IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Supreme Ct. No. 89,115
4th DCA Case No. 94-2354

DEN1 ASSOCIATES OF FLORIDA, INC.,

Petitioner/Appellant,

vs.

STATE FARM CAS. INS. CO.,

Respondent/Appellee.
_____ /

L.T. CASE NO. 93-23021-02

On appeal from the en banc decision of the Fourth District Court of Appeal

# Amended Initial Brief of Petitioner Deni Associates of Florida, Inc.

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## PREFACE

In this Brief, Petitioner Deni Associates of Florida, Inc. shall be referred to as "DENI" or "Appellant." Respondent State Farm Fire & Casualty Insurance Company shall be referred to as "STATE FARM" or "Appellee." References to the record shall be identified by a parenthetical containing the letter "R" followed by the page number upon which the cited material appears.

## STATEMENT OF THE CASE AND FACTS

This dispute involves the interpretation of language contained in an insurance policy (issued in the State of Florida) and a determination of whether that policy covers losses incurred from a small ammonia spill out of a blueprinting machine located in the office building the insured occupied.

Appellant Deni Associates (the insured) was moving its office equipment within the building when the spill occurred. (R. 53-54). The City of Tamarac Fire Department was contacted, and when they arrived, the building was evacuated as a precaution. After they removed some carpeting and broke a window (to ventilate the interior atmosphere of the building), they ordered the building evacuated for a short time until the air inside was considered safe to breathe. Several people felt ill from the fumes and sought medical attention. (R. 36-37). A number of personal injury claims were later leveled against Deni, whereupon it sought coverage from its liability carrier, State Farm.' (R. 1-3, 53).

Relying on a so-called "pollution exclusion" clause in the policy, State Farm ultimately denied all coverage for this accident, and forced Deni to sue in Broward County Circuit Court to determine whether or not the accident was covered under the policy. The Trial Court - on a motion for summary judgment - found that the pollution exclusion to be ambiguous, and that the policy thus covered the accident at issue. (R. 57). State Farm then appealed that decision to the Fourth District Court of Appeals, and in a divided, ***en banc*** opinion, a five-judge majority ***reversed*** the decision of the trial court and certified the following question to this Court:

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'The tenants lost the use of the building for a full day, and so Deni also sought recovery for lost business income. (R. 54).

*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?*

State Farm Cas. Ins. Co. v. Deni, 678 So. 2d 379 at 404 (Fla. 4th DCA 1996)(Italics in the original).

The insurance policy in which the pollution exclusion is contained is commonly referred to as a "comprehensive general liability" policy (CGL), a type widely purchased by businesses throughout the state of Florida. The "pollution" exclusion in the policy provides that:

BUSINESS LIABILITY EXCLUSIONS

Under Coverage I. (LIABILITY), this insurance does not apply:

to any:

bodily injury, property damage, person 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[.]

The Trial Judge noted that "pollution clauses typically contemplate *long-term* environmental degradation" or, at the very least, "an environment-wide exposure to extremely hazardous or toxic substances." (R. 56). The Trial Judge also pointed out that many of the recent judicial decisions which have enforced pollution-exclusion clauses have been those which have involved very specific language excluding only those claims which result from "sudden and accidental" discharges. Citing Claussen v. Aetna Cas. & Sur. Co., 865 F.2d 1217 (1 lth Cir. 1989), and a number of law review articles, the Court found that State Farm's overly-broad definition of the term pollutant was not

specific enough, and that the company had "stretched] the definition of the term 'pollutant' far beyond what a reasonable person placed in the position of the insured would have understood the word to mean." As such, the Court concluded, the term was ambiguous. (R. 53-58).

Upon finding the language in the policy to be "ambiguous," the Trial Judge next applied the traditional rules of insurance policy construction by construing the ambiguous exclusion *in favor* of the insured, and found that the ammonia spill was covered by the policy. The trial court concluded that:

> The terms of [STATE FARM's] exclusionary clauses are ambiguous and susceptible to more than one meaning. The interpretation of the instrument leaves one genuinely uncertain as to which meaning is proper. Where the terms of the policy of insurance are ambiguous, uncertain, conflicting, or susceptible to more than one meaning, the construction most favorable to the insured must prevail.

(R. 56). In fact, after finding that the pollution exclusion clause to be capable of more than one meaning, the Trial Court had no choice but to rule in favor of coverage. (R. 57-58). As such, the Trial Court correctly granted DENI's Motion For Summary Judgment , and made no error when it ruled that the ambiguous language in the policy must be read so as to provide Deni with coverage. (R 53-58). Indeed, the fact that both the Trial Judge and Deni believed the exclusion to mean one

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Magnus, Clearing Muddy Waters: Anatomy of the Comprehensive General Pollution Exclusion, 75 Cornell L. Rev. 6 10 (1990) (intent of the drafters of the standard pollution exclusion clause is far from obvious - the explanation of the intended scope is particularly murky as to intent to apply the exclusion to unintentional releases or unintentional damages); Peters, Insurance Coverage for Superfund Liability: A Plain Meaning Approach to the Pollution Exclusion Clause, 27 Washburn L.J. 161 (1987) (numerous jurisdictions have held terms contained in standard CGL policy and pollution exclusion clause are ambiguous); Rosenkranz, The Pollution Exclusion Clause Through the Looking Glass, 74 Georgetown L.J. 1237 (1986) (most courts impose insurers with coverage when insured neither expected nor intended ultimate loss, even though loss may have arisen out of intentional act).

thing - and State Farm believed it to mean another - is evidence that the pollution exclusion clause at issue was ambiguous.

Further, when State Farm then appealed the trial court's decision, Court of Appeal, *en banc*, reversed with a divided Court.[3] The Judges at the Fourth District found the provision to have several different meanings, and yet the majority still held the provision at issue to be unambiguous . See generally Deni, 678 So. 2d 379 (Fla. 4th DCA 1996).

In order to enable this Court to decide the issue of ambiguity on these facts and to decide whether the doctrine of reasonable expectations is recognized law in this jurisdiction, like in many others, the Fourth District Court certified the foregoing question. This Court, which conditionally accepted jurisdiction, may now review the entire case, rule on the facts here and settle this issue for all courts within the state of Florida.

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[3]Only six of eleven judges at the Fourth District (Judges Farmer, Gunther, Glickstein, Stevenson, Shahood and Warner) believed the exclusion to be unambiguous. Three judges (Klein, Polen and Pariente) considered the exclusion to be ambiguous "as applied" and two more judges (Judges Stone and Dell) concluded that the provision is ambiguous on its face; u d g e (Warner) might have applied the "reasonable expectations" test if she believed that this Court had authorized it. Judge Gross recused himself.

## SUMMARY OF ARGUMENT.

The Trial Court correctly found the language in the pollution exclusion to be ambiguous. In the same regard, the six-judge majority at the Fourth District Court of Appeals erred by holding that the provision is unambiguous as a matter of law. The facts, the law, and common sense itself all dictate that the losses attributable to this accident are covered under State Farm's "comprehensive" insurance policy, and this is true despite the existence of the overly-broad exclusionary terms it contains. The language of this particular pollution exclusion, is clearly susceptible to more than one "reasonable interpretation" and, if read as expansively as State Farm suggests, its reach would extend far beyond its intended purpose. In fact, the existence of this ambiguity is confirmed by the fact that a good number of judges in this state (including those involved in this very case) cannot themselves agree on its meaning.

The broadly-worded language of the provision should not be read literally to produce the sort of absurd result State Farm champions here. Courts in other jurisdictions have found little difficulty in limiting the reach of these so-called "absolute" exclusions, and have in fact found similar provisions to apply only in situations which involve a general (and substantial) toxic exposure, or a significant amount of environmental degradation - not a minor office spill of ammonia from a blueprint machine. In fact, the insurance industry itself has acknowledged that it never intended this sort of pollution exclusion to be read as broadly as was done by the six-judge majority at the Fourth District Court of Appeal.

Alternatively, this particular clause - when read with the "reasonable expectations" of the typical insured in mind - should be interpreted to provide coverage under the facts of this particular case. In fact, it may not be necessary for the Court to find that such exclusions are ambiguous - as

a matter of law - in order to find coverage in this sort of case. The Court, by looking at the provision from Deni's position - as a "reasonable" insured - should be able to conclude that the provision is "ambiguous as applied" or it can simply apply the so-called "reasonable expectations doctrine," and conclude that Deni's "subjective" expectations (of coverage) were entirely "reasonable." Under either analysis, the result is the same: The accident is covered.

Indeed, Florida insurers should have the responsibility to state with specificity just what activities they intend to exclude from coverage, and particularly so when those activities are clearly within the normal scope of activities the Company knows its insured will be regularly engaged. To allow State Farm to deny coverage for claims which arose out of the movement of a blueprint machine across the hall would foster an "unreasonable" interpretation of the policy language, and render this insurance policy almost useless to Deni. Common sense and the "reasonable expectations" of the insured dictate no less.

In light of the provision's ambiguity, and the reasonableness of affording coverage in these circumstances, this Court should answer the certified question in the affirmative (or find the pollution exclusion ambiguous as applied to the particular facts of this case), reinstate the Trial Court decision in favor of Deni, and remand the case back for further proceedings consistent with those rulings.

## ARGUMENT

### I. THE POLLUTION EXCLUSION IS AMBIGUOUS AS A MATTER OF LAW

The Trial Court properly applied the fundamental rules of insurance contract law in concluding that the pollution exclusion clause was ambiguous (R. 53-58).

Under Florida law, the trial court must construe an insurance contract it its entirety, striving to give every provision meaning and effect. Associated Elec. & Gas Ins. Servs., Ltd. v. Houston Oil and Gas Co., 552 So. 2d 1110 (Fla. 3d DCA 1989). To further this goal, the terms contained in an insurance contract must be given their plain, unambiguous and common meaning. Old Dominion Ins. Co. v. Elysee, Inc., 601 So. 2d 1243 (Fla. 1st DCA 1992). It is generally accepted that where the policy language is clear and unambiguous, there is no need for judicial construction and the policy is to be enforced as written. Great Global Assur. Co. v. Shoemaker, 599 So. 2d 1036 (Fla. 4th DCA 1992).

Where the terms employed in an insurance policy are ambiguous, however, the courts are to strictly construe the language against the insurer and in favor of coverage. f West Palm Beach, 595 So. 2d 284 (Fla. 4th DCA 1992). See also Florida Power & Light Co. v. Penn America Ins. Co., 654 So. 2d 276, 277-78 (Fla. 4th DCA 1995). In this regard, it is also considered axiomatic that an insurance policy is to be interpreted so as to provide coverage whenever possible. Infinity Yachts, Inc. v. St. Paul Fire & Marine Ins. Co, 655 So. 2d 1259, 1261 (Fla. 4th DCA 1995); Sanz v. Reserve Ins. Co. of Chicago, Ill., 172 So. 2d 912, 913 (Fla. 3d DCA 1965). This is especially true where the language of an insurance contract can be considered ambiguous, which then requires that the language be construed in favor of the insured, See State Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So. 2d I245 (Fla. 1986); Harnett v. Southern Ins. Co., 181 So. 2d 524 (Fla.

1965); Sterling v. City of West Palm Beach, 595 So. 2d 284 (Fla. 4th DCA 1992).

Where, as in the case at bar, the question of coverage turns on the meaning of an exclusionary clause, it is firmly established that such provisions are to be construed even more strictly than coverage clauses. See, e.g., Triano v. State Farm Mut. Auto. Ins. Co., 565 So. 2d 748 (Fla. 3d DCA 1990). Perhaps most importantly, it is the insurance company which has the burden of proving that any given accident is excluded from coverage under a particular provision. B & S Assocs., Inc. v. Indemnity Casualty & Property. Ltd., 641 So.2d 436 (Fla. 4th DCA 1994).

In light of these various rules of construction, it is clear from the record that State Farm did not meet its burden before the Trial Court, and that it was unable - as it is today - to dispute the fact that this particular provision is "reasonably" susceptible to at least more than one interpretation.

One of those interpretations - the one that State Farm now champions - is that the provision excludes all damage of all kind whatsoever - caused by a grocery list of items collected under the broad term of "pollutants." At least one alternative meaning - that the one offered by Deni (and ultimate accepted by the Trial Court and several Judges at the Fourth District) - suggests that this provision was only meant to include "pollutants" in its normal connotation, and was not meant to cover this small chemical spill from an office blueprint machine.

Deni certainly understands that the terms of an insurance contract may be subject to different interpretations, and that - particularly when the question is one of coverage - courts should not strain or resort to unnatural constructions in order to create ambiguity. Weldon v. All American Life Ins. Co., 605 So. 2d 911 (Fla. 2d DCA 1992); Jefferson Ins. Co. of New York v. Sea World of Florida, Inc., 586 So. 2d 95 (Fla. 5th DCA 1991). However, it is still true - as is supported by the law in this State - that insurance contracts are to be read in light of the skill and experience of reasonable,

"ordinary" people, and given their everyday meaning as understood by the "man on the street." Lindheimer v. St. Paul Fire and Marine Ins. Co., 643 So. 2d 636 (Fla. 3d DCA 1994), rev. denied, 65 1 So. 2d 1194 (Fla. 1995). Thus, while it certainly is plausible - as State Farm has contended at both the trial level and at the Fourth District Court of Appeal - that this broadly-worded provision can be literally construed so as to exclude from coverage all damage which might arise out of "release" of any "chemical" no matter how small, and no matter whether it falls into the "normal" concept of "pollution." It is also quite plausible, however - and, in fact, highly probable - that Deni, as a "reasonable" insurance consumer, might have construed the provision to mean that the term "pollutant" and "pollution" took on a more practical, "everyday" definition. In other words, the word "pollutant," to Deni, as a reasonable insured, does not include the accidental spilling of such a small amount of ammonia from an office blueprint machine, the same way it does not include an injury caused to one of Deni's customers who might slip on some orange juice spilt on the floor (i.e., as a "release" of "liquid" containing "acid"). The Trial Court (and the Record) clearly supports the more practical interpretation of the language in the exclusion, under which only those accidents which result in substantial or long-term environmental degradation, or, at the very least, an environment-wide exposure to extremely hazardous or toxic substances." (R 56).

The Trial Court applied the traditional rules of policy construction (i.e., that exclusionary provisions are to be strictly construed, with any ambiguities resolved in favor of coverage), and construed the language in the policy as would have been done by any reasonable insurance consumer in Deni's position - that it excluded only that sort of damage which might be caused by substantial release of some toxic otherwise or harmful substance a release of which "generally" results in long-term harm to either people or the environment, and not through some form of "special" circumstance

of exposure. (R. 57-58). See Infmitv Yachts. Inc. v. St. Paul Fire and Marine Ins. Co., 655 So. 2d 1259, 1261 (Fla. 4th DCA 1995); Pridgen, 498 So. 2d 1245 (Fla. 1986); Harnett, 181 So. 2d 524 (Fla. 1965); Sterling, 595 So. 2d 284 (Fla. 4th DCA 1992). unable to show a spill of ammonia like this would result in general long-term harm, and not only in "special" or substantial exposure to the environment - as was its burden under Florida law - summary judgment in favor of coverage for DEN1 was appropriate, and the majority of the Fourth District Court erred when it reversed that decision. (R. 58, 78-79). See B&S Assoc.. Inc. v. Indemnitv Cas. and Prop., Ltd., 641 So. 2d 436 (Fla. 4th DCA 1994).

Indeed, in adhering to traditional rules of insurance contract construction, the Trial Court properly determined that the exclusion, was susceptible to at least two reasonable interpretations, and was thus ambiguous as a matter of law. (R. 56). See Sterling, 595 So. 2d 284 (Fla. 4th DCA 1992). Moreover, in reaching this decision, the Trial Court did not read the language of the exclusion in a "vacuum," as STATE FARM would have had it do. Instead, it read the exclusion in such a manner as to give it a reasonable, practical, and sensible interpretation, one that was consistent with the "plain" meaning of the language used, and with the obvious intent of the parties. See Weldon v. All American Life Ins. Co., 605 So, 2d 911 (Fla. 2d DCA 1992); American Man. Ins. Co. v. Horn, 353 So. 2d 565 (Fla. 3d DCA 1977).

As the Court's decision and trial record amply illustrate, the spill of ammonia in DENI's office is not the sort of situation that can be fairly characterized as constituting "substantial," "widespread," or "industrial" pollution (all of which would be properly excluded under the more reasonable construction of the Policy). Instead, the small ammonia spill here was no more than a minor office mishap which arose out of Deni's everyday business; it was extremely short-lived

(lasting only a few hours), left no "long term" adverse environmental effects, and was completely dissipated by the very next business day. This was no "pollutant," and Deni caused no "pollution." It must be stressed that State Farm knew of the precise nature of DENI's business when it issued the Policy. The company should not now be permitted to exclude an accident as environmentally benign as the small chemical spill involving DENI's office blue-print machine. If State Farm wished to exclude this sort of minor office-equipment accident from its commercial insurance policies as "pollution," it should have expressly stated so, rather than relying on this unreasonably broad interpretation of the word "pollutant," it now champions, a word which has come to have its own meaning to the "reasonable insured," the so-called "man on the street." Whether this flawed drafting is considered negligent or intentional, it should be fatal to its overbroad construction of the term. See Westchester, 768 F. Supp. at 1471 (insurer has the duty to exclude with specificity any activity it wishes to exclude which it knows its insured is likely to engage in); Tufco Flooring, 409 S.E.2d at 697 ("[t]o allow [an insurer) to deny coverage for claims arising out of [its insured's] central business activity would render the policy virtually useless to Tufco").[4]

The pollution exclusion provides:

> We do not insure for loss either consisting of, or directly and immediately caused by one or more of the following:
>
> > the presence, release, discharge or dispersal of pollutants, meaning any solid, liquid, gaseous or thermal irritant or contaminant, including vapor, soot, fumes, acids, alkalis, chemicals and waste, except as provided in the Pollutant Clean Up and Removal Extension of Coverage.

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[4] Accordingly, it is easy to see how Deni would reasonably believe this type of office "spill" would be "covered" under the Policy,

The Trial Court correctly found that the above language to be ambiguous - and that decision can be justified, either under ordinary rules of contract construction or by the application of a reasonable, practical, and sensible interpretation of the policy, one that is consistent with the plain meaning of the language used, and with intent of the parties. Indeed, it was State Farm itself who failed to properly refine the language of this exclusion over the years, and State Farm itself who now claims to have such unreasonable construction of the word "pollutant", (instead of making it clear to its insured that it intended to exclude even those ordinary chemical accidents that one would not normally think of as "pollution." This carelessness of drafting underscores the ambiguity of the terms, helps to justify placing the responsibility for that ambiguity upon State Farm, and demonstrates the equity in affording Deni coverage under the facts of this particular case.

Indeed, despite its current protestations to the contrary, State Farm itself could never have intended this particular exclusion to operate so as to leave its insured without coverage for this type of minor office accident (the spilling of ammonia from a blueprint machine). As Judge Klein pointed out in his dissent in *Deni I,* these insurance policies are not referred to as being "comprehensive" without a reason. If they were construed to exclude from coverage all of the claims which fit within the Fourth District Court's broad, literal interpretation here, there would be no reasonable or practical limits on this particular exclusion, and commercial insureds would only discover their lack of coverage as everyday mishaps occurred, Florida Farm Bureau Ins, Co v. Birge, 659 So. 2d 3 10 (Fla. 2d DCA 1994), rev. denied, 659 So. 2d 271 (Fla. 1995).

The ambiguity of this particular exclusion can surely be confirmed by the wide disparity of opinion concerning its meaning in this case where different insurers disagreed as to the meaning of the provision with two different insureds. Then two separate circuit court judges agreed

with the insureds, and disagreed with the insurers. Then, a severely divided (Fourth District) Court itself could not agree, and as a result, was forced to certify the question of ambiguity to this Court. The only other Florida Court to construe the exclusion interpreted it differently then did the six judges of the majority at the Fourth District. In light of all this disagreement as to the meaning of the provision - by some of the best legal minds in the State - how can State Farm carry its burden to show that a layperson could in no way find it susceptible to at two "reasonably interpretations (as did the dissent at the Fourth District and the two judges at the Circuit Court).

In sum, in light of the express language of the provision in question, and the reasonable, practical meaning given that language, this Court should find that this exclusion is ambiguous as a matter of law, and that, as such, it should be construed so as to afford Deni with coverage in this case.

## II. The Objective Theory Espoused by the District Court

While the six-judge majority at the Fourth District principally grounded its decision on the application of the 'objective" theory of contractual intent, it must be remembered that this theory cannot to be used to produce an "absurd" result. See, e.g., United States Fidelity and Guar. Co. v. Murray, 671 So. 2d 812,813 (Fla. 4th DCA 1996) (citing Dorsey v. State, 402 So, 2d 1178 (Fla. 1981), and State v. Webb, 398 So. 2d 820 (Fla. 1981) ("It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result"); United States Fire Ins. Co, v. Pruess, 394 So. 2d 468, 470 (Fla. 4th DCA 1981) (the terms of a policy exclusion should be "construed to promote a reasonable, practical, and sensible interpretation"). Indeed, the Fourth District itself appears to have taken this approach several times, as in Amica Mut. Ins. Co. v.

Cherwin, 673 So. 2d 112 (Fla. 4th DCA 1996). In Cherwin, the court concluded that a requirement of actual physical contact (in order to recover under the insurance company's literal construction of the policy) would lead to an "absurd" result - and the case is quite instructive in this regard. The court said:

> To say that the plaintiff-pedestrian herein cannot seek to recover for his alleged damages unless he remained in the path of the defendants' oncoming vehicle, thereby being physically hit by the vehicle itself, would be ludicrous. The sound policy reasons of promoting the concept of mitigation of damages, the saving of lives, and compensating innocent individuals for their injuries, dictate that a plaintiff under the circumstances of this case should be entitled to seek to recover compensation for his injuries.

Id. at 114 (citing Lowd v. Kovens Construction, 546 So. 2d 1087 (Fla. 3d DCA 1989)). See also Lambert v. Berkelev South Condominium, 680 So. 2d 588,590 (Fla. 4th DCA 1996) (whether a document is ambiguous depends upon whether it is "reasonably" susceptible of more than one interpretation (citing State Farm Fire & Cas. Ins. Co. v. De Londono, 5 11 So. 2d 604 (Fla. 3d DCA 1987)); Collett v. State, 676 So. 2d 1046 (Fla. 1st DCA 1996) (objective literal application of the burglary statute could cause an "absurd" result, in that every time a person entered a structure that was open to the public with the intent to commit a crime, the person would have committed a burglary - a result which directly conflicts with the express language of section 810.02( 1)). See also State v. Roberts, 677 So. 2d 264 (Fla. 1996) (strict reading of Florida Rule of Criminal Procedure 3.11 1(d)(5) - which requires that the court advise *pro* se defendants of the right to counsel at every stage of trial - would be "absurd" in a case where the defendant already caused one mistrial by representing himself, been given three Faretta hearings, and opted to represent himself once again, even after the public defender's office had been reappointed); Schuck v. Habicht, 672 So. 2d 559

(Fla. 4th DCA 1996). Roberson v. Winn Dixie Stores, Inc., 669 So. 2d 294 (Fla. 1 st DCA 1996) (It is the obligation of District Court of Appeal to avoid interpreting any part of Workers' Compensation Act in such a manner as would lead to absurd result).

The majority at the Fourth District correctly recognized that the interpretation of this insurance policy cannot turn purely on Deni's "subjective" expectations (as insured). Deni's subjective expectations, however, are not necessary to support the Trial Court's conclusion that the policy exclusion is ambiguous - because the "plain" language of the exclusion is ambiguous, whether it be read from Deni's perspective, or from the perspective of any reasonable, practical, and sensible insured.

Thus, it is unnecessary for this Court - as the majority at the Fourth District put it - to "tortur[e] clear meaning into uncertainty" or to give defined terms "meanings deemed more socially responsible or desirable to the insured" in order to find this particular provision to be ambiguous. Deni, 678 So. 2d at 401. The ambiguity here is quite readily apparent, and has already been resoundingly confirmed by the Trial Judge, by Deni, and by four different appellate judges from the Fourth District Court of Appeals - not to mention Deni's counterparts in the companion case in this proceeding. Moreover, any remaining question on this issue can be resolved quite simply by applying traditional rules of contract construction - which require that policy exclusions be "construed to promote a reasonable, practical, and sensible interpretation." United States Fire Ins. Co. v. Pruess, 394 So. 2d 468,470 (Fla. 4th DCA 198 1). And this result holds true whether or not the Court simply recognizes the ambiguity and applies traditional rules of construction (to find coverage) or applies the so-called "objective" theory of contractual intent, and finds coverage in that way. Under either approach, the "insurance company still has the burden of

proving that the blueprint accident is clearly excluded under express language of the exclusionary clause and that the provision is not "reasonably" susceptible if more than an interpretation . B & S Assocs., Inc. v. Indemnity Casualty & Property. Ltd., 641 So. 2d 436 (Fla. 4th DCA 1994). As discussed, however, State Farm cannot possibly meet that burden here.

In addition, it is not at all evident that the majority's application of the "objective" theory of contractual intent should be so blindly (or rigidly) applied to interpret insurance policies, which are generally considered "contracts of adhesion," in which the insured has virtually no choice but to accept the terms as stated, or go without insurance. See, e.g., Pasteur Health Plan. Inc. v. Salazar, 658 So. 2d 543, 545 (Fla. 3d DCA 1995) ("insurance policies are known in law as 'contracts of adhesion,' meaning' a standardized contract which, imposed and drafted by the party of superior bargaining strength [insured], relegates to the subscribing party [insured] only the opportunity to **adhere** to the contract or **reject** it"') (emphasis supplied by court). It may be that in these special circumstances, a more flexible approach to interpretation - one which more clearly favors the interests of the unrepresented insured - is warranted.

## III. The Intent of the "Drafters"

The insurance industry itself has acknowledged that it intended its various pollution exclusions (like the one at bar) to be read more narrowly than State Farm now argues it should. See, e.g., Richard Levy, "Avoid the Exclusions," Business Insurance, March 1, 1993, p. 19, In his article, Mr. Levy quotes from the transcript of an October, 1985, Texas Insurance Commission hearing in which a 1985 version of the pollution exclusion was being discussed, When the speaker, an insurance industry spokesman was asked about the definition of the term "pollutants," the

spokesman had to admit that it was an extremely broad provision:

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

Id. (emphasis supplied).

In that very same discussion, a questioner at the Hearing offers an example of an accident in a grocery store where a child falls in some spilled acid and is permanently disfigured. The questioner suggests that under his reading of the exclusion, that situation would be excluded under the policy and there would be no coverage for the injured child. Id. The industry representative responds,

> "That is a reading, yeah." He then admitted that "our insurers would be at the State Board quicker than a New York minute if, in fact, every time a bottle of Clorox fell off a shelf at grocery store and we denied the claim because it's a pollution loss."

Id. (emphasis added).

When questioned as to whether courts might refuse to interpret the policy that way in the event that an insurance company tried to enforce the overly broad wording of the provision, the industry representative took the position that, "nobody would read it that way." *Id*. Apparently this particular insurance representative did not figure on the position of State Farm takes here (and the position taken by at least six judges took at the Fourth District Court of Appeal).

Consistent with the narrower interpretation that was originally intended, a number of courts which have confronted terms like "pollutant" in pollution exclusion have already recognized the dangers involved with a broad construction of that term:

> [T] here is virtually no substance or chemical in existence that would not irritate or damage some person or property, The terms "irritant"

> or "contaminant," however, cannot be read in isolation, but must be construed as substances generally recognized as polluting the environment.

Westchester Fire Ins. Co. v. City of Pittsburgh. ansas, 768 F. Supp. 1463, 1479 (D. Ran. 1991), *affirmed,* 987 F.2d 1516 (10th Cir. 1993) ("Westchester Fire I"). The court gave the following examples of everyday substances which could fall within the literal definition of the words "chemical" "irritant"; and "polluted":

> If a child at a city pool complains about the chlorine in his or her eyes, the causative factor is a chemical but the city has not polluted the environment. If a fire hydrant sprays water on a passer-by, that water may be an "irritant" to the person, but again the municipality responsible for the fire hydrant has not polluted the environment.

Id. In fact, every single container of Coca-Cola states that indicates it contains both phosphoric and citric acid, thus bringing it within the literal definition of the term "pollutant" (which includes all "acids"). No one would doubt that Coca-Cola could cause substantial damage if it was accidentally spilled on some sensitive computer equipment. It would be ridiculous to suggest (as State Farm apparently would) that such an occurrence was excluded from coverage because State Farm considers soda pop as a "pollutant" under the policy.

## IV. Overbroad "Pollution Exclusions" Should be Strictly Construed Despite Apparent Overbroad Terms

In Pipefitters Welfare Education Fund v. Westchester Fire Ins, Co., 976 F.2d 1037 (7th Cir. 1992), the court stated:

> The terms "irritant" and "contaminant," when viewed in isolation, are virtually boundless, for "there is virtually no substance or chemical in existence that would not irritate or damage some person or property." Westchester Fire Ins, Co, v. City of Pittsburgh, 768 Fo Supp. 1463, 1470 (Dn Kan.1991). i m i t i n g principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the

> clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.

Id. at 1043. After citing a case in which the exclusion was held not to apply, including one where an apartment dweller ate lead paint, and another where a worker breathed asbestos particles during removal of insulation, the court went on to state:

> The bond that links these cases is plain All involve injuries resulting from everyday activities gone slightly, but not surprisingly, awry.

Pipefitters, 976 F.2d at 1044. Indeed there is a great deal of authority to support a narrow reading of these sorts of exclusions. See. e.g., Westchester Fire Ins. Co. v. Citv of Pittsburgh, 768 F. Supp. 1463 (D. Kan. 1991) (pollution clauses contemplate long term environmental degradation); Molton, Allen. and Williams. Inc. v. St. Paul F. & M. Ins., 347 So. 2d 95 (Ala. 1977) (pollution exclusion applies only to industrial pollution and contamination); Mine&nter., Inc. v. Bituminous Cas. Corp., 85 1 S.W.2d 403 (Ark. 1993) (pollution exclusion cover only industrial pollution and contamination); Thompson v. Temple, 580 So. 2d 1133 (La. 4th Cir. Ct. App. 1991); West American Ins. Co. v. Tufco Flooring East. Inc., 409 S.E.2d 692 (N.C. Ct. App. 1991) (discharge must be into the environment to be excluded under pollution exclusion); A-1 Sandblasting & Steamcleaning Co.. Inc. v. Raiden, 643 P.2d 1260 (Or. 1982) (pollution exclusion clause can be read to exclude liability only for pollution damages to the environment) .

In Westchester I, several people sued the city of Pittsburgh as a result of exposure to pesticides which the City had used in its pest-spraying operations. Westchester, 768 F. Supp. at 1465. The City's insurance company denied coverage on the basis of a pollution exclusion clause

similar to the one at bar, Id. at 1465-66. The Trial Court held that the pollution exclusion clause was ambiguous, because in the Court's opinion, "[p]ollution clauses appear to contemplate long-term environmental degradation or, at the very least, an environment-wide exposure to extremely hazardous or toxic substances," Id. at 1469 n. 9. The Court felt that the expansive reading of the exclusion suggested by the insurer would "stretch the definition of the term 'pollutant' beyond what a reasonable person placed in the position of the insured would have understood the word to mean." Id. Therefore, the pollution exclusion clause was read to exclude coverage of only "industrial type" pollution (i.e., pollution which results in long term damage or harmful exposure to the environment).

For these same legally and logically supportable reasons, the Trial Court in the case at bar found the exclusion in question to be ambiguous (and thus interpreted it so as to provide coverage). As discussed, if it desired to do so, STATE FARM was obligated to state with specificity every type of activity it sought to exclude from coverage.[5] See Vantage Dev. Corn.. Inc. v. American

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[5] In the policy reviewed in Vantage, for example, the pollution exclusion contained as expressing:

**ATTENTION**
**IMPORTANT NOTICE**

Re: Pollution Exclusion

This policy contains an absolute Pollution Exclusion. This means, under this policy, there is no *coverage* for any liability which any insured may have for damages arising out of pollution.

Clean-up and defense costs arising out of pollution are *also not covered* under this policy

Vantage, 598 A.2d at 950. Partially based on this separate and distinct notice, Vantage Court found that the pollution exclusion in that case was not ambiguous. Id. at 955. The failure of STATE FARM to utilize such a warning only provides further support for the conclusion that the exclusion

Environment Technologies Corn., 598 A.2d 948 (N.J. Sup. Ct. Law Div. 1991). See also Florida Farm Bureau Ins. Co. v. Birge, 659 So. 2d 310 (Fla. 2d DCA 1994) ("[o]ur conclusion is supported by the availability of clear and unambiguous language that the insurance company could have used . . . .").

In the case at bar, the law supports the Trial Court's ruling. Thus, this Court should affirm the decision and award attorney's fees to DEN1 .[6] STATE FARM cannot establish any error on the part of the Trial Court. Instead, it simply maintains that the exclusion is "clear" and "unambiguous" in excluding any spill of any chemical, and in this regard, relies on two principle cases: American States Ins. Co. v. F.H.S., Inc. 843 F. Supp. 187 (S.D. Miss. 1994) ; and Alcolac Inc. v. California Union Ins. Co. 716 F. Supp. 1546 (D. Md. 1989). These two cases, however, are distinguishable from the present case, and do not support reversal of the Trial Court's decision.

In its Briefs to the Fourth District Court, STATE FARM argued American States Ins. Co. v. F.H.S., Inc., for the proposition that any spill of ammonia should be excluded from coverage, contending that this case is "directly on point." See State Farm's Initial Brief at the Fourth District Court level at 8. However, a review of the facts and holding in American States reveals that it does not support STATE FARM'S contention.

It should be first noted that - unlike the case at bar - the ammonia in American States leaked from a warehouse, then into the surrounding area. American States, 843 F. Supp. at 187. In the case

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is ambiguous.

[6] It should be noted that the Trial Judge felt strongly enough about the applicability and correctness of Westchester I to adopt several paragraphs that opinion into his Order. (R 53-58). As in Westchester I, the Exclusion in the present case can be read - at most - to apply only to long-term damage or exposure of a harmful substance to the environment.

at bar, the slight spill of ammonia in DENI's office was contained within the building and did not result in the surrounding area being exposed in any way to the chemical. (R. 36-37).[7] This critical and important distinction serves to illustrate the difference between that case and DENI, which experienced only a minor chemical spill from some ordinary office equipment, and the type of claims raised by large-scale "chemical nightmares" where there is harmful, wide-spread exposure of toxic substances to the surrounding environment. The purpose of the pollution exclusion in STATE FARM's insurance policy - as in all such policies - only to provide some sort of limitation where there could be harmful, wide-spread exposure to the environment, See supra.

Second, the ammonia leak in Statesican , resulted in numerous people from the surrounding. area incurring injury, and being treated at local hospitals, with fifteen separate claims being made against F.H.S. for injury. American States, 843 F. Supp. at 188. This reflects the fact that a substantial amount of the toxic chemical was released into the surrounding environment in that case, and that it was not simply contained to F.H.S.'s warehouse. In contrast, the spill in the present case never carried over to the surrounding environment, was confined to excluding DENI's building, was remedied quickly and did not result in injury to people the building. (R. 1-3, 36-37). The facts of American States are thus wholly distinguishable from the case at bar, and the holding of American States certainly cannot be said to mandate reversal of the Trial Court's interpretations here.

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[7] The distinction between American States and the case at bar is even more evident when one tries to suggest that the ammonia could have reached " the surrounding area." The only argument would be the creative (yet illogical) suggestion that the ammonia from the blueprint machine could have escaped into "the surrounding area" when the fire department knocked out a back window to provide ventilation for the building. (R. 36-37). Obviously, the fire department would not have knocked out the window if such action would prove to be harmful to the environment or a threat to the people in the "surrounding area."

In its Brief to the Fourth District Court, STATE FARM also cited Alcolac Inc. v. California Union Ins. Co., 716 F. Supp. 1546 (D. Md. 1989) for the proposition that "absolute" pollution exclusions cannot be susceptible to more than one meaning, and that they thus exclude coverage for any release of pollutants, however they may be defined. See State Farm's Initial Brief to the Fourth District at 8. With all due respect, this case does not support reversal of the Trial Court's determinations either. Unlike the minimal amount of ammonia spilled in this case. Alcolac involved "repeated, gross violations of safe procedures governing the handling of toxic substances, and those violations "contaminated the environment" adjacent to the Alcolac Sedalia plant . . . ." Id. at 1547 (emphasis supplied). In fact, unlike the small accident in the case at bar, the large-scale release of toxic substances in Alcolac is precisely the type of incident these pollution exclusion provisions are intended to address - the widespread industrial pollution of the environment.[8] Clearly, the facts of Alcolac. are distinguishable from those at bar, and the case cannot be controlling here.

Other jurisdictions have found that coverage despite the existence of broad exclusionary language contained in the policy and particularly where the court concludes that a "reasonable" insured would not ordinarily have recognized the breadth of the exclusion because the policy was

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[8] Respectfully, most, if not all of the cases that State Farm cites in this regard fall prey to such a distinguishable analysis. The majority of cases which have found pollution exclusions to be unambiguous are - among other reasons - principally distinguishable on the ground that they involve the widespread exposure of a harmful substance to the environment, or some other form of injurious exposure. See. e.g., Western World Ins. Co. v. Stack Oil. Inc., 922 F.2d 118 (2d Cir. 1990) (70,000-80,000 gallons of fuel oil spilled into nearby waterways); City of Salina v. Maryland Cas. Co., 856 F. Supp. 1467 (D. Kan. 1994) (1,500 gallons of cleaning chemicals escaped into the City's main sewer line); American Home Assur. Co. v. Devcon Int'l. Inc., No. 92-6764-CIV, 1993 WL 401872 (S.D. Fla. Sept. 28, 1993) (5 year exposure to toxic substances); Guilford Ind.. Inc. v. Liberty Mut, Ins, Co,, 688 F. Supp. 792 (D. Maine 1988) (pipes for two 10,000 gallon storage tanks of oil ruptured, causing fuel oil to flow into stream). Therefore, their holdings of the foregoing cases are irrelevant and inapposite to the decision of this case.

not sufficiently explicit. See, e.g., A-l Sandblasting & Steamcleaning Co. v. Baiden, 53 Or. App. 890,632 P.2d 1377 (198 1), aff'd, 293 Or. 17,643 P.2d 1260 (1982). See also Westchester Fire Ins. Co. v. City of Pittsburgh. Kansas, 768 F. Supp. 1463 (D. Kan.1991), reconsideration denied, 794 F. Supp. 353 (D. Kan. 1992), aff'd sub nom. Pennsylvania Nat. Mut. Cas. Ins. Co. v. City of Pittsburgh, 987 F.2d 1516 (10th Cir.1993); West American Ins. Co. v. Tufco Flooring E., Inc., 104 N.C. App. 312, 409 S.E.2d 692 (1991), rev. denied, 332 N.C. 479,420 S.E.2d 826 (1992). Cf. Vantage Dev. Corp., 251 N.J. Super. at 521,598 A.2d at 950 (policy contained express warning of lack of coverage).

Some of the courts in other jurisdictions faced with the issue have found these exclusions to be ambiguous, if not facially, then " as applied" to the facts. See Stonev Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995) (relying on several New York state court case decisions which found ambiguity; and holding such an exclusion ambiguous as applied to claims for injury by carbon monoxide poisoning in an apartment building); Island Assoc., Inc. v. Eric Groua. Inc., 894 F. Supp. 200 (W.D. Pa.1995) (holding the pollution exclusion ambiguous when applied to the facts of workers removing asbestos floor tile mastic and being injured by fumes); West Am. Ins. Co. v. Tufco Flooring E., Inc., 104 N.C. App. 3 12, 409 S.E.2d 692 (1991), rev. denied, 332 N.C. 479,420 S.E.2d 826 (1992) (holding the pollution exclusion ambiguous as applied to claim); Atlantic Mut. Ins. Co. v. McFadden, 413 Mass. 90,595 N.E.2d 762 (Mass. 1992) (holding that to the extent that exclusion can be read to imply that lead in paint is a "pollutant" it is ambiguous). See also Judge Stone's dissent in Deni, 678 So. 2d at 403-06.

The above decisions, each of which held exclusions of the kind at bar to be ambiguous when applied to the facts, did not label this type of ambiguity as a "latent" ambiguity, but, nevertheless,

that is apparently what it is. Consider Bunnell Medical Clinic, P.A. v. Barrera, 419 So. 2d 681,683 (Fla. 5th DCA 1982), in which the court stated:

> A latent ambiguity has been defined as one where the language in a contract is clear and intelligible and suggests a single meaning, but some extrinsic fact or extraneous evidence creates a need for interpretation or a choice between two possible meanings, Hunt v. First Nat'1 Bank of Tampa, 381 So. 2d 1194 (Fla. 2d DCA 1980); Drisdom v. Guarantee Trust Life Ins. Co., 371 So. 2d 690 (Fla. 3d DCA 1979).

In Drisdom, the Third District Court of Appeal applied the latent ambiguity doctrine to conclude that the word "school," in a group accident insurance policy, created a latent ambiguity.

As Judge Stone's dissent points out, a number of courts in other jurisdictions have found these exclusions ambiguous on their face. See Deni, 678 So. 2d at 404.

In Minerva Enterprises, Inc. v. Bituminous Casualty Corp., 312 Ark. 128, 851 S.W.2d 403 (1993), the court determined that the broadly worded pollution exclusion provision was ambiguous with respect to whether it applied to damage to a tenant's mobile home flooded by a backed-up septic system. The Court decided that the term "waste" in the provision par01 evidence would be admissible on the meaning of the term "waste" as used in the exclusion, The Court in Minerva concluded that the term was ambiguous because such clauses were meant to cover the activities of "persistent" or "active" polluters, not of those who may innocently cause some isolated contained damage by something that could be classified as a contaminant or waste. Minerva, 3 12 Ark. at 130, 851 S.W.2d at 404.

## V. Widespread Disagreement in the Courts is a Ground for Finding of ambiguity

The widespread disagreement in the courts as to what these pollution exclusions really mean is a ground for a finding of ambiguity in itself. As Judge Letts pointed out in Security Ins. Co, of

Hartford v. Investors Diversified Ltd., Inc., 407 So.2d 314 (Fla. 4th DCA 1981):

> The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language,

Id. at 3 16. One other court has observed, in deciding whether an insurance exclusion was ambiguous:

> If Judges learned in the law can reach so diametrically conflicting conclusions as to what the language of the policy means, it is hard to see how it can be held as a matter of law that the language was so unambiguous that a layman would be bound by it.

Alvis v, Mutual Benefit Health & Accident Ass'n, 201 Tenn. 198, 204, 297 S.W.2d 643, 645-6 (1956)). See also Stroehmann v. Mutual Life Ins. Co. of New York, 300 U.S. 435, 57 S. Ct. 607, 8 1 L. Ed. 732 (1937); Annotation, Division of Opinion Among Judges on Same Court or Among Other Courts or Jurisdictions Considering Same Question, as Evidence that Particular Clause of Insurance Policy is Ambiguous, 4 A.L.R. 4th 1253 (1981).

Here, at least six judges (two circuit court judges, and four at the District Court) considered the exclusion to be ambiguous. Six judges believed it was not ambiguous. These contrasting opinions, when read in the light "favoring" coverage and "strictly construed" against the insurer, should result in a finding of ambiguity .

## VI. Other Jurisdictions - Distinguishing Factors

Cases from other jurisdictions which have found clauses like these to be unambiguous are distinguishable from the case at bar that they all involve widespread exposure of a harmful substance to the environment, or some other form of injurious exposure. See e.g., Guilford Ind. v. Liberty Mut. Ins. Co., 688 F. Supp. 792 (D. Me. 1988) (thousands of gallons of oil escaping from

the pipes of a textile mill and flowing down a river fits within this definition); See Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995) (reversing dismissal of insured's claims against an insurance company, determining pollution exclusion clause applied to environmental pollution, but not to personal injury arising out of the insured's tenants inhaling carbon monoxide coming from faulty heating and ventilation system); Miano v. Helm, 206 A.D.2d 957,614 N.Y.S.2d 829 (1994) (determining that an insurer was obligated to defend an insured who was sued by tenants for damage caused by the insured's employee pulling asbestos-containing insulation from pipes, and noting that the absolute pollution exclusion has generally been interpreted as applying only to environmental pollution); Western World Ins. Co. v. Stack Oil. Inc,, 922 F.2d 118 (2d Cir. 1990) (70,000-80,000 gallons of fuel oil spilled into nearby waterways); City of Salina v. Marvland Cas. Co,, 856 F. Supp. 1467 (D. Kan. 1994) (1500 gallons of cleaning chemicals escaped into the City's main sewer line); American Home Assur. Co. v. Devcon Int'l. Inc., No. 92-6764-CIV, 1993 WI, 401872 (SD. Fla. Sept. 28, 1993) (5 year exposure to toxic substances); Guilford Ind., Inc. v. Liberty Mut. Ins. Co,, 688 F. Supp. 792 (D. Maine 1988) (pipes for two 10,000 gallon storage tanks of oil ruptured, causing fuel oil to flow into stream).

The Second District, has found language contained in a homeowner's policy which excludes damage f from "water" or from "pollutants or contaminants" to be ambiguous as it applied to the facts of that case, and thus ruled favor of the insured. Florida Farm Bureau Ins. Co. v. Birge, 659 So. 2d 3 10 (Fla 2d DCA 1994). In Birge, the damage was caused by raw sewage which had filled the insured's house. Id. at 3 11. The court noted the "average homeowner's examination of the insurance contract would not reveal the applicability of the exclusion to this type of disaster." Id. As such, the Court affirmed the Trial Court's determination that the homeowner's policy was

ambiguous, and it did so despite a broadly- worded pollution and water damage exclusion (which did not contain any additional language to clarify that the clause was meant to exclude coverage for such damage).

State Farm urges a broad interpretation of the definition of "pollutants," a definition which could very well encompass just almost every conceivable substance used on a daily basis, no matter how safe or benign under normal circumstances, including everyday items such as soap and hot water. However, as the Florida cases hold, the language in policy exclusions is not to be interpreted broadly, but construed rather narrowly in favor of coverage.

## VII, The Trial Court Did Not Err when It Applied The Reasonable expectations Doctrine

The majority at the Fourth District apparently believed that the Trial Judge applied some form of the so-called "Reasonable Expectations Doctrine" and were reluctant to do the same without the express authorization of this Court. interpretation of an insurance policy cannot turn exclusively on the subjective interpretation of the insured. As discussed, however, such an interpretation is unnecessary to the conclusion that the policy exclusion here is ambiguous, and particularly when read from the perspective of Deni as a "reasonable insured." In any event, construing a policy provision in accordance with the reasonable expectations of the insured is not a concept which is entirely foreign to this state. Cf. Florida Farm Bureau Cas. Co. v. Hurtado, 587 So. 2d 13 14, 1320 (Fla. 1991) (Barkett, J., concurring in part and dissenting in part); Galink v. Aetna Cas. And Sur. Co., 432 So. 2d 178, 182 (Fla. 1st DCA 1983) (adoption of the modern rule of reasonable expectations promotes social function of insurance coverage); McDaniels v. Lawyers' Title Guar. Fund, 327 So, 2d 852 (Fla. 2d DCA 1976) (the court looked to the reasonable expectations of the

policyholder who had purchased title insurance). Similarly, in Nat'l Gypsum Co. v. Travelers Indem. Co., 417 So. 2d 254 (Fla. 1982), the Supreme Court reiterated the necessity of looking to the reasonable expectations of the insured to allow recovery against the insurer despite - in that case - the insured's failure to give the required notice as required under the policy:

> Insurance contracts are not truly consensual; they involve forfeitures; and allowing recovery is the more equitable course of action and furthers the reasonable expectations of those who purchase insurance.

Id. at 256. Indeed, there is no reason why Florida courts cannot embrace this concept - if they already have not - grounded in fundamental principles of contract interpretation, already well ingrained in Florida jurisprudence. These principles are in fact totally consistent with other jurisdictions' proper application of this common sense approach. See. e.g., Island Associates, Inc. v. Eric Group, Inc., 894 F. Supp. 200 (W.D. Pa. 1995); Minerva Enterprises, Inc. v. Bituminous Cas. Corp., 312 Ark. 128,851 S.W.2d 403,406 (Ark. 1993); West American Ins, Co, v. Tufco Flooring East. Inc., 104 N.C. App. 3 12,409 S.E. 2d 692 (N.C. App. 1991), review denied, 332 N.C. 479,420 S.E.2d 826 (N.C. 1992); Westchester Fire Ins. Co. v. City of Pittsburgh, Kansas, 768 F. Supp. 1463, 1479 (D. Kan. 1991), aff'd, 987 F.2d 15 16 (10th Cir. 1993); Pipefitters Welfare Education Fund v. Westchester Fire Ins. Co,, 976 F.2d 1037, 1043 (7th Cir. 1992); Consolidated American Ins. Co. v. Ivey's Steel Erectors. Inc., M.D. Fla. Case No. 90-205-CIV-ORL-19 (J. Fawsett Mar. 11, 1991 order); A-1 S-cleaning: Co,, Inc. v. Baiden, 53 Or. App. 890, 632 P.2d 1377 (1981), affirmed, 293 Or. 17,643 P.2d 1260 (1982);

Indeed, courts across the country have utilized this approach when determining the scope of pollution exclusion clauses, and these courts have generally interpreted the word "pollutant" to mean 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." See, e.g., Westchester Fire I, 794 F. Supp. at 355 (D. Kan. 1992), aff'd, 987 F.2d 1516 (1 lth Cir. 1993) (emphasis added).

In Deni, the ammonia from the blueprint machine only caused injury because of the "closed-in" nature of the office building in which the spill occurred. The same would be true if an even small amount of ammonia had spilled onto, and damaged, a piece of computer equipment. Also, as noted above, a computer could also be damaged by spilled Coca-Cola, yet no reasonable person would consider Coca-Cola to be a "pollutant" merely because of its acid content. Is a glass of fresh-squeezed orange juice really considered a "pollutant" under the policy? How about Lemonade?

In A-l Sandblasting & Steamcleaning Co., Inc. v. Baiden 53 Or. App. 890,632 P.2d 1377 (1981), aff'd, 293 Or. 17, 643 P.2d 1260 (1982), a bridge painter brought an action against his insurer for "over-spray" damage caused to several passing cars. In rejecting the insurer's broad interpretation of the exclusion to the overspread paint,[9] the court explained:

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

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[9]The exclusion provided:

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

Id. at 1379 (emphasis added). See Island Assoc.. Inc. v. Eric Group, Inc., 894 F. Supp. 200 (W.D. Pa. 1995) (applying a common sense approach to find that an otherwise broad and absolute pollution exclusion did not exclude coverage for harm caused by exposure to fumes from a cleaning compound used by an asbestos abatement subcontractor - the court stating that "[i]t is unclear whether the pollution exclusion clause was intended to apply to dangerous work environments where the conditions within the work area may be toxic, but where once disbursed into the atmosphere the smoke, fumes or vapors do not reach a toxic level"), Accord Consolidated American Ins. Co. v. Ivey's Steel Erectors. Inc., M.D. Fla. Case No. 90-205-CIV-ORL-19 (J. Fawsett Mar. 11, 1991 order ) (Mealey's Litigation Reports, Insurance, Vol. 5, #28) (finding in favor or the insured, thus requiring the insurer to defend). In this regard, it is significant that the 'Policy in Ivey's Steel contained used the same exclusion used in A-1 Sandblasting. However, the case did not turn on the "sudden and accidental" language of the exclusion, however (which was addressed in this Court's decision in Dimmitt). The definitional ambiguity addressed in *Ivey* continues to exist, as reflected in the decisions discussed herein on the 1985 and 1988 exclusions, As this Court is aware, Dimmitt did not directly address this issue. See also West American Ins. Co. v. Tufco Flooring East. Inc.,104 N.C. App. 312,409 S.. 2d 692 (N.C. App. 1991), review denied, 332 N.C. 479,420 S.E.2d 826 (N.C. 1992).

The facts and holding in Tufco are instructive. Perdue Farms, Inc. to resurface the floors in one of its chicken processing facilities. While the work was being done, some chicken parts which had been stored in a cellar adjacent to the area being resurfaced came into contact with styrene vapors released from the chemicals Tufco used during the resurfacing work. The contact

with the fumes rendered the chicken unfit for human consumption, forcing Perdue to dispose of $500,000 worth of tainted chicken.

West American denied coverage for the contaminated chicken on the ground that the chemical vapors emanating from the flooring material constituted a "pollutant," and thus any damage incurred as a result of escaping vapors was excluded from coverage. The court disagreed with the insurance company's interpretation, and did so even though the definition of "pollutants" in the Policy expressly included "fumes" and "vapors."

Similarly, the court in Sargent Constr. Co,. Inc. v. State Auto Ins. Co., 23 F.3d 1324, 1327 (8th Cir. 1994), found that the application of a 1985 pollution depended upon whether the substance could be classified as an "irritant" or a "contaminant." There, the insured had used muriatic acid (a common household cleaner) to etch a concrete floor in a building. The acid emitted fumes which damaged some chrome fixtures in the building. The Eighth Circuit held the term "irritant or contaminant" to be susceptible of more than one meaning:

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

Id. (Emphasis supplied by court).

Indeed, the absurdity of an overly-expansive reading of these same terms was further supported in Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Company, 976 F.2d 1037 (7th Cir. 1992), where the Seventh Circuit stated:

> [t]he terms "irritant" and "contaminant," when viewed in isolation, are virtually boundless, for "there is virtually no substance or chemical in existence that would not irritate or damage some person or property."

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

To the extent there may be cases which conflict with those cited above (which found coverage under certain factual scenarios despite strict exclusionary language), that conflict only emphasizes the variety of ways in which these provisions have been interpreted, as does the deep split in the Fourth District Court decision itself. See Deni I, 678 So. 2d at 407-08 (Klein, J. dissenting). In light of the extensive disagreement this exclusion has generated amongst the lawyers and judges it has been before, there is simply no way nonlawyer policyholders could have been expected not to be covered under these circumstances, and thus there can be no doubt as to its ambiguity.[10]

Indeed, it is completely consistent with the law and common sense - as here and in other jurisdictions as well - that coverage be afforded in certain cases despite the existence of broad exclusionary terms. This is particularly so where the court can conclude that a reasonable insured

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"Perhaps the removal of the older "sudden and accidental" language created a new ambiguity, particularly in light of the fact that the industry inserted no newer additional language to clarify that incidents such as Deni's will not be covered, or the reasonable expectations of the parties commands that this sort of minor ammonia spill inside the building was not the sort of spill that would exclude Deni from obtaining coverage under the pollution exclusion clause identified in this case.

ordinarily would not recognize the breadth of the exclusion because the language in the policy is not sufficiently explicit. See, e.g., A-l Sandblasting & Steamcleaning Co. v. Baiden, 53 Or. App. 890,632 P.2d 1377 (1981), aff'd, 293 Or. 17,443 P.2d 1260 (1982) (paint spray damage to vehicles passing under a bridge was not within the definition of "pollutant"). See also Westchester Fire Ins, Co. v. Citv of Pittsburgh. Kansas, 768 F. Supp. 1463 (D, Kan.1991), reconsideration denied, 794 F. Supp. 353 (D. Kan.1992), aff'd sub nom. Pennsylvania Nat. Mut. Cas. Ins. Co. v. City of Pittsburg,. Kansas, 987 F.2d 1516 (10th Cir.1993); West American, Ins.. Co. v. Tufco Flooring East. Inc., 104 N.C. App. 312,409 S.E.2d 692 (1991), rev. denied, 332 N.C. 479,420 S.E.2d 826 (1992). Cf. Vantage Dev. Corn., 251 N.J. Super. at 521,598 A.2d at 950 (policy contained express warning of lack of coverage),

## VIII. The Reasonable Expectations Doctrine

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

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

Robert Keaton, Insurance Law 350, 35 1 (1971) (emphasis added), Thus, the reasonable expectations doctrine applies in construing the terms of an insurance policy **regardless of whether the policy is found to be ambiguous.**

In his dissent in Deni I, Judge Stone noted that the concept of reasonable expectations is not entirely foreign to Florida. 678 So. 2d at 397. In fact, a number of Florida decisions have used the phrase "reasonable expectations" in the insurance context, including several cases which in turn have

cited to the law of other states.

Some courts apply the doctrine only when the policy language is found to be ambiguous. With all due respect, however, this approach does not address the problems faced by policyholders when their insurers urge expansive applications of the otherwise "unambiguous" pollution exclusion they (the insurance companies) unilaterally draft in their favor. Such an approach conflicts with the established rule which always construes ambiguities against the insurer. That is, if the exclusion is ambiguous as applied to a particular situation, then the insured would already be entitled to the most favorable construction (i.e., coverage). There is no reason to consider the reasonable expectations doctrine when one of the constructions provides coverage.

The insurers who drafted and insisted on the form exclusion should not be able to benefit from an ambiguity by advancing the reasonable expectations doctrine, It is only when the court feels no construction of the exclusion provides for coverage that the court should resort to the reasonable expectations doctrine. Accord Max True Plastering Co. v. United States Fid. & Guar. Co., 912 P.2d 861,866 (Okla. 1996) (identifying 36 jurisdictions which have addressed the reasonable expectations doctrine, with only four rejecting the rule). See also Chacon v. American Family Mut. Ins. Co., 788 P.2d 748 (Colo. 1990) (interpreting unambiguous insurance policy in light of what a reasonable insured would have understood contract to mean).

The Court in Tufco articulated the difference between the past and present pollution exclusion clauses, noting the new exclusion differs from the (older) version in that it omitted the language which required the discharge to be "into or upon land, the atmosphere or any water course or body of water," and found no indication that this change was meant to expand the scope of the exclusion to non-environmental damage. 409 S.E.2d at 699. The court quoted from the International

Risk Management Institute, Inc., Commercial Liability Insurance, Volume I, Section V, Annotated CGL Policy (1985), which notes that the 1985 amendment to the pollution exclusion clause was "intended by the insurance industry to exclude governmental clean up costs from coverage." The Court stated that:

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

Id. at 700 (emphasis added). This is consistent with the historical limitation that pollution exclusions do not apply to non-environmental damage. See Culvert Ins. Co. v. S & L Realty Corp., 926 F. Supp. 44, 47 (S.D.N.Y. 1996) ('discharge, disposal, seepage, migration, release or escape" are terms of art in environmental law); Stonev Run Co. v. Prudential-L.I. Comm, Ins. Co., 47 F.3d 34, 38 (2d. Cir. 1995) (holding the absolute pollution exclusion clause to be ambiguous because an insured could reasonably interpret the clause as applying only to environmental pollution, and not to all contact with substances that can be classified as pollutants); S.N. Golden Estates v. Continental Ins. Co., 680 A.2d 114 (N.J. Super. 1996) (exclusion meant to apply to traditional environmental type damages); Regional Bank of Colorado. N.A. v. St. Paul Fire and Marine Ins. Co., 35 F.3d 494,498 (10th Cir. 1994) (reasonable policy holder would understand pollution exclusion as being limited to irritants and contaminants commonly thought of as environmental pollution.)

## CONCLUSION

In light of the foregoing, and on the strength of the authorities cited, Appellant Deni Associates of Florida, Inc. respectfully suggest that this Court answer the certified question in the affirmative, or determine - as the language of the Policy is applied to the facts of this particular case - that coverage be afforded to Deni, or otherwise find that Deni is entitled to coverage, that this Court

reverse the decision of the Fourth District Court of Appeals, and that it direct that the trial court decision be reinstated, or grant such similar relief as is available or proper, as well as granting Deni's Motion for Attorney Fees and Costs,

Respectfully submitted,

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**CERTIFICATE OF SERVICE.**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via regular United States Mail to the following individuals on the attached service list this 21st day of October, 1997.

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