for the damages concerned in this action, [the policyholder's] claim are without merit. An expectation of coverage under these circumstances would be unreasonable."); United States Fire Ins. Co. v. Ace Bakins Co., 476 N.W.2d 280, 282 (Wis. Ct. App. 1991) ("objectively reasonable expectations" would not include a finding of coverage in the case); Vantage Dev. Corp. v. American Env't Technologies Corp., 598 A.2d 948, 955 (N.J. Super. Ct., Law Div. 1991) ("Given the clarity of the language of the

exclusion . . . the [reasonable expectations] argument is strained.").

In sum, the application of the pollution exclusion must be determined by the circumstances presented. If in context the substance is an irritant or contaminant, then the exclusion applies. In the words of a Wisconsin appellate court,

> Just as "what is one man's meat is another man's rank poison" . . . it is a rare substance indeed that is alwavs a pollutant; the most noxious of materials have their appropriate and non-polluting uses.

Ace Baking, 476 N.W.2d at 283 (emphasis in original). For the foregoing reasons, this Court should reject the arguments advanced by the policyholder and its amici seeking to graft additional limitations and conditions on the application of the absolute pollution exclusion.

III. BECAUSE THE PLAIN MEANING OF THE EXCLUSION IS UNAMBIGUOUS, RELIANCE ONEXTRINSIC EVIDENCE TO CONTRADICT THE PLAIN WEANING OF THE POLLUTION EXCLUSION IS IMPROPER AND SHOULD BE REJECTED.

A. Under Florida Rules Of Contract Interpretation, Extrinsic Evidence Cannot Be Used To Contradict Clear And Unambiquous Contract Language.

Finally, the policyholder and its amici seek to rely on the same type of one-sided extrinsic materials concerning the alleged "history" of the absolute pollution exclusion that were rejected in Dimmitt Chevrolet, Inc. v. Southeastern Fidelitv Insurance Corp., 636 So. 2d 700 (Fla. 1993). In Dimmitt, the policyholder and its amici proffered so-called "regulatory" and "drafting history" materials in an effort to demonstrate that the word "sudden" was

ambiguous. The materials in question were selected non-representative excerpts of extra-record documents. This Court concluded that such materials were irrelevant, stating that "[b]ecause we conclude that the policy language is unambiguous, we find it inappropriate and unnecessary to consider the arguments pertaining to the drafting history of the pollution exclusion clause." Id. at 705. In fact, then-Justice -- now Chief Justice -- Grimes changed his vote because of this factor, stating:

> I have now become convinced that I relied too much on what was said to be the drafting history of the pollution exclusion clause and perhaps upon the social premise that I would rather have insurance companies cover these losses rather than parties such as Dimmitt who did not actually cause the pollution damage. In so doing, I departed from the basic rule that language should be given its plain and ordinary meaning.

Id. at 706 (Grimes, J., concurring). This Court should not be persuaded by the same policyholder tactic that was ultimately rejected in Dimmitt.

Similar to any rule governing the purported "expectations" of the party, extrinsic evidence is irrelevant in the absence of an ambiguity. Certainly, the Court should not look to non-representative materials that have not been tested in accordance with the normal rules of evidence, which would include subjecting the drafters of these documents to cross-examination -- an important test in light of their obvious hearsay character. Repetition and cross-citation of such materials by policyholder attorneys, or even by courts, do not prove the propositions for

which the materials are cited.[14/] Where, as here, the terms of the contract are unambiguous, a court should not look beyond those terms to divine a contradictory interpretation. In the absence of ambiguity, the Court should enforce the contract as written.

B. Even If The Court Considers The So-Called "Drafting History," The Extrinsic Evidence Does Not Support The Argument Advanced.

In any event, the Court would find that an examination of the entire range of available materials bears out the plain and ordinary meaning of the exclusion's language. Policyholders, state insurance regulators, and insurers alike understood the scope and effect of the absolute pollution exclusion.

The policyholder and its amici assert that the "history" of the pollution exclusion compels the conclusion that the absolute pollution exclusion was intended to bar coverage only for "general (and substantial) toxic exposure, or a significant amount of environmental degradation." Initial Brief of Appellant at 5. As the District Court of Appeal correctly observed:

> The fact that these insurers may have been predominately motivated by the prospect of claims from a "Love Canal" to exclude the whole class of pollution claims cannot serve as a basis for judges to infer an intent, despite policy language, to cover less catastrophic losses. While the

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[14/] See, e.g., article by insurer counsel Victor C. Harwood et al., The "Frivolity" of Policyholder Gradual Pollution Claims, 5 Mealey's Litig. Reps.: Ins. 19, 38 (Aug. 27, 1991) ("Policyholders . . . routinely distort [the drafting history] issue and cite a few documents . . . to the exclusion of an entire universe of documents related to state insurance commissions across the country which reveal these policyholder assertions for what they are.").

> exclusion certainly entails "environmental pollution-related activities," there is not a single word in the text that suggests an intent to cover claims arising from more isolated incidents of pollution.

Deni, 678 So. 2d at 403 (footnote omitted).

Studies conducted by the National Association of Insurance Commissioners ("NAIC") confirm that, at the time the exclusion was adopted, state regulators understood the need for an absolute pollution exclusion and the exclusion's scope.[15/] For example, a 1985 Report of the NAIC Advisory Committee on Environmental Liability Insurance (the "ACELI Report") recognized that "[t]he judicial blurrings of distinctions drawn in insurance contracts have persuaded the domestic insurance industry to . . . remov[e] all pollution coverage from CGL contract[s]." ACELI Report (Dec. 2, 1985) (emphasis added), reprinted in 1986 NAIC Proceedings, Vol. I, at 761 (Ex. 6). The ACELI Report further observed that insurers "have concluded that the only way to protect themselves from court-imposed liability for gradual pollution is to exclude &pollution whether sudden and accidental or gradual from the policy." Id. at 766 (emphasis added). Even policyholder advocates recognized that a policy containing the absolute pollution exclusion "provides absolutely no pollution coverage." Eugene R. Anderson, Statement to the New York Superintendent of Insurance, May 16, 1985, at 7 (Ex. 7).

[15/] The National Association of Insurance Commissioners is comprised of the chief insurance regulatory officials of all 50 states, the District of Columbia, and the territories.

Thus, references to the "history" of the absolute pollution exclusion do not support a departure from the language of the exclusion. Regulators, policyholder advocates, and insurers alike understood that the absolute pollution exclusion was intended to be more comprehensive than the earlier exclusions. Any suggestion that the absolute pollution exclusion should be limited to the interpretation accorded to those earlier exclusions must therefore be rejected.

IV. FAILURE TO GIVE EFFECT TO THE PLAIN LANGUAGE OF INSURANCE CONTRACTS WOULD HARM THE INSURANCE MARKET.

As demonstrated above, the District Court of Appeal correctly held that the absolute pollution exclusion was clear and unambiguous, and applied that language as written. This Court should affirm that decision. Failing to enforce plain insurance contract language would have significant destabilizing effects in the insurance industry. It would affect underwriters' ability to price insurance in a rational manner.

Insurers are not "deep pocket" guarantors against the consequences of all unfortunate events. Rather, insurance is a carefully defined risk-for-premium exchange, calculated by an exacting actuarial science that is essential to the integrity of the underwriting process. Because underwriters rely on these actuarial predictions in calculating premiums, insurers must have confidence that unambiguous policy language will be enforced as written, and not be subjected to arbitrary interpretation. As the Wisconsin Supreme Court succinctly stated:

> [t]he original risk assessment becomes a nullity if the language of the policy is redefined in order to expand coverage beyond what was planned for by the insurer in the contract of insurance.

City of Edgerton v. General Cas. Co., 517 N.W.2d 463, 476 n.26 (Wis. 1994).

Giving effect to the plain meaning of the policy language allows parties to rely on a court to implement their intentions as memorialized in the written contract. This enhances predictability. Judicial redrafting of policy language, instead of giving effect to the language as written, will ultimately result in excessive uncertainty over risk assessment.

The consequences of failing to give effect to the language of the contract are potentially far-reaching. Over time, imposing pollution-related liability on insurers despite clear contractual limitations to the contrary would invade and deplete insurer surplus, thereby resulting in a significant distortion of the entire insurance process. In the long run, the cost of these unforeseen liabilities would be shifted to all consumers of insurance -- businesses and individuals alike. As the California Supreme Court has observed, judicially created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 711 (Cal. 1989). These unanticipated intrusions into insurers' surplus could also threaten their ability to respond to

everyday claims, as well as catastrophic events such as hurricanes, tornadoes, fires, and other disasters.

In sum, fundamental policy considerations reinforce what Florida law already requires: that the terms of an insurance policy, like those of any other contract, be enforced according to the language contained in the policy. The en banc District Court of Appeal decision properly recognized these longstanding rules of contract interpretation, rejecting the policyholder and its amici's own public policy notions concerning the language of the contract. To preserve the settled expectations of insurers, policyholders and all persons doing business within this State, this Court should affirm the decision below.

CONCLUSION

For all of the foregoing reasons, IELA respectfully requests that this Court affirm the en banc decision of the Florida District Court of Appeal for the Fourth District.

With respect to the question certified to this Court by the District Court of Appeal, IELA requests that this Court decline to adopt a doctrine of "reasonable expectations" in Florida. If this Court were to adopt such a doctrine, IELA respectfully suggests that such a doctrine should be relevant only after a court determines that the policy language is ambiguous, and should be limited to determining the parties' mutual intent and understanding at the time of contracting.

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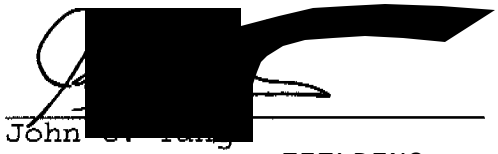
CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to all counsel of record by first class, U.S. mail, postage prepaid on this 11th day of February, 1997.



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