In the Supreme Court of Florida

CASE NO. 89,115

DENI ASSOCIATES OF FLORIDA, INC.,

Petitioner,

v.

STATE FARM FIRE & CASUALTY INSURANCE COMPANY,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other authorities cited

LACK OF JURISDICTION

A. Brief factual and procedural overview as background to jurisdictional challenge

These proceedings arise from a declaratory judgment action over the applicability of an absolute pollution exclusion, as it is called in the industry, contained in a comprehensive general liability policy issued by Respondent State Farm, In pertinent portion, the exclusion states that the policy's coverage does not apply to "bodily injury or property damage . . . arising from the . , . dispersal, release or spill of . . . chemicals." (R 43, 46). State Farm's insured, Petitioner Deni Associates, sought coverage for an ammonia spill incident — described in Deni Associates' complaint as a "chemical spill" — which resulted in evacuation of a building and hospitalization of some of the building's occupants, with ensuing personal injury and loss of income claims. (R 1-3). The trial court ruled for the insured, and the Fourth District reversed holding that the exclusion was unambiguous and that coverage for claims arising from the chemical spill was clearly excluded. The Fourth District also certified a question to this Court.

B. These proceedings should be dismissed for lack of jurisdiction

Before addressing the merits of the case, we submit that these discretionary review proceedings should be dismissed for lack of jurisdiction. This Court lacks jurisdiction because the Fourth District Court of Appeals did not pass upon the question it has certified to this Court.

When Petitioner Deni Associates filed its notice to invoke based on a certified question, this Court ordered briefing on the merits and stated that its decision on jurisdiction would be postponed. Fla.R.App.P. 9.120(d) provides that "[i]f jurisdiction is invoked under rules 9.030(a) (2) (A) (v) or (a) (2) (A) (vi) [certification by the district courts to the supreme court], no briefs on jurisdiction shall be filed." Thus, under the Florida appellate rules, the fact of certification — even if the certification itself is invalid — sets the jurisdictional wheels in motion. But, while a

district court's certification may be sufficient to confer tentative jurisdiction on the Supreme Court and act as the procedural device which triggers the filing of briefs on the merits, the separate question of whether a decision "passes upon" a particular question and, therefore, whether the Court should retain jurisdiction, remains open to challenge. See, e.g., Gee v. Seidman & Seidman, 653 So. 2d 384 (Fla. 1995); Susco Cur Rental Systems v. Leonard, 112 So. 2d 832,835 (Fla. 1959).

We accordingly raise here the Court's lack of jurisdiction based on the fact that the district court's decision self-evidently did not pass upon the question it has certified, The decision of the Fourth District held that the pollution exclusion under scrutiny in the case was unambiguous in excluding coverage for bodily injury and loss of income claims made against Petitioner Deni Associates as a result of the ammonia spill:

> We find but one message in these exclusions and it is apparent: no personal injury claims resulting from the discharge, dispersal, release or escape of liquid irritants or chemicals are covered. Because we find the clause unambiguous, we are unable to agree with the trial court's construction of this categorical exclusion of pollution coverage in the summary judgments.

State Farm Fire & Casualty Insurance Co. v. Deni Associates of Florida, Inc., 678 So. 2d 397,400 (Fla. 4th DCA 1996). In direct contrast, the question certified by the Fourth District was:

> 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?

(678 So. 2d at 404; A. 6). Clearly, the Fourth District's decision — finding a policy exclusion clause unambiguous — does not pass upon the question certified which concerns clauses "where an ambiguity is shown to exist."

The case should accordingly be dismissed for lack of jurisdiction. See, e.g., Gee v. Seidman & Seidman, 653 So, 2d 384 (Fla. 1995); Revitz v. Baya, 355 So. 2d 1179 (Fla. 1977). In Gee

v. Seidman & Seidman, this Court initially accepted jurisdiction in a case in which the Third District had certified a question as one of great public importance. This Court later concluded, however, that it was without jurisdiction for the same reason there is no jurisdiction here — the Third District had not passed upon the question certified:

> We find that review was improvidently granted in this case as the question certified by the district court does not reflect the issue actually ruled upon by the court.
>
> * * *
>
> Under Article V, Section 3 (b) (4) of the Florida Constitution, this Court has jurisdiction to review "any decision of a district court of appeal that *passes upon* a question certified by it to be of great public importance." (Emphasis added). Because the ***district court specifically stated*** that **it did not address the issue contained in the question certified to this Court, we are without jurisdiction to entertain the *question*.**

653 So, 2d at 385.

Similarly, in *Revitz v. Baya*, 355 So. 2d 1170 (Fla. 1977), the district court certified a question to this Court even though it had noted in its decision that it had not decided the question, Abiding by limitations set by the constitution, tbis Court held that it was without jurisdiction to consider the question:

> Article V, Section 3 (b) (3), Florida Constitution, provides, in pertinent part, that the Supreme Court "[m]ay review by certiorari any decision of a district court of appeal . . . that gasses *upon* a question certified by a district court of appeal to be of great public interest . . . "
>
> Since, sub judice, the District Court specifically found it unnecessary to pass upon the question now certified to this Court, we are without jurisdiction to consider and decide the question.

355 So, 2d at 1171.

As in Gee and *Revitz*, this Court has no jurisdiction over this case under the limitations set by the Florida Constitution, and the case should accordingly be dismissed.'

STATEMENT OF THE CASE AND FACTS

Petitioner Deni Associates' statement of the case and facts is incomplete and contains inaccuracies, including citation throughout to the wrong exclusion, a repeatedly inaccurate recital of the Fourth District's certified question, and a failure to recite the full record facts about the chemical spill incident which triggered tbis coverage litigation. Respondent State Farm accordingly restates the facts as they appear in the record, and where appropriate Respondent notes the specific inaccurate recitals made in Petitioner's brief.

'This case should also be dismissed because Petitioner Deni Associates never filed a timely notice to invoke this Court's jurisdiction. The Fourth District Court of Appeal issued its decision in this case on July 17, 1996, Although without prior notice to the parties, the Fourth District addressed and disposed of this case *and* an entirely unrelated case (*Fogg v.* Florida *Farm* Bureau, now pending under this Court's Case No. 89,300) in that one decision. Contrary to the representation in footnote 1 of Petitioner's notice to invoke this Court's discretionary jurisdiction, the two appeals were never consolidated in the Fourth District.

Neither of the parties in this Deni Associates case tied any motions — for rehearing or otherwise — directed to the substantive decision. The only motion filed was by State Farm directed to a separate attorneys' fee order, and it was granted by order dated August 20, 1996. The Fourth District then issued the mandate in the Deni Associates appeal on September 6, 1996. Deni Associates' notice to invoke the discretionary jurisdiction of this Court was filed on October 4, 1996 — 79 days after the Fourth District's decision in the case was rendered, and 45 days after disposition of State Farm's motion on the attorneys' fee award, Petitioner's notice was thus untimely under Fla.R.App.P. 9.120, and this appeal should accordingly be dismissed for the additional reason that it was untimely.

We recognize this Court's recent decision in *National Union* Fire *Insurance* Co. *v. Reno's* Executive Air, Inc., 682 P.2d 1380 (Nev. 1984), but believe that it should not govern in this case where two unconsolidated cases were, without prior notice to the parties, decided with one opinion. The Fourth District never consolidated the cases, continued to treat the cases separately after the opinion was filed, issued the mandate separately, and this Court has denied consolidation.

A. Petitioner' Deni Associates' chemical spill and the resulting evacuation of its building, disposal of the chemical, and removal of contaminated building contents

Petitioner Deni Associates of Florida, Inc., an architectural engineering firm, was one of several tenants in a two-story commercial building located in Tamarac, Florida. (R 27, 36).[2] On June 8, 1993, at 8:20 a.m., both the City of Tamarac Fire Department and the Broward County Fire Department responded to a 911 call at the office of Deni Associates generated by a chemical spill: specifically, a spill of ammonia from a blueprint machine. (R. 2, 36). Due to the hazardous nature of the spill, the two fire departments sent twenty-three fire service personnel to the scene and immediately evacuated the building. (R. 2, 36). Two persons had already begun experiencing respiratory problems as a result of the ammonia fumes, and they were taken to the hospital for treatrnent. (R. 36).

After evacuating the building, the fire service personnel set up ventilators, and broke the windows on the south side of the building to expedite ventilation. (R. 36). The building was not turned back over to the building manager until some six hours later, (R. 36). The Fire Chiefs report noted that the fire team had had to remove carpeting that had become "contaminated," in the words of the report. (R. 36). Responsibility was also assigned for "disposal of chemical." (R 36).

B. The personal injury and property damage claims arising from the chemical spill

After the spill incident, claims were made against Deni Associates for personal injuries sustained from inhalation of the ammonia fumes, and claims were also made by several co-tenants seeking reimbursement for loss of income due to the evacuation of the building.(R. 36, 39, 45).

C. The State Farm commercial liability policy

Deni Associates thereafter contacted Respondent State Farm Fire & Casualty

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[2]References to the record on appeal appear in this brief as (R.), and to the supplemental record as (S.R.). All emphasis is added unless otherwise stated.

Insurance Company seeking coverage for the liability claims arising from the chemical spill under a commercial general liability policy which had been purchased by Deni from State Farm on April 30, 1993 for a premium of $645. (R. 2, 4, 10). State Farm responded by noting that coverage for chemical spills was excluded under the policy's terms. (R. 2, 13, 43, 46). The policy provided general business liability coverage with certain specific exclusions, including:

> BUSINESS LIABILITY EXCLUSIONS
>
> Under Coverage L (LIABILITY), this **insurance does not *apply:***
>
> * * *
>
> **to any:**
>
> **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:***
>
> 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 definitional section of the policy defines "pollutants" as follows:

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

(R 46). Deni Associates has not accurately quoted the language of the Business Liability exclusion although it is undisputedly the exclusion at issue in this case.[3]

D. The declaratory action filed below

After State Farm denied coverage because of the exclusion for "bodily injury or

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[3] There is no explanation in its brief for Deni Associates' failure to quote this exclusion accurately when it is the only exclusion which has ever been at issue between the parties in this litigation. (R. *passim*). The exclusion set out in Deni Associates' brief (for example at pages 2 and 11) is an exclusion in the Property section of the policy. That exclusion — indeed, that entire section of the policy — is in no way involved in this case. The quotation of that exclusion's language is thus puzzling, not least because Deni Associates has referred to it for the first time in the briefing before this Court.

property damage . , . arising out of. . . the . . . spill or release of, . . fumes [or] chemicals", Deni Associates filed a declaratory judgment action. (R. 1-4). In its complaint for declaratory relief, Deni Associates itself alleged the operative facts showing that it was seeking coverage for bodily injuries and property damage arising out of a chemical spill:

> 6. On or about June 8, 1993, the defendant, DEN1 ASSOCIATES, were moving office equipment into their new office. The equipment included a blueprint machine which contained certain chemicals to allow it to run. During the process of the move, the chemicals from the blueprint machine spilled, causing the necessity of evacuation of the building in which plaintiff, DENI ASSOCIATES, leases premises.
>
> 7. As a result of the evacuation of the building, certain claims have been made against plaintiff, DENI ASSOCIATES, for personal injury and loss of business.

(R. 2).

State Farm answered the complaint, raised the above cited exclusion as an affirmative defense, and counter-claimed for declaratory judgment as well. (R 9-12). Thereafter, because there was no disagreement as to the material facts, State Farm moved for a summary judgment ruling that State Farm had no coverage and no duty to defend based upon the clear and unambiguous language in the subject exclusion. (R 27-35). Deni Associates filed a cross-motion for summary judgment of coverage claiming that the policy should be deemed ambiguous, although Deni Associates' motion did not actually identify any ambiguity in the policy language. (R 49-52).

E. The trial court's summary judgment ruling

The trial judge held that there was an ambiguity and therefore coverage, but his ruling was not based on the language of the State Farm policy. Rather, it was based on the trial judge's interpretation of other language contained in other — earlier — industry versions of commercial liability policies, with differently-worded pollution exclusions. (R 54, 57). The trial judge remarked

in his order — without reference to the actual State Farm policy at issue — that "virtually every pollution exclusion contains an exception" allowing for coverage if the damage "results from the discharge of pollutants that is *'sudden and accidental'*". (R. 54). The trial judge then went on to hold that the 'sudden and accidental' language — which is not part of the State Farm policy at issue anyway — is ambiguous. (R. 57). Not only was this holding not pertinent to the policy in question, but it ran directly counter to this Court's ruling in *Dimmitt* Chevrolet, Inc. *v. Southeastern Fidelity Insurance* Corp., 636 So. 2d 700 (Fla. 1993) (term 'sudden and accidental' as used in pollution exclusion clause in comprehensive general liability policy is not ambiguous).[4]

After making the irrelevant ruling that the 'sudden and accidental' language not contained in the State Farm policy is ambiguous, the trial court also went on to state that State Farm was "seeking to stretch the definition of pollutant beyond what a reasonable person placed in the position of the insured would have understood the word to mean." (R. 57-58). The trial judge's order did not state that the policy definition of 'pollutant' was ambiguous, but rather indicated only that the definition was very broad: "Under defendant's, STATE FARM, definition, practically anything could be deemed a pollutant." (R 57-58).

Based on his order, the trial judge entered final summary judgment in favor of Deni Associates (R 74-75), and State Farm sought review of the ruling in the Fourth District Court of Appeal. (R 76-77).

F. The Fourth District's en *banc* opinion

The Fourth District reversed, finding that the exclusion was plainly worded and unambiguous.

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[4]The trial judge's order was dated July 22, 1994, well after this Court's 1993 decision in *Dimmitt*. (R. 53-58).

> None of the words used in the policy texts . . . are highly technical; all are simple words of ordinary use. The fact that the words together combine to completely eliminate an entire area of potential coverage does not render them unclear. We find but one message in these exclusions, and it is apparent: no personal injury claims resulting from the discharge, dispersal, release or escape of liquid irritants or chemicals are covered. Because we find the clause unambiguous, we are unable to agree with the trial court's construction of this categorical exclusion of pollution coverage in the summary judgments.

State *Farm* Fire *& Casualty Insurance* Co. *v. Deni Associates of Florida,* Inc., 678 So. 2d 397,400 (Fla. 4th DCA 1996) (Fourth District's emphasis). Reviewing established principles of Florida law on construction of insurance policies, the Fourth District referenced numerous decisions from this Court and the Florida districts courts of appeal — all of which are in complete harmony on the bedrock principle that where policy language is plain and clear there is no need for further inquiry or scrutiny or construction; the language will be given effect as written, 678 So. 2d at 400-403. For example, the Fourth District quoted this Court's decision in *Rigel v. National Casualty* Co., 76 So. 2d 285,286 (Fla. 1954):

> We acknowledge the rules that if the language is plain and unambiguous, there is no occasion for the Court to construe it, . . . that if uncertainty is present, the instrument should be construed against the insurer, , . . *that* the Court should not extend strictness *in* construction *to* the *point* of adding a meaning to language that is clear, . . . and that the Court should construe the contract of insurance to give effect to the intent of the parties[.]

678 So. 2d at 400 (Fourth District's emphasis). The Fourth District also referenced this statement of the principle:

> A court may resort to construction of a contract of insurance only when the language of the policy in its ordinary meaning is indefinite, ambiguous or equivocal, If the *language* employed *in the policy is clear* and *unambiguous,* there is no occasion for *construction* or the exercise of a choice of *interpretations.* In the- absence of *ambiguity,* waiver or *estoppel,*

> *contravention* of *public* policy or *positive law, it is* the *function* of the *court to give effect to and enforce* the *contract as it is written.*
>
> Florida courts adhere to the principle that a court should not rewrite a contract of insurance extending the coverage afforded beyond that plainly set forth in the insurance contract,

768 So. 2d at 401, citing U.S. *Fire* Insurance Co. v. Morejon, 338 So. 2d 223 (Fla. 3d DCA 1976), *cert.* denied, 345 So. 2d 426 (Fla. 1977) (Fourth District's emphasis).

Summing up the governing Florida case law, the Fourth District reaffirmed Florida's adherence to strict construction of insurance policies against insurers as their drafters, but noted that strict construction rules do not displace the fundamental plain language rule:

> Thus, the current Florida rule is that strict construction is required of exclusionary clauses in insurance contracts only in the sense that the insurer is required to make clear precisely what is excluded from coverage. If the insurer fails in the duty of clarity by drafting an exclusion that is capable of being fairly and reasonably read both for and against coverage, the exclusionary clause will be construed in favor of coverage. If the insurer makes clear that it has excluded a particular coverage, however, the court is obliged to enforce the contract as written.
>
> Strict construction does not mean that a court must always find coverage. Strict construction does not mean, as the foregoing cases establish, that clear words may be tortured into uncertainty so that new meanings can be added.

678 So. 2d at 401.

The Fourth District went on to contrast the established Florida rules of construction with a doctrine referred to as the 'reasonable expectations' doctrine, adopted in various — although by no means harrnonious or even compatible — versions in other jurisdictions. 678 So. 2d at 402-403. In one context or another (as discussed in the argument section below, some jurisdictions apply the doctrine only in the face of an ambiguity, some jurisdictions apply it whether or not there is an ambiguity, and some jurisdictions apply it only if there is no ambiguity), the doctrine considers the

insured's subjective intentions and apparently lets them govern if they are 'reasonable.'

As the Fourth District pointed out, the trial court — while not referring to the doctrine — seemingly applied reasoning of the 'reasonable expectations' ilk in saying that State Farm's broad definition of pollutants had "stretched the definition of 'pollutant' beyond what a reasonable person placed in the position of the insured would have understood the words to mean." 678 So. 2d at 402. The Fourth District found that the trial judge erred in this for two reasons:

> The first and foremost is, as we have just shown, that the Florida Supreme Court has not adopted the doctrine of reasonable expectations; instead the rule here is that ambiguities result in coverage.
>
> Second, 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. In other words, applying the fundamental principle under Florida law that the contractual language must be enforced if it is clear, an ambiguity must therefore first be shown to exist before the court can consider the question of the reasonable expectations of the insured,

678 So. 2d at 402.

The Fourth District went on to reject as impermissible the attempts of the *Deni Associates* and *Fogg*[5] trial courts to engraft limitations onto the clearly-worded exclusion so that it somehow would be more 'environmental' in application. The *Deni Associates* trial judge had said that he thought the exclusion should apply to "long-term environmental degradation or, at the very least, an environment&de exposure to extremely hazardous or toxic substance." (R. 56). The *Fogg* trial judge had different phraseology for revising the policy. He indicated, according to the Fourth District, that the term pollutant should be construed to mean "a substance particularly harmful or toxic to persons or the environment generally, and not merely a substance harmful to persons or the

[5]As set out in note 1, *supra*, the Fourth District's decision addressed and disposed of two unrelated cases — the instant case and the unrelated case of *Fogg v. Florida Farm* Bureau.

environment due to special circumstances," 678 So. 2d at 400, The *Fogg* trial court also said that the absolute pollution exclusion "is not triggered by non-environmental, routine accidents." 678 So. 2d at 403.

The Fourth District disagreed that these limitations could be strapped on to the exclusion except by violating the plain language rule in order to reach results subjectively more acceptable to the trial courts:

> To repeat ourselves, the express language of this exclusion is to exclude *all* pollution bodily injury claims from coverage. The definition of pollution drafted by the underwriters in these cases was obviously intended to be both broad and comprehensive. Indeed, the trial courts themselves tacitly recognized that the text seeks to exclude the whole of the class. The whole necessarily comprehends its parts,
>
> 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 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. We can find no ambiguity from the placement of the definition in a text that is at once broad enough to exclude both environmental pollution and also the kinds of acts involved here affecting only two persons or other persons in the same building. Under the policy definition used in these cases, pollution is pollution, even if it injures only a few bystanders in the same general area.

678 So. 2d at 403.

G. The concurring/dissenting opinions

One judge of the Fourth District thought the policy exclusion was ambiguous on its face and three thought that the exclusion could be characterized as having a 'latent ambiguity', as set out in their opinions concurring in part and dissenting in part. One judge thought the 'reasonable expectations' doctrine could have had some appeal in this case, but felt constrained by the fact that

this Court has not adopted any of the versions of the doctrine. 678 So.2d at 406.

H. The Fourth District's certified question

Although the Fourth District had ruled that this case involves an unambiguous provision in a comprehensive general liability ("CGL") policy, it certified the following question:

> 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?

678 So. 2d at 404.[6]

I. The untimely notice to invoke and denial of the Fogg motion to consolidate

As set out in note 1 above, Petitioner filed an untimely notice to invoke this Court's discretionary jurisdiction on October 6, 1996. This Court denied a motion to consolidate filed by the Petitioner in *Fogg v. Florida Farm* Bureau, Supreme Court Case No. 89,300 by order dated December 10, 1996. On this basis, this case now pends before this Court.

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[6]For whatever reasons, Petitioner Deni Associates consistently misquotes the certified question, incorrectly stating that it was:

> *Whether* 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 the insured to resolve ambiguities in CGL policies?

See Initial Brief of Petitioner Deni Associates, pp. 2, 4. Perhaps Petitioner was concerned with the obvious jurisdictional problem created when the Fourth District certified a question it had not passed upon. Misquoting the question, however, can hardly cure the problem.

SUMMARY OF ARGUMENT

These proceedings should be dismissed for lack of jurisdiction because the Fourth District did not pass upon the question it certified to this Court. The Fourth District's decision held that the pollution exclusion in the subject State Farm policy is clear and *unambiguous*. The question certified, on the other hand, asks this Court to address whether the 'reasonable expectations' doctrine should be adopted in Florida where a policy has been held ambiguous.

If jurisdiction is retained, the Fourth District's decision should be affirmed. The undisputed facts show that the claims in this case arose from an ammonia spill which caused a 2-story commercial building to be evacuated for a day and sent occupants affected by the ammonia fumes to the hospital. The pollution exclusion in question excluded coverage for claims arising from the "release , . . or spill, . . of chemicals [and] fumes." The Fourth District held the pollution exclusion — referred to in the industry and case law as the 'absolute pollution exclusion' — clear and unambiguous, and its language shows that it plainly is, for which reason the vast majority of courts to consider the issue have so held. Appropriately following Florida's plain language rule, the Fourth District held that there was no coverage for the claims arising from the chemical spill.

The arguments made by Petitioner and amici for reversal should be rejected. There is no patent or latent ambiguity in the policy language. Neither should this Court adopt any version of the 'reasonable expectations' doctrine in Florida. Amicus The Florida Department of Insurance has urged against adoption of the doctrine, and with good reason. Florida has adequate rules for construction of insurance policies, which are dominated always by the plain language rule. The plain language rule promotes certainty and minimizes litigation, The version of the 'reasonable expectations doctrine' Petitioner asks this Court to adopt discards the plain language rule altogether, and instead mandates a case-by-case inquiry *after the* insured *has sustained* a loss as to whether the

insured expected coverage for that loss and whether such an expectation was reasonable, notwithstanding the fact that coverage is expressly excluded by the policy. That rule can only create uncertainty in the law and generate more litigation when less is what is needed. Florida's plain language rule has worked for over a century, and it should be retained.

This case does not, in any event, present the opportunity for consideration of the 'reasonable expectations' doctrine. Where an insured itself states that the claims against it arise from a chemical spill, there is no factual support for a finding that such an insured had a reasonable basis for expecting coverage under a policy expressly excluding coverage for chemical spills.

ARGUMENT

A, The Fourth District correctly held that the policy language is clear in excluding coverage for claims arising from chemical spills

The Fourth District correctly held that the State Farm policy issued to Deni Associates was clear and unambiguous in excluding coverage for claims arising from the chemical spill and consequent release of noxious fumes in this case. The policy's pollution exclusion specifically states that coverage does not exist for "bodily injury [or] property damage arising out of the . . . discharge, seepage, migration, ***dispersal, spill,*** release or escape of pollutants" (R 43), and "pollutants" are defined as **"any liquid or gaseous , , . *irritant* or *contaminant,* including fumes, *[and]* chemicals".** (R 46). In its complaint, Deni Associates alleged that its equipment included a "blueprint machine which contained **certain** chemicals to allow it to ***run*", and that during a move "chemicals *from the blueprint* machine spilled *causing* the necessity of *evacuation* of the *building*[.]"** (R 2). Deni Associates went on to allege that ***as a result* "certain claims have been made against *plaintiff, Deni* Associates, for *personal injury*** and loss of business." (R. 2).

The facts of this incident — as alleged by Deni Associates itself- fall squarely within the policy's pollution exclusion. Deni Associates' own allegations seek coverage for claims arising from a "chemical spill". (R 1-3). The pollution exclusion in the policy straightforwardly excluded coverage for bodily injuries and property damage claims arising' from chemical spills. Under long established Florida law, plain and unambiguous language in an insurance policy is simply enforced as written.' This case is as simple as that. Respondent submits that unless the plain language rule is disregarded, no further analysis was or is required. State Farm was entitled to summary judgment, and the Fourth District has properly so ruled. If jurisdiction is retained over this case, the Fourth District should be affirmed.

B. The Fourth District's ruling that the pollution exclusion is unambiguous and that there must be adherence to the plain language rule comports with identical rulings from the vast majority of the courts which have considered the pollution exclusion issues and should be approved as the law in Florida

1. The issue: adherence to the plain language rule or judicial reformation

The Fourth District's holding that the language of the pollution exclusion is clear and unambiguous is supported not only by the plain policy language, but also by the vast majority of courts which have addressed the issue. Over 100 cases have so held as of the date of this brief.'

Review of the case law about the pollution exclusion shows that courts which have refused to apply the exclusion as written cannot really point to any ambiguity in the language.[9]

'See, e.g., *Dimmitt Chevrolet,* Inc. *v. Southeastern Fidelity Insurance* Corp., 636 So. 2d 700 (Fla. 1993); *State Farm Mutual Automobile Insurance* Co. *v. Pridgen,* 498 So. 2d 1245 (Fla. 1986); *Travelers Insurance Co. v. Bartoszewicz,* 404 So. 2d 1053 (Fla. 1981); *Excelsior Insurance* Co. *v. Pomona* Park *Bar & Package Store,* 369 So. 2d 938 (Fla. 1979).

'Because they are so numerous, the decisions are listed in the Appendix hereto.

'Tellingly, Petitioner Deni Associates and the amici who have filed briefs with Petitioner never once set out the language of the exclusion. As indicated above, Petitioner quotes the language from an irrelevant exclusion contained in the *property* coverage section of the policy. Thgt language

Instead, these courts seem to have relied on their own subjective impressions triggered by the words "pollution" and "pollutants" — which they apparently project as being shared by the 'public' — and simply declined to apply the plainly-worded policy exclusion and its equally plain defmition of "pollutants" in cases they felt did not comport with 'public' notions of pollution. Whatever the rationale invoked — e.g., 'reasonable expectations' of the insured, 'latent ambiguity', 'ambiguity as applied' — these courts were, we submit, doing nothing more or less than sidestepping the plain language rule because of subjective discontent with a result that would be produced by using the plain language.

The decisions reached by these courts and the confusing, litigation-generating variety of modifications, limitations, and changes they propose to engraft onto the pollution exclusion are discussed below. We initially note, however, that this Court and other courts throughout the nation have recognized that subjective judicial impressions about what words mean or may connote to the 'public' cannot govern over plain contractual language, producing different results from case to case. Neither does individual discontent with the particular results which will follow from application of unambiguous language serve as a license for judicial alteration of the language. Justice Grimes pointed out these potential judicial temptations in concurring specially in this Court's decision in *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity* Corp., 636 So. 2d 700 (Fla. 1993) (holding a prior version of the pollution exclusion clear and unambiguous):

> I originally concurred with the position of the dissenters in this case. 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 subconsciously upon the social premise that I would rather have insurance companies cover these losses than parties such as

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has never been — and is not now — at issue in this case. The amici merely adopt Petitioner's statement of the facts, so they do not recite the exclusion either. Only the definition of pollutants is accurately quoted by Petitioner and the pro-Petitioner amici.

> Dimmitt who did not actually cause the pollution damage. In so doing, I departed from the basic rule of interpretation that language should be given its plain and ordinary meaning.

636 So. 2d at 706 (Grimes, J., concurring.). The Fourth District's decision here quite correctly avoided the danger identified by Justice Grimes, i.e., the subconscious pull towards judicial tampering with plain language under the guise of construction where it appears that an 'undesirable' or 'socially irresponsible' result may otherwise occur:

> Where the insurer has defined a term used in the policy in clear, simple, non- technical language, as is the case with pollut [ants][10] in these policies, strict construction does not mean that judges are empowered to give the defined term a different meaning deemed more socially responsible or desirable to the insured.

678 So. 2d at 401.

It is this choice between the plain language rule and judicial rewriting that is the crux of this case, A recent commentator aptly posed the alternatives, drawing from Carroll's Through the Looking Glass:

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean-neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> 'The question is," said Humpty Dumpty, "which is to be master— that's all."

E. Joshua Rosenkranz, Note, The Pollution *Exclusion* Through the Looking *Glass,* 74 Geo. L. J. 1237 (1986), quoting Lewis Carroll, Through the Looking *Glass* 94 (1946). Florida law has always been firm in holding that in the case of plain policy language, the *language* will be master — not the courts."

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[10]The opinion says "pollution", but obviously "pollutants" was intended as that is the defined term in the policy and the Court is referring to definitions,

"See, e.g., cases cited in note 9, *supra.*

We submit that Florida should continue to follow that rule.

2. Decisions in accord with the Fourth District's determination that the pollution exclusion is plainly-worded and will be given effect as written

Courts in other jurisdictions recognize the plain language of the pollution exclusion as master, as did the Fourth District here. These courts have properly applied the absolute pollution exclusion as written to all occurrences falling within its clear terms, resisting arguments that the court should be master and modify or limit the exclusion in various ways and contexts to reach desired results in individual cases.

Since Petitioner and amici seek to draw a distinction between cases involving 'major industrial polluters' and cases involving 'others' (as discussed below, no usable, recognizable parameters have been offered by the courts, Petitioner, or amici to define the groups on either side of the distinction), all of the cases reviewed in this section involve mishaps of one sort or another occurring during the activities of a variety of types of businesses *other* than what might be considered 'major industrial polluters,' such as industries whose operations inherently require discharges of hazardous waste or large scale use of toxic chemicals.

The — not 'major-industrial-polluters' — insureds in these cases attacked the pollution exclusion with the same types of arguments raised by Petitioner and amici here. One of the arguments is that the definition of pollutants should not be given effect because (1) it is not the same as the 'common' definition of pollutants, and/or it does not comport with scientific or statutory definitions of pollutants, or (2) it can include normally harmless substances. Another argument is that the exclusion should be allowed to apply only in a certain category of cases although — as detailed more fully in another section of the brief — there is very little agreement on what that category should be or how to describe and/or recognize it (i.e., descriptions vary from case to case in

saying the exclusion should apply only to 'actual polluters'; or only to 'industrial' or 'industry-related activities; or only to 'traditional environmental pollution'; or only to 'those who indifferently pollute our environment — and not to those who only incidentally possess the pollutant in the course of their business'; etc., etc.). There is also an argument that the exclusion should only apply to spills, dispersals, releases, etc. 'into the environment', which is argued to mean 'outdoors'.

In the face of these arguments, the courts in all of the cases discussed here — and again they are part of a body of cases which represents by far the majority view — have steadfastly adhered to the plain language rule. The plain language does not contain all of the qualifications, modifications, and restrictions argued by the insureds, so these courts properly refused to write them in after the fact.

a. The policy definition of "pollutants" is clear, so other definitions are irrelevant

Under Florida law, as the Fourth District appropriately pointed out below, if a policy provides a clear definition of a term, that definition will be followed. *Deni* Associates, 678 So. 2d at 401. See *also*, e.g., Grunt *v.* State Farm Fire *&* *Casualty* Co., 638 So. 2d 936 (Fla. 1994); *Dorrell v.* State *Farm* Fire *&* Casualty Co., 221 So. 2d 5 (Fla. 3d DCA 1969).

Two recent federal decisions discussed the clarity of the subject definition of "pollutants", and the corollary conclusion that its plain language precludes further consideration of either 'courts' notions' as to the usual meaning of the word "pollutants" or 'common notions' as to what it means. *American States* Insurance Co. *v. Nethery*, 79 F.3d 473 (5th Cir. 1996); Brown *v.* American Motorists Insurance Co., 930 F. Supp. 207 (E.D. Pa. 1996).

In *Nethery, supra*, a company was hired to perform some home repairs, including painting portions of interior walls and replacing sections of floors. The homeowner had 'chemical

hypersensitivity,' and thus said she had asked that certain special paints and glues be used, The company's employee instead used industry-standard paint and glue containing chemicals which the homeowner claimed injured her and caused her to lose use of part of her home. She sued the repair company, which made a demand on its insurance carrier for coverage and a defense under a CGL policy with an identical pollution exclusion to that contained in the State Farm policy here.

The insured argued, and the district court held, that the exclusion was ambiguous because the "pollutants" definition's reference to "irritant" should not be read to include paint and glue fumes which do not normally inflict injury. The Fifth Circuit reversed holding that the exclusion clearly and unambiguously defmed "pollutants," and just as clearly and unambiguously excluded coverage for the incident sued upon:

> We agree with American States; the ***absolute pollution*** exclusion does unambiguously **exclude *coverage* for *Nethery's* claim. "Pollutant" is** a ***defined term* in the *policy*. Whether the *policy definition* comports with** *this* **court's *notion* of** *the* **usual meaning of "*pollutants*" *is* not the issue; the court has no *special expertise* in writing insurance *policies*. Our *judgment about* *the* *reasonable scope* of a *pollution* exclusion — in the absence** *of* **ambiguity — must be tied to the *language*** of *the* ***policy*.** Nethery contends she suffered bodily injury and property damage from the "discharge, dispersal . . . release or escape of pollutants . . . at or from any premises on which the insured [was] working." "Pollutants" is defined in the policy as "any . . . gaseous . . . irritant or contaminant, including . , , vapor . . , fumes . . . [and] chemicals." The paint and glue fumes fall under the definition of gaseous substances, vapors, and fumes, while the [main chemical ingredient] in the paint and glue is plainly a chemical.

79 F.3d at 475-476,

In Brown *v. American* Motorists Insurance Co., 930 F. Supp. 207 (E.D. Pa. 1996), a homeowner applied a chemical waterproofing sealant to the brick exterior of her home. According to her and her husband, fumes from the sealant then migrated into the interior of their home causing them such physical discomfort that it was necessary for them to vacate their home. They sued their

homeowners insurer, who denied the claim on the basis of the pollution exclusion. The court held that the claim fell "squarely within the pollution exclusion," 930 F. Supp. at 206, which the court found clear and unambiguous.

The homeowners argued that the noxious fumes were not "pollutants" because they came "from an over-the-shelf product used in an everyday activity" and that a "common sense understanding of the term pollutants . . . [would] not include such fumes." 930 F. Supp. at 208. That argument was rejected by the court because the policy contained a clear and unambiguous definition of "pollutants" such that the court could not and would not replace it with a 'common meaning' or 'common understanding':

> Plaintiffs argue that the noxious fumes that made their home unlivable were not "pollutants" under the pollution exclusion because the fumes came from an over-the-shelf product, used in an everyday activity. Essentially, ***Plaintiffs' position is that a common sense understanding of*** **the term pollutants, as reasonably understood by *Plaintiffs,* does not *include* the *fumes* here.**
>
> **Whether or not fumes from a household *product* would *commonly* be understood as a *pollutant* is *not* the issue, *however.* The *term pollutant* is *defined* in the *policy* to include solid, liquid and gaseous *irritants* and *contaminants,* including fumes *and vapors. This* definition is clear and unambiguous, and *includes the* fumes that *Plaintiffs claim* caused them *sufficient* irritation *to make them* vacate their** home. See Madison *Constr. Co.,* 1996 WL 338810, at *3 (finding fumes from commonly used sealant a pollutant under similarly worded pollution exclusion). Where ***a term is clearly* and unambiguously defined in a policy, the Court *will* not substitute a *common definition* of *the term* for the definition contained in the policy.**

930 F. Supp. at 208.

Also refusing to deviate from the plainly-worded policy definition, *American States* Insurance Co. *v.* F.H.S., Inc., 843 F. Supp. 187 **(S.D.** Miss. 1994) made it clear that neither will the policy definition be replaced with scientific or statutory/regulatory definitions. In F.H.S., the insured

owned and operated a cold storage warehouse. A cooling system malfunctioned, and ammonia leaked into the warehouse and the surrounding area, As a result of the ammonia leak, various people in the vicinity of the warehouse were overcome by the ammonia fumes and taken to local hospitals. They thereafter made personal injury claims against the insured, who then sought coverage under a CGL policy with a pollution exclusion identical to that contained in the State Farm policy here. The court held that both the exclusion and the definition were clear and unambiguous; that ammonia was clearly a pollutant as defined by the policy; and that coverage was plainly excluded from claims arising from the ammonia leakage incident. Id. at 189-190.

The F.H.S. court — in a discussion directly on point for this case — noted that where, as here, uncontroverted facts show the release of ammonia at the insured's premises causing respiratory irritation to persons exposed to the ammonia, the pollution exclusion is clearly applicable:

> There is no question here but that the injuries for which claims have been made against F.H.S. are based on an incident involving the "escape or release of' ammonia "from [a] premises, site or location which . . . was . . , owned by [an] insured." The issue, then, is whether ammonia is a pollutant within the meaning of that term *as* defined *by the* policy. The policy defines "pollutants" to include any "gaseous . . . irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." It is **undisputed that ammonia is a gaseous substance. And it is specifically *claimed* by those alleging that they were injured by ammonia release that experienced respiratory irritation as a result of *exposure to* the ammonia which escaped from *F.H.S.'s* warehouse.**

843 F. Supp. at 189 (court's emphasis). The F.H.S. court then went on to discuss — and reject — the argument by the warehouse owner that the court, "for purposes of evaluating the disputed exclusion, should define the term pollution as environmental engineers do, i.e., in quantitative limits; or as it is defined by state law, i.e., 'environmental pollution;' or that it should define pollution as 'others' do, i.e., as a violation of federal or state environmental quantity laws." Id. The court noted

that it could not rewrite the policy exclusion because there was nothing ambiguous about it:

> **F.H.S. asks that this court, in essence, ignore the policy definition of** "pollutants" or, perhaps more accurately, limit the term so that it is defined in the manner employed by environmental engineers, and thereby create coverage not provided by the policy, The court reiterates that **it is not free to rewrite the terms of the insurance contract where that contract is not ambiguous. In this case, regardless of what is or might be a preferable definition from F.H.S.'s standpoint, or what would be the definition of choice from [an environmental engineer expert's] perspective, or the perspective of the scientific community, the policy definition of "pollutant," and the pollution exclusion construed as a whole is clear and unambiguous.** The claims that have been asserted against F.H.S. fall well within the exclusion.

843 F. Supp. at 190. Thus, scientific, environmental, and statutory definitions will also not be used to rework the policy definition, since it is clear on its own.[12]

For purposes of the instant case, we note that the policy definition of "pollutants" has been held unambiguously to include ammonia leaks and spills which cause respiratory injuries to persons exposed to the ammonia fumes not only in F.H.S., *supra,* but also in Bituminous Casualty Corp. v. RPS Co., 915 F. Supp. 882 (N.D. Ky. 1996). The RPS case involved a company that services

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[12]Any such reworking of, or substitution for, the policy definition would not help Deni Associates here in any event. Florida's Pollutant Discharge Prevention and Control Act categorizes ammonia as a 'pollutant'. $376.03 1(16), Fla. Stat. The Federal Clean Air Act categorizes ammonia as an extremely hazardous substance, the release of which is known to have serious adverse effects to human health. 42 U.S.C. §7412(r)(3). The Environmental Protection Agency designates ammonia as a hazardous substance under the Federal Water Pollution Control Act. 33 U.S.C. §1251; §1317(a), §1321(b)(2)(A); 40 C.F.R. §116.4. The Occupational Safety and Health Administration designates ammonia as a toxic and hazardous substance which causes air contamination. 29 U.S.C. §655; 29 C.F.R. ~1910.1000. The Food and Drug Administration categorizes ammonia as a caustic poison under the Federal Hazardous Substances Act. 15 U.S.C. $1261; 21 C.F.R. §2.110. The Consumer Product Safety Commission found that the labeling regulations of the Federal Hazardous Substances Act were not sufficient for certain substances such as ammonia — the Commission now requires that ammonia also be labeled as a 'poison', not merely a hazardous substance. 15 U.S.C. $1261; 16 C.F.R. $1500.129. The Department of Transportation likewise designates ammonia as a hazardous substance and prescribes specific shipping requirements for purposes of transportation safety. 49 C.F.R. $172,101, $173.304; 46 C.F.R. $154.1700, 8154.1760.

ammonia refrigeration systems whose employee, through a mishap, released ammonia into a customer's hog processing plant, As a result "the plant was evacuated by health and emergency officials for about 3% hours, a few [plant] employees required medical treatment, and many hog carcasses were condemned by the United States Department of Agriculture." 915 F. Supp. at 883. Claims were then brought against the service company for personal injury and property losses arising from the ammonia release. The insurance company denied coverage on the basis of a pollution exclusion identical to State Farm's here. The insured claimed there were ambiguities in the exclusion, but the RPS court could find none:

> We examined the terms of the exclusion and found no ambiguity. The policy exclusion is what it purports to be, an exclusion of liability based upon, inter *alia*, the release of pollutants.

915 F. Supp. at 884. The court said that ammonia, as a liquid or gaseous irritant and contaminant, was a pollutant within the policy definition, and that the insured had not contested that the damages claimed arose from the release of ammonia in the plant, Plainly then, the court concluded, there was no coverage.

Not only have the courts rejected arguments that the plain language of the policy's definition of "pollutants" should be judicially replaced with common, scientific, statutory or other definitions, but they have also rejected arguments that the definition should be held ambiguous because of overbreadth since it can potentially include substances that are ordinarily harmless or harmless if used properly. For example, the Fifth Circuit in *Nethery, supra*, rejected an 'eggshell plaintiff argument[13] that the paint and glue fumes used in the hypersensitive plaintiff's home should

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[13]The origins of this argument in the pollution exclusion context are found in the district court decision in Westchester Fire *Insurance* Co. *v. City* of *Pittsburgh, Kansas*, 768 F. Supp. 1463 (D. Kan. 1991), *aff'd* sub *nom. Penn.* Nut. Mut, *Cas. Ins.* Co. *v. City* of Pittsburgh, *Kansas*, 987 F.2d 1516 (10th Cir. 1993), where a family claimed to have been sprayed with malathion by a city truck. Malathion is a mosquito spray that is ordinarily quite safe as to humans, so the claimed injuries to

be allowed to fall within the defmition of pollutants as an "irritant" because they do not normally inflict injury:

> Despite the patent applicability of the pollutant exclusion here, it is contended that paint and glue fumes do not constitute an "irritant" because they do not normally inflict injury. This argument might have made sense under a differently worded policy, but here it does not. Although the policy does not define "irritant," Webster's Dictionary defines it as "an agent by which irritation is produced (a chemical) ." **WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED** 1197 (198 1). An irritant is a substance that produces a *particular* effect, not one that generally or probably causes such effects. The paint and glue fumes that irritated Nethery satisfy both the dictionary definition and the policy exclusion of irritants.

79 F.3d at 476.

A similar point was made in United States Fire Insurance Co. *v.* Ace *Baking Co., 476* N.W.2d 280 (Wis. Ct. App. 1995), where a manufacturer's ice cream cones and packing materials were contaminated by a fragrance additive (linalool) for fabric softener stored in the same warehouse. The trial judge had held that since the "ordinary person would think of a pollutant as something that would adversely affect the environment or a person's health", 476 N.W.2d at 282, and since the fragrance additive was not in that category even though it could affect the taste and smell of food products, it was *not* a pollutant. The appellate court reversed, saying:

> Just as "what is one man's meat is another man's rank poison," Lucretius, De *Rerum Natura,* 293 (W.H.D. Rouse trans. 3rd. ed 1947), it is a rare substance indeed that is *always* a pollutant; the most noxious of materials have their appropriate and non-polluting uses. Thus, for example, oil will "pollute" water and thus foul an automobile's radiator, but be essential for the engine's lubrication.

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family were highly unusual. The district court held that for that reason it would not be deemed a "pollutant" under the policy definition which it otherwise clearly met. We discuss this case further below, but note — as did the Fifth Circuit in *Nethery* — that the vitality of the district court's holding on the "pollutant" issue is questionable since the Tenth Circuit affirmed the judgment only on explicitly different grounds. *Nethery, supra,* 79 F.3d at 477. See also *Dryden Oil* Co. *v. Travelers Indemnity Co.,* 91 F.3d 278,283 (1st Cir. 1996).

> Conversely, water can "pollute" oil and thus foul the engine, but be essential for the automobile's radiator. Here, although linalool is a valued ingredient for some uses, it fouled Ace Baking's products. Accordingly, it was a "pollutant" in relation to those products, and coverage for the resulting damages is excluded from the United States Fire policy.

476 N.W.2d at 283 (court's emphasis),

As these cases suggest, the policy definition of "pollutants" would cover almost nothing if judicially revised to include only substances which are noxious or hazardous to all persons in all contexts. It is always the *particular* effect in a *particular* context that allows the determination of whether a substance has acted as an irritant or contaminant.[14] The oil from the Exxon Valdez had a useful intended purpose at one point, but when it was spilled into the ocean and wasted the Alaskan shores it became a contaminant, So also the ammonia here had a useful purpose when contained in Deni Associates' blueprint machine, but when it was spilled into the building causing an evacuation and sending people to the hospital, it became a contaminant and its fumes became an irritant.

Petitioner and amici have provided no legal basis for reworking the policy definition of pollutants as a general proposition. Moreover, with respect to this particular case, ammonia not

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[14]Petitioner and amici complain that 'irritants' and 'contaminants' are not defined terms. But, as the First Circuit pointed out in *Titan Holdings Syndicate v. City of Keene, N.H.*, *898* F.2d 265 (1st Cir. 1990), "the policy definition of pollutants is workable, and defeats [a] claim of ambiguity." 898 F.2d at 269. The Court said:

> Although the terms within the definition of pollutant — "irritant" and "contaminant" — are not defmed, the drafter of a policy need not define each word in the policy *ad infinitum*, but may rely on the ordinary meaning of words [cite omitted], and on the use of illustrative examples.

898 F.2d at 269. And, as the court put it in *Vantage Development Corp.* v. American Environment *Technologies Corp.*, 598 A.2d 948 (N.J. Super. Ct. 1991), "a failure to convert an insurance policy into a veritable thesaurus cannot served to create an ambiguity where none exists." 598 A.2d at 955.

only meets the policy definition, but it would meet the most stringent definition of "pollutants" anyone has proposed. In sum, the policy definition is perfectly clear anyway, as the Fourth District properly held, but *this* case does not present a controversy about whether a particular substance falls within the definition of "pollutants" in any event.

b. The exclusion should **be applied as written without judicial revisions modifying the exclusion to apply only to certain entities and certain activities**

A variety of arguments have been made — including by Petitioner and amici here — that 'environmental' limitations should be written into the exclusion so that it will only apply to certain (always ill-defined) types of entities and/or certain (always equally ill-defined) types of activities. The Fourth District properly declined to undertake a judicial reworking of the exclusion in disregard Florida's plain language rule. As set forth below, other courts have similarly adhered to the plain language rule and the certainty it provides, and we submit that this Court should reject the arguments of Petitioner and amici to the effect that this Court should do otherwise.

In West American Insurance Co. *v.* Band *& Desenberg,* 925 F. Supp. 758 (M.D. Fla. 1996), the landlord of an office building was sued by a tenant's employees claiming illness from a phenomenon known as 'sick building syndrome'. The employees alleged that a poorly designed air conditioning system allowed air-borne contaminants to be dispersed from the attic space into the building's office space. In a declaratory suit over whether the landlord's CGL policy covered the claims, the insurer maintained there was no coverage because of a pollution exclusion identical to State Farm's here. The landlord did not dispute that the employees' injuries were caused by contaminants and pollutants in the building's air, but argued rather that the exclusion did not apply because he was not an "actual polluter" and because the pollutants were not discharged into the "environment." 758 F. Supp. at 761.

The Florida Middle District held that the exclusion's plain language barred coverage, and thus rejected the insured's urged modifications. The Middle District first noted that "the majority of courts that have reviewed these absolute pollution exclusions have found them to be unambiguous and have enforced them in accordance with their plain language." 925 F. Supp. at 761. The Middle District agreed with that conclusion, saying: "This Court can find no language in the exclusion which would be ambiguous when applied to the facts of this case," Id. The court then rejected arguments — like those made by Petitioner and amici here — that limitations should be placed on the exclusion because of its history or because of the alleged intent of the drafters. For example, the court rejected the argument that it should consider cases which had interpreted an older, replaced version of the exclusion to apply only to "actual" or "industrial" polluters:

> However, the language that gave rise to the "actual polluter" interpretation is absent from this policy. Therefore, the interpretations from that language cannot be applied to this case. Further, *Florida law* does not *permit* **this Court to look *to* the drafters intent when the *exclusionary language* is *plain.* Excelsior, 369 So. 2d** at 942. **In this case, the language of the exclusion is clear and unambiguous. Nothing in the exclusion requires *that* the insured be the actual *polluter* for *the* exclusion *to apply.* The *language* requires *only* that *the pollution occur* at a premises owned *or* occupied by *an* insured.**

925 F. Supp. at 761. The court also rejected an argument like that advanced by Petitioner here that the exclusion should apply only to 'environmental' pollution because the history of the exclusion allegedly commended such a limitation. The Middle District correctly pointed out that it could *not* "examine the history of the exclusion because the language is clear and unambiguous and to resort to history would, therefore, be contrary to Florida law." 925 F. Supp. at 762.

Similar suggestions about limiting the pollution exclusion were rejected in *Bernhardt v. Hartford* Fire *Insurance* Co., 648 A.2d 1047 (Md. App. 1994), a case involving the escape of carbon

monoxide fumes from the central heating system of an apartment building into the tenants' apartments causing personal injuries. The landlord of the building argued — as Petitioner does here — that "notwithstanding the literal language of the pollution exclusion [identical to that involved here], the parties intended that it apply only to persistent industrial pollution of the environment, and not to an accident of the kind generally covered by a comprehensive business liability policy[.]" 648 A.2d at 1049. The court refused to disregard, or add to, the plainly worded exclusion:

> The landlord suggests that we judicially draft limitations upon the exception. First, he says, it should be limited to "industrial" or "industry-related" activities. Quite apart from the problems inherent in determining what may or may not be "industry-related," we are required to state the obvious — nowhere in this exclusion does the word "industry" or "industrial" appear, There simply is no such limitation.

648 A.2d at 1051. The court also refused to graft on the limitation that only "active" polluters' activities fall within the exclusion. "The absolute pollution exclusion draws no distinction between intentional and non-intentional discharge of pollutants; nor does it in any manner suggest that only chronic emission of the defined pollutants is excluded from coverage." 648 A.2d at 1052.

Another recent decision specifically rejected an argument like that made by Petitioner and certain amici here that courts should — notwithstanding lack of foundation in the policy language — limit the pollution exclusion so that it applies to 'traditional environmental pollution', but not to 'routine workplace torts' or to 'injuries arising from business operations.' *Cook v. Evanson*, 920 P.2d 1223 (Wash. Ct. App. 1996). In Cook, office workers suffered respiratory injuries when they were exposed to fumes from a sealant being applied to the exterior of the building where they worked, The contractors applying the sealant did not close off a fresh air intake vent, so the sealant fumes were drawn into the building requiring evacuation.

The office workers sued the contractor, obtained default judgments, and sought to

enforce the judgments against the carrier who had issued the contractor a CGL policy, The carrier denied coverage based on the same pollution exclusion as is involved here. In a declaratory suit, summary judgment was entered for the insurer and affirmed on appeal. The appellate court reviewed the policy provisions — identical to those in the subject State Farm policy — including reference to the policy definition of pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." 920 P.2d at 1226, Noting that the office workers themselves had alleged that 'toxic vapors' caused their injuries, the court said that the sealant clearly met the definition of pollutant and that the personal injury claims fell "squarely within the pollution exclusion clause." 920 P.2d at 1227.

The Cook court then took on the arguments — also advanced by Petitioner and amici here — that application of the exclusion to this workplace mishap would lead to "absurd" "results, that an average insured would expect such an incident to be covered under its CGL policy, and that the exclusion should therefore not be allowed to apply to "workplace torts." 920 P.2d at 1226. The court reviewed these arguments — and a 'parade of horribles' set of hypotheticals like those presented by Petitioner and amici here — and rejected them because the language of the exclusion is plain and clear:

> Because the injuries in this case fall within the plain language of the pollution exclusion clause, we decline to find an ambiguity based on the clause's application to hypothetical cases.

920 P.2d at 1227. The court also refused to consider the drafting history for precisely the reason the Fourth District — following this Court's directive in *Dimmitt* — did here:

> Appellants contend that the drafting history of the pollution exclusion clause, discussed in opinions from other jurisdictions, supports limiting the clause to environmental pollution cases. A ***party can present drafting* history *to* assist in determining a *reasonable construction only* after the court *finds* a clause *ambiguous.***

> We cannot use the drafting history to find the clause ambiguous herein.

920 P.2d at 1227.

Crescent Oil Co. v. Federated Mutual Insurance Co., 88 P.2d 869 (Kan. Ct. App. 1995), is another example of a court's adherence to the rule that plain insurance contract language precludes judicial interference. In Crescent Oil, a convenience store's gasoline tank leaked into the basement of a building next door. Rejecting arguments that 'contaminant' should not be read "'quite so literally", that the exclusion should only apply to "toxic or particularly harmful materials recognized as such by the industry," and that it should apply only to "active industrial polluters", the court held that it would only apply the policy's plain language:

> Cases in some jurisdictions may have limited the scope of the definition of pollution in a number of ways, but we are not constrained to do so. * * * In Kansas, we look to the wording of the policy and apply it as clearly written.

888 P.2d at 872. The court declined to consider the alleged drafting history in order to interpret the exclusion as applying only to "active industrial polluters": "Such an interpretation might be proper elsewhere, but in Kansas the meaning of the clause must come from the language contained in the policy." Id.

> We will not create ambiguity where none exists, Limiting the definition of pollution to intentional industrial pollution has no basis in the language of the policy.

Id.

The US. Third Circuit Court of Appeals has also pointed out that there is no basis in the language of the pollution exclusion for reading in limitations in scope of application which simply are not there. In Northern Insurance Co. v. Aardvark Industries, Inc., 942 F.2d 189 (3d Cir. 1991), the insured argued that the exclusion applies only to "active polluters" or those who "actually

release pollutants", but the court could find no basis for such a limitation:

> We have scrutinized this language for any hint that it is limited to "active" polluters or those who "actually release pollutants," but we find no ambiguity and no support for Aardvark's argument. The clause unambiguously withholds coverage for injury or damage "arising out of the discharge, dispersal, release or escape" of pollutants (emphasis added), not merely the insured's discharge, dispersal, release or escape "of pollutants." As the district court aptly wrote in Federal Insurance Co. v. Susquehanna Broadcasting Co., 727 F. Supp. at 117, "The exclusion clause makes no reference at all to active polluters or passive polluters. The terms are foreign to the policies in question." See also Powers Chemco, Inc. v. Federal Ins. Co., 74 N.Y.2d 910,548 N.E.2d 1301,549 N.Y.S.2d 650 (1989).

942 F.2d 194. Similarly, the court in Madison Construction Co. v. Harleysville Mutual Insurance Co., 678 A.2d 802 (Pa. Super. Ct. 1996) rejected an argument that the court should read in a requirement that the discharge, release, or dispersal of the items defined as pollutants be "into the environment" in order to serve the "true policy" behind the pollution exclusion.

> [The insured] states that the true public policy behind a pollution exclusion provision is to prevent the escape of pollutants "into the environment."
>
> * * *
>
> We follow in the footsteps of this and other jurisdictions that have consistently declined to accept such an argument when the policy language is clear and unambiguous. [cited omitted]. * * *[The exclusion] 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,

678 A.2d at 806.

The Sixth Circuit similarly refused to engage in judicial editing of the absolute pollution exclusion in Park-Ohio Industries, Inc. v. Home Indemnity Co., 975 F.2d 1216 (6th Cir. 1992). Park-Ohio arose from a products liability action in which it was alleged that certain induction furnaces manufactured by a Park-Ohio Industries subsidiary caused injuries, disabilities, and deaths

to employees of an army depot. The employees alleged that the furnaces — used to strip and burn rubber from army tanks and other vehicles — were defective, as a result of which rubber combustion products resembling "soot, fumes, dust pollutants and other particulates" evolved from the incomplete combustion of the rubber and released "hazardous, dangerous, and carcinogenic agents into the atmosphere where they were breathed, inhaled and absorbed by the employees who contracted cancer and other respiratory problems." 975 F.2d at 12 17.

Park-Ohio had a CGL policy which covered damages arising from any defective product they produced subject to the terms, conditions and exclusions in the policy. The insurer declined to defend or indemnify due to the policy's pollution exclusion. Contending that the policy had a 'latent ambiguity', the insureds argued that it was "unclear whether the pollution exclusion should apply in products liability cases where the insured (1) was not actively engaged in the discharge of pollutants, . . . or (2) did not discharge the pollutants on its premises." 975 F.2d at 12 19. The court summarized the insureds' position:

> According to plaintiffs, the pollution exclusion is clear and unambiguous only in those situations where the insured was actively engaged in polluting, e.g., an oil tanker dumping oil in the ocean, or where the discharge occurred on the premises of the insured, e.g., a chemical company emitting toxins into the air from its plant.

975 F.2d at 12 19 (court's emphasis). The Sixth Circuit rejected the insured's argument, holding that the case presented no latent ambiguity and that the plain language of the pollution exclusion gave rise to no such limiting interpretation as the insured suggested. Rather, the injuries from the fumes, soot, etc. discharged by the induction furnace clearly fell within the exclusion:

> While these cases illustrate that Ohio embraces the concept of latent ambiguities in an insurance contract, they do not support plaintiffs' argument that a latent ambiguity exists in this case. In the present case, the exclusionary provision precludes coverage for "the discharge, dispersal, release or escape of smoke, vapors, soot fumes . . . ." J.A.

> 195. The *Fleenor* plaintiffs allege they were injured by "certain rubber combustion products resembling soot, smoke, fumes, dust pollutants and other particulates" which were "released" into the atmosphere. J.A. 136, 137. There is no ambiguity in this situation' The pollution exclusion places no limitation on how the discharge is to be made or by whom, "The discharge" applies to any discharge, and there is nothing in the facts of this case which bring into question the meaning of "the discharge" or who must make the discharge.

975 F.2d at 1219.

In a similar vein, the court in *Brown v.* American *Motorist, supra,* rejected the homeowners' argument that the phrase "discharge, dispersal, seepage, migration, release or escape" is ambiguous because it was "not intended to apply to everyday activities of a homeowner", but rather only to "intentional acts of polluters who cause harm to the environment":

> This argument is without merit. The best manifestation of the intent of the parties is the clear and unambiguous language of the policy. Plaintiffs have not identified any ambiguity, and none is apparent to the Court. Accordingly, the Court declines to look to, or speculate on, the intent of the parties in an attempt to avoid the plain meaning of policy language.

930 F. Supp. at 209.

Additional examples of cases where the courts applied the plain language of the exclusion, notwithstanding arguments that only 'larger' or 'more environmental' events or 'more industrial' events or more 'active polluters' should be governed by the exclusion, are: American States *Insurance* Co. *v. Zippro Construction* Co., 455 S.E.2d 133 (Ga. Ct. App. 1995) (subcontractor's employee sanded kitchen floor in home after termite treatment in a manner that negligently caused asbestos fibers to become airborne in home — held unambiguously excluded by the absolute pollution exclusion); *Essex* Insurance *Co. v. Tri-Town Corp.,* 865 F. Supp. 38 (D. Mass 1994) (ice in skating rink was being resurfaced between periods of a hockey game when catalytic converter in Zamboni ice machine discharged carbon monoxide causing personal injuries — held absolute

pollution exclusion is clear and unambiguous, "once the carbon monoxide was released into the atmosphere causing injuries, the incident fell within the scope of the absolute pollution exclusion,"); League of Minnesota Cities *Insurance Trust v.* City of *Coon Rapids,* 446 N.W.2d 419 (Minn. Ct. App. 1989) (personal injury claims for lung injuries suffered inside ice arena due to discharge of nitrogen dioxide from Zamboni ice machine unambiguously excluded by pollution exclusion) ; Kruger *Commodities,* Inc. *v. USF&G,* 923 F. Supp. 1474 (M.D. Ala. 1996) (recreational vehicle company's personal injury and property damage claims arising from offensive odors caused by neighboring plant which processed animal carcasses and used cooking oil held unambiguously excluded by absolute pollution exclusion; court rejected arguments that 'purpose' of the pollution exclusion requires that hazardous chemicals be involved and that insured be in violation of environmental law) ; *Damakos v. Travelers Insurance* Co., 613 N.Y.S.2d 709 (N.Y. App. Div. 1994) (claim for physical injuries to tenant caused by cigarette smoke which seeped into tenant's apartment from billiards club in basement fell within clear and unambiguous language of pollution exclusion).

c. **The policy language does not support Petitioner's indoor/outdoor distinction**

As a sub-topic in Petitioner's vaguely parametered theme that there should be something 'environmental' about the source of a claim for it to be subject to the pollution exclusion, Petitioner suggests that the Court should read into the language of the exclusion a requirement that the spill or release or discharge in question be 'into the environment', and then construe 'environment' to mean outdoors and not indoors, Thus, Petitioner argues, since the ammonia spill in this case occurred inside a building, it should be judicially held that the injuries caused by the spill are not subject to the pollution exclusion. Of course, the exclusion makes no such indoor/outdoor

distinction. For that reason, the Fourth District — like the courts discussed below — properly refused to revise the policy to include an indoor/outdoor distinction here.

As a Florida federal district court pointed out in West American Insurance Co. *v. Band & Desenberg*, 925 F. Supp. 758 (M.D. Fla. 1996), a case also involving an 'indoor' occurrence, the indoor/outdoor distinction was only meaningful — if at all — under the language of older pollution exclusions that referred to "discharge onto land, into the atmosphere or into water." 925 F. Supp. at 762.

> ***Band ako argues that the pollution*** **exclusion** ***should apply only*** **to** ***"environmental"*** pollution. Band again relies on cases interpreting older versions of the pollution exclusion for this argument. [cites omitted]. In those cases, the courts first looked to the historical purpose of the pollution exclusion and held that the drafters intended the exclusion to limit coverage for clean-up costs imposed by EPA legislation. [cite omitted]. ***The courts*** then ***looked at the language*** **requiring the** ***discharge*** **to be** ***"onto land,*** **into the** ***atmosphere, or into water" and interpreted that to mean that the exclusion was applicable only when the pollutants were discharged into the outside environment.*** [cite omitted[. ***However,*** as with Band's first argument, *this* ***pollution exclusion does not have*** the ***language interpreted by the other courts. Thus,*** the ***reasoning*** **of those cases is** ***inapplicable to the case*** **at** hand. Additionally, this Court cannot examine the history of the exclusion because the language is clear and unambiguous and to resort to history would, therefore, be contrary to Florida law.

925 F. Supp. at 761, 762.

In fact, pollution exclusions like the subject State Farm exclusion have been applied in numerous cases involving 'indoor' incidents or injuries. For example, Bituminous ***Casualty Corporation v.*** R.P.S., 915 F. Supp. 882 (W.D. Ky. 1996) involved an ammonia leakage incident much like that involved in the instant case. Bituminous was the case, referenced above, in which an employee of a company servicing the ammonia refrigeration system, through mishap, released ammonia *within* a *plant.* 915 F. Supp. at 883. The plant was evacuated for about three and one-half

hours, a few of the plant's employees required medical treatment, and hog carcasses in the plant became contaminated. The pollution exclusion was held to apply unambiguously, and there was thus no coverage for the injuries arising from the incident.

American *States* Insurance Co. *v. Nethery*, 79 F.3d 475 (5th Cir. 1996), *supra*, also involved an 'indoor' occurrence — the claims of the 'chemically hypersensitive' homeowner arising from glue and paint fumes within her home. The pollution exclusion was held unambiguously to exclude coverage for the homeowner's claims. See also, e.g., *Madison Construction* Co. *v. Harleysville Mutual Insurance* Co., 678 A.2d 802, 806 (Pa. Super. Ct. 1996) (injuries to employee who was overcome by fumes in an enclosed area where sealant had been applied to concrete held excluded by the pollution exclusion with the court noting that the exclusion "contains no 'into the environment' language, so we, as a court, will not convolute the plain meaning of a writing merely to fmd an ambiguity"); American *States* Insurance Co. *v. Zippro Construction Co.*, *455* S.E.2d 133 (Ga. Ct. App. 1995) (exclusion applied to claims arising from subcontractor's work sanding kitchen floor *in* home after termite treatment which released asbestos fibers in home); Essex *Insurance* Co. *v. Tri-*Town *Corp.*, 863 F. Supp. 38 (D. Mass. 1994) (carbon monoxide released in skating rink during ice resurfacing between game periods) ; *Demakos v.* Travelers Insurance *Co.*, 613 N.Y.S.2d 709 (N.Y. App. Div. 1994) (physical injuries to tenant caused by cigarette smoke seeping into the tenant's premises from billiard club in basement excluded from coverage by pollution exclusion).

In short, Petitioner's 'indoor/outdoor' distinction has no basis in the policy language. As have the other courts in similar cases, the Fourth District properly refused to redraft the language to include the distinction.

3. The cases cited by Petitioner and amici do not comport with Florida law and provide no basis for altering Florida law

Petitioner and amici have cited the minority set of cases from around the country where the courts have refused to apply the absolute pollution exclusion as written. The stated rationales are 'latent ambiguity' or 'ambiguous as applied' or the 'reasonable expectations' doctrine, but it is obvious from reading the decisions that the courts are merely circumventing the plain language rule since in each case the court had to add words or phrases to the policy language to justify the conclusion that the exclusion did not apply, Since Florida does abide by the plain language rule, these cases are simply not in accord with Florida law. Moreover, they provide no basis for altering Florida law, but rather demonstrate the mischief that can result when courts begin the process of accreting *ad* hoc judicial revisions onto insurance policies.

The specific mischief that arises is that once the plain policy language is discarded as the guide to what is covered and what is not, substitute language must be formulated, and the courts, because they are proceeding independently and addressing fact-specific situations, generate disparate language revisions. In the case of the absolute pollution exclusion, the alterations and limitations the courts are formulating are so diverse, inconsistent, and vague that it is impossible to tell what coverage they will create — or disallow — in the future. A review of the cases cited by Petitioner and amici illustrates the problem.

One of the most frequently cited cases which began the tampering with the language of pollution exclusions is Westchester Fire *Insurance* Co. *v.* City of *Pittsburgh, Kansas, 768* F. Supp. 1463 (D. Kan. 1991) and 794 F. Supp. 353 (D. Kan. 1992), a case in which a family claimed they were injured when a city truck sprayed them with malathion, a mosquito spray ordinarily non-toxic to humans. The Westchester Court decided the malathion was not a 'pollutant', and said, in its first

opinion, that "pollutant" would be defined — not as worded in the policy — but as "a toxic or particularly harmful material which is recognized as such in industry or by governmental regulations," 768 F. Supp. at 1479. In a second opinion, the court came up with a different definition to substitute for the policy language, saying that "pollutants . . . contemplates 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." 794 F. Supp. 353 (D. Kan. 1992).

The continuing viability of these particular holdings in Westchester has been questioned[15] since the Tenth Circuit affirmed only on the entirely separate grounds that the spraying was 'sudden and accidental' under the terms of that pollution exclusion (different from that involved here). *Penn. Nat.* Mut. *Cas.* Ins. Co. v. *City of Pittsburgh, Kansas,* 987 F.2d 15 16 (10th Cir. 1993). Nonetheless, Westchester had got the ball rolling and the variety of judicial revisions to the exclusion began to proliferate. *Compare,* e.g., Island Associates, Inc. v. *Eric Group,* Inc., 894 F. Supp. 200,204 (W. D. Pa. 1995) (test for applying the exclusion is a determination of whether the alleged pollutants "caused or were a threat to cause environmental harm" — no definition of "environmental" provided); *Minerva Enterprises* v. *Bituminous Casualty Corp.,* 851 S.W.2d 403, 404, 406 (Ark. 1993) (pollution exclusion is " intended to exclude industrial wastes, not common household wastes" and applies only to "industrial polluters" — 'industrial' not defined and 'industry' being referenced not identified); Molten, *Allen and Williams,* Inc. v. St. *Paul Fire & Marine Insurance* Co., 347 So. 2d 95, 99 (Ala. 1977) (exclusion should only be applied "to eliminate coverage for damages arising out of pollution or contamination by industry-related activities" — no indication of what industries are being referred to in phrase 'industry-related') ; West *v.* Board of Commissioners of *the Port* of *New Orleans,* 591 So. 2d 1358, 1360 (La. App. 1991) (pollution exclusion "is applicable to 'polluters' —

[15]See note 13, *supra.*

those who indifferently pollute our environment — and not to those who only incidentally possess the pollutant in the course of their business" — 'indifferently' and 'incidentally' not defined).

The Florida trial judge's attempt here to follow in the footsteps of these out-of-state courts added yet another version of language to be tacked onto the exclusion. He said the exclusion should apply **"only if the spill, leakage, or discharge results in long-term environmental degradation, or, at the very least, an environment-wick exposure to extremely hazardous or toxic substances."** (R 56). Notably, he provided no definitions for 'environment' or 'degradation' or 'environment-wide exposure'. It is thus hard to foretell the effect of reading such a broad — but vague — limitation into the exclusion, or how much litigation the change itselfwould generate. Another revision came from the *Fogg* trial judge who — off on a different tangent — rejected the policy definition of "pollutants" and, imprecisely echoing Westchester, substituted **"a *substance particularly harmful or toxic* to *persons* or the *environment generally, and not merely a substance harmful to persons* — *the environment due to special circumstances.*"** 678 So. 2d at 400. This alteration to the policy language is also less than helpful. Not only is it unwieldy as a definition since it attempts to say what it does *not* mean as well as what it does, but it is also considerably *less* specific than the actual policy defmition.

Two problems become evident when the various court alterations to, and substitutions for, the plain policy language are assembled. The formulae are too vague and they are too different. Each court was confronted with a particular factual situation, and each altered the policy language because of a concern with creating a particular, more 'fair', result than application of the actual policy language would produce. The short term satisfaction may have been great, but the combined effect of these disparate judicial revisions is leading only to chaos. The out-of-state cases cited by Petitioner and by amici create uncertainty and the incentive for more litigation

because they ignore the plain language rule. Florida should adhere to its own law.

C. **Response to certain additional arguments made by Petitioner and amici**

Petitioner's scattergun series of additional arguments — echoed in various versions by amici — can be organized into four topics which we address briefly next. First, Petitioner makes extensive — and entirely improper — reference to the so-called drafting history. Second, Petitioner contends that the existence of conflicting court opinions on an issue of ambiguity *ipso facto* compels a finding of ambiguity, Third, Petitioner argues that the pollution exclusion clause, even if it is clear on its face, should be held to contain a latent ambiguity. And, fourth, Petitioner asks this Court to adopt one of the many and irreconcilable versions of the 'reasonable expectations' doctrine. We submit that none of the arguments presents a basis for reversing the Fourth District's well-reasoned decision as set forth below.

1. **Petitioner's improper references to drafting history have no place in this briefing process and were properly disregarded by the Fourth District**

Notwithstanding this Court's express admonition that it is inappropriate and unnecessary, Petitioner and amici make constant reference throughout their briefs to the alleged 'drafting history' of the absolute pollution exclusion in an attempt to create an ambiguity where none exists.[16] For example, Petitioner and amici are particularly enamored of a statement they attribute to an 'industry spokesman' — actually a Liberty Mutual employee[17] — which was made to the Texas insurance board in 1985 about how an incident involving a child slipping in Clorox in a grocery store might be treated. But neither this nor any of the other items selectively assembled by Petitioner and

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[16]Neither petitioner Deni nor any of the amici have been able to identify an ambiguity in the language of the exclusion itself.

[17]*See* R Levy, "Avoid the Exclusions", Business Insurance, March 1, 1993, p. 20.

amici purportedly from the 'drafting history' of the exclusion" have any significance at all unless Petitioner and amici could have identified an ambiguity in the language of the exclusion itself, and they have not. Thus, all of the 'drafting history' discussions were presented in direct disregard of this Court's ruling *in* *Dimmitt*:

> 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.**

Dimmitt Chevrolet v. Southeastern *Fidelity, supra,* 637 So. 2d at 705. Indeed, as noted above, Justice Grimes specifically pointed out in his special concurrence that his prior reliance on drafting history to fmd an earlier version of the pollution exclusion ambiguous was a "depart[ure] from the basic rule of interpretation that language should be given its plain and ordinary meaning." *Dimmitt* Chevrolet *v.* Southeastern Fidelity, 636 So. 2d at 706 (Grimes, J., concurring).

Since the language of the absolute pollution exclusion at issue here is clear and unambiguous, this Court should disregard all references to its alleged drafting history.

2. Petitioner's contention that disagreement among courts *ipso* facto requires a finding of ambiguity is not — and should not be — the law in Florida

Petitioner contends that because there is a conflict in court decisions on the issue of whether the absolute pollution exclusion is ambiguous, *ipso* facto it is ambiguous. Petitioner's argument in that regard is far too broad and not the law in Florida. This is evidenced not least by this Court's decision in *Dimmitt* Chevrolet, Inc. *v. Southeastern Fidelity Insurance Corp., supra.* In *Dimmitt,* this Court initially held that an earlier version of the pollution exclusion — containing

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"Petitioner and amici have obviously been very selective and incomplete in choosing 'drafting history' materials. We are not even furnished with the entire interchange with the Texas commissioner, much less what was presented nationwide. We note that *all* of the 'drafting history' materials are irrelevant as a matter of law, as set out in text, but we submit that there is no way of ascertaining what the full or real history is anyway from the few (incomplete) materials which have been cited.

'sudden and accidental' language — was ambiguous. *Dimmitt* Chevrolet, Inc. *v. Southeastern* Fidelity *Insurance Corp.*, 17 Fla. L. Weekly S579 (Fla. September 3, 1992). Notwithstanding that initial evaluation — and the nation-wide controversy over the issue — on rehearing this Court withdrew its first opinion and issued a new decision ruling the exclusion unambiguous. 636 So. 2d at 705. It is thus obvious that Petitioner's argument that the fact of judicial disagreement alone *compels* a finding of ambiguity is clearly not the law in this state.

Courts have also specifically rejected arguments like Petitioner's in connection with reviewing the subject pollution exclusion. For example, in *Madison Construction* Co. *v. Harleysville* Mutual *Insurance Co.*, 678 A.2d 802 (Pa. Super. Ct. 1996), the court pointed out that the courts' first priority must be to look at the language itself, as that is the most fundamental of all principles of contract construction:

> Rather than relying on the fact that jurisdictions are split over construing the provisions or that one jurisdictional line of reasoning is better than another, courts must remember to invoke the basic tenet of contract law and look to the writing itself first, before otherwise deciding that a policy is ambiguous.

678 A.2d at 807. See *also Park-Ohio Industries*, Inc. *v.* Home *Indemnity* Co., 975 F.2d 1215, 1220 (6th Cir. 1992) (Ohio law would certainly not embrace a principle that insurance contract provisions become ambiguous *as* a *matter* of *law* once there is a conflict in interpretation among jurisdictions — it is the language of policy which must be examined first).

In sum, Petitioner's argument that the first judicial disagreement over ambiguity of a policy provision ends all further inquiry and all subsequent judicial review is without merit and presents no basis for reversing the Fourth District's decision here.

3. **The latent ambiguity doctrine does not apply**

Next, contrary to the contention of Petitioner Deni, the amici and Judge Klein in his

opinion concurring in part and dissenting in part, the doctrine of latent ambiguity does not apply to this case. This Court first described what was meant by a latent ambiguity in Perkins *v. O'Donald,* 82 So. 401,404 (Fla. 1919):

> A latent ambiguity arises when it is sought to apply the words of the will to the subject or object of the devise or bequest, and it is found that the words of the will apply to and fit without ambiguity indifferently to each of several things or persons, In such cases evidence will be received to prove which of the subjects or persons so described was intended by the testator.

Since Perkins — and in accord with its definition — the doctrine of latent ambiguity has only been applied in Florida where applying the clear and unambiguous language of the instrument in question to the underlying facts presents a choice between two distinct options. See State ex *rel.* Florida Bank & Trust Co. *v.* white, 2 1 So. 2d 2 13 (Fla. 1945) (where testatrix's will unambiguously bequeathed "diamond brooch" to one heir and "remaining jewelry" to another, discovery of two diamond brooches created latent ambiguity); Ace *Electric Supply* Co. *v. Terra Nova Electric,* Inc., 288 So. 2d 544, 547 (Fla. 1st DCA 1973) (where purchase orders had to be approved by "the undersigned", question as to which of two undersigned was intended created latent ambiguity),

The Texas Supreme Court recently explained why the 'latent ambiguity' doctrine will never serve as a means for circumventing the plain language of the absolute pollution exclusion. The court fist posited a classic example of a latent ambiguity, i.e., where a contract calls for goods to be delivered to "the green house on Pecan Street," but there are in fact two green houses on the street. The fact of the two green houses creates an uncertainty or ambiguity as to which was meant, thus requiring parol inquiry. Id. at 52. *National Union* Fire Insurance Co. *v.* CBI *Industries,* 907 S.W.2d 517, 520 n. 4 (Tex. 1995). In absolute pollution exclusion cases, however, there is only one underlying spill or dispersal or discharge incident, and the question is simply whether it falls within

the language of the exclusion, As the Texas Supreme Court noted:

> Applying the policies' language to the context of the claim here does not produce an uncertain or ambiguous result, but leads only to one reasonable conclusion: the loss was caused by a cloud of hydrofluoric acid, a substance which is clearly a "pollutant" for which coverage is precluded.

907 S.W.2d at 521.

The situation is the same here, The unambiguous language of the pollution exclusion excludes coverage for chemical spills and the underlying facts undisputedly show only one incident — a chemical spill. There is, in short, only one "green house", and no latent ambiguity at all.

4. No version of the 'reasonable expectations' doctrine should be adopted and this case does not bring the issue before the Court in any event

a. The doctrine should not be adopted

Petitioner has raised, in various sections of its brief, what it refers to as the 'reasonable expectations doctrine'. In fact, there is no single such doctrine, but rather several conflicting and incompatible versions of it[19] none of which, we respectfully submit, would add anything meaningful to the present law of Florida on construction of insurance policies and contracts.[20]

One version of the 'reasonable expectations' doctrine provides that where there is *an ambiguity* in a policy, courts may consider the reasonable expectations of the insured, among other

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[19] Although Petitioner and some of the amici have claimed widespread adoption of the doctrine, the claim is misleading in light of the variety of versions that exist. *Allen v. Prudential Property and Casualty* Insurance Co., 839 P.2d 798 (Utah 1992) provides an overview of the various versions of the doctrine, how they have fared, and how little they have contributed to clarifying or improving the law of insurance contract construction. As the Men court noted: 'Today, after more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application," 839 P.2d at 803.

[20] We concur in the arguments made by Amicus The Florida Department of Insurance and Amicus Insurance Environmental Litigation Association against adoption of the reasonable expectations doctrine.

factors, in resolving the ambiguity. See, e.g., *National Union* Fire *Insurance Co. v. Reno's Executive* Air, *Inc.*, 682 P.2d 1380 (Nev. 1984). See *generally* 2 COUCH ON INSURANCE 3d § 22:11, nn, 89 and 90. We submit that Florida has adequate rules for resolving ambiguities in insurance contracts, including a general rule that terms of a policy will be construed to promote a reasonable, practical and sensible interpretation consistent with the intent of the parties. United *States* Fire *Insurance* Co. *v. Preuss*, 394 So. 2d 468, 470 (Fla. 4th DCA 1981). Furthermore, Petitioner does not seek adoption of this version of the doctrine.

The other pertinent version of the 'reasonable expectations' doctrine — which requires courts to give effect to an insured's 'reasonable expectations' *notwithstanding* unambiguous *policy language* to the contrary — is completely antithetical to the law of Florida. The classic formulation of this version of the 'reasonable expectations' doctrine is that "the objectively 'reasonable expectations' of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated these expectations." Robert Keeton, *Insurance Law* Rights at *Variance with* Policy *Provisions*, 83 Harv. L. Rev. 96 1,967 (1970). This version of the 'reasonable expectations' doctrine thus calls upon courts — *after* a loss has occurred and on an *ad hoc* basis — to provide insureds with coverage that is excluded by a term of the policy. The doctrine empowers the courts to create coverage in this fashion whenever they feel it will be 'fair' to do so to meet expectations of the insured that seem reasonable.

As an Ohio court put it in declining to adopt this version of the doctrine:

> [T] he reasonable expectations doctrine requires a court to rewrite an insurance contract which does not meet popular expectations. The rewriting is done regardless of the bargain entered into by the parties to the contract. Such judicial activism has not been adopted in Ohio by its courts and the courts' use of liberal rules of construction.

Further, this court declines to do so.

Sterling Merchandise Co. v. Hartford Insurance Co., 506 N.E.2d 1192, 1197 (Ohio App. 1986). Florida courts to date have also declined to become active in providing expressly excluded coverage, and instead have consistently held that unless policy language is ambiguous, it will be enforced as written.[21]

Adoption of the 'reasonable expectations' doctrine, and, specifically, that version which is applied notwithstanding unambiguous policy language, would represent a major departure from established Florida law, which has long adhered to the certainty of universal application of the plain language rule. Displacing the plain language rule with the case-by-case 'reasonable expectations' approach carries the potential for producing substantial — and unforeseen — alterations in Florida insurance and contract law. Tellingly, Amicus The Florida Department of Insurance has specifically urged that this uncertain doctrine not be made a part of Florida insurance law.

The only justification Petitioner and amici have offered this Court for implementing this far-reaching change is a public policy entreaty, vaguely formed, that *something* seems unfair about

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[21] *See,* e.g., *Dimmitt Chevrolet,* Inc. *v. Southeastern Fidelity Insurance Corp., 636 So,* 2d 700 (Fla. 1993); State *Farm Mutual* Automobile Insurance Co. *v. Pridgen,* 498 So. 2d 1245 (Fla. 1986); *Travelers Insurance Co. v. Bartoszewicz, 404 So.* 2d 1053 (Fla. 1981); *Excelsior Insurance Co. v. Pomona Park Bar & Package* Store, 369 So. 2d 938 (Fla. 1979); *Weldon v.* AU American *Life Insurance Co., 605 So.* 2d 911 (Fla. 2d DCA 1992); Old *Dominion Insurance Co. v. Elysee, Inc.,* 601 So. 2d 1243 (Fla. 1st DCA 1992); *American* Motorists Insurance Co. *v. Farrey's Wholesale* Hardware Co., Inc., 507 So. 2d 642 (Fla. 3d DCA 1987); American *Casualty* Co. *v. Fernandez,* 490 So. 2d 1340 (Fla. 3d DCA 1986); Southeastern Fire Insurance Co. *v. Lehrman,* 443 So. 2d 408 (Fla. 4th DCA 1984); *Saha v. Aetna Casualty & Surety* Co,, 427 So. 2d 316 (Fla. 5th DCA 1983); Brown *v.* Lee County Mosquito Control *District,* 352 So. 2d 116 (Fla. 2d DCA 1977); Winter *Garden Ornamental Nursery, Inc. v. Cappleman,* 201 So. 2d 479 (Fla. 4th DCA 1967). Insofar as Petitioner and amici suggest that the Second District in *Florida Farm* Bureau *v.* Birge, 659 So. 2d 3 10 (Fla. 2d DCA 1994) adopted the reasonable expectations doctrine, it was without power to do so, *Hoffman v.* Jones, 280 So. 2d 43 1 (Fla. 1973).

applying this absolute pollution exclusion to some businesses and to some of the occurrences that may arise in the course of their operations. This Court, however, is quite properly guarded abut responding to requests for interference with contracts on 'public policy' grounds:

> **. . . should be guided by the *rule* of extreme *caution when called upon to declare transactions as*** contrary to ***public policy*** and should refuse to strike down contracts involving private relationships on this ground, unless it is made clearly to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental policy of the right to freedom on contract between parties ***sui juris.***

Bituminous Casualty Corp. *v. Williams,* 17 So. 2d 98 (Fla. **1944).** Such caution is well warranted in this area because courts rewriting insurance contracts in the name of public policy can end up producing results far afield from whatever was originally intended. As Justice Terre11 described it in *Story v.* First Nut. Bunk *& Trust* Co., in *Orlando,* 156 So. 101, 103 **(1934),** public policy is a "very unruly horse, and, when once you get astride it, you never know where it will carry you."

We submit that Florida's plain language doctrine is the better rule. It is straightforward, certain, and easily understood. It certainly minimizes litigation. In contrast, a doctrine which encourages insureds to come forward and express their 'reasonable expectations' *after* a loss *has occurred* can only also encourage litigation to proliferate." And, a doctrine allowing courts to grant coverage where plain policy language excludes it can only lead to higher premiums for all since insurers no longer know what they are selling to whom.

b. This case presents no opportunity to consider adoption of the 'reasonable expectations' doctrine

Finally, we submit that this case does not present an opportunity for adoption of the

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[22] Although Arizona has adopted a broad version of the reasonable expectations doctrine, even the Arizona Supreme Court acknowledged that "most insureds develop 'reasonable expecations' that every loss will be covered by their policy." *Darner* Motor Saks, Inc. *v. Universal* Underwriters *Insurance* Co., 682 P.2d 388,395 (Ark 1992).

'reasonable expectations' doctrine in any event because of the undisputed facts. The policy excluded coverage for claims arising from chemical spills, and Petitioner sued for coverage for what it *characterized* as claims arising from a chemical spill. There was thus no misunderstanding as to what kind of an occurrence was involved. Even where the reasonable expectations doctrine is applied, "[r]easonable expectations must be based on policy language, not on an abstract conception of what should or might be the subject of coverage." *Vantage Development, supra,* 598 A.2d at 955. With the insured's irrefutable knowledge that chemical spill claims were involved and the policy's plain exclusion of coverage for chemical spill claims, there is no possible factual basis for a finding that the insured could have had a *reasonable* expectation of chemical spill coverage. As the court said in the other 'indoor ammonia' release case directly on point with this one: "An expectation of coverage under these circumstances would be unreasonable." Bituminous *Casualty Corp. v.* RPS Co., *supra,* 915 F. Supp. at 884.

CONCLUSION

Based on the foregoing facts and authorities, it is respectfully submitted that these proceedings should be dismissed for lack of jurisdiction, Alternatively, the decision of the Fourth District Court of Appeal should be afiirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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