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STATE OF WISCONSIN
SUPREME COURT

JOEL HIRSCHHORN AND EVELYN F. HIRSCHHORN,
Plaintiffs-Appellants,

Appeal No. 2009AP002768

v.

Cir. Ct. Case No. 2008CV000202

AUTO-OWNERS INSURANCE COMPANY,
Defendant-Respondent-Petitioner.

BRIEF-IN-CHIEF OF DEFENDANT-RESPONDENT-PETITIONER AUTO-OWNERS INSURANCE COMPANY

REVIEW OF A FINAL JUDGMENT OF THE CIRCUIT COURT FOR ONEIDA COUNTY, JUDGE MARK MANGERSON, DISMISSING PLAINTIFFS-APPELLANTS' COMPLAINT

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Issue I: **Does a standard pollution exclusion in a homeowner's policy (not a CGL policy) apply to exclude coverage for a loss caused by a "penetrating and offensive odor" emanating from an accumulation of bat guano so severe the house needed to be demolished?**

Answered by the Circuit Court: The circuit court initially concluded that the pollution exclusion did not apply because an accumulation of bat guano was not "traditional pollution." (P-Appx. 22; R.24:27.) Upon a motion for reconsideration, the circuit court agreed with Auto-Owners that animal excrement constituted "waste" and was therefore a "pollutant" within the meaning of Auto-Owners' pollution exclusion. (P-Appx. 11-14; R.26.)

Answered by the Court of Appeals: The Court of Appeals held that the pollution exclusion did not apply because even though excrement fell within the definition of "waste" in Auto-Owner's homeowner's policy, "when a person reading the definition arrives at the term 'waste,' poop does not pop into one's mind." *Hirschhorn v. Auto-Owners Ins. Co.*, 2010 WI App 154, ¶12, 330

Wis. 2d 232, 792 N.W.2d 639. The Court of Appeals ruled that a reasonable insured would, in reviewing their homeowner's policy, understand "waste" to be limited to "damaged, defective, or superfluous material produced during or left over from a manufacturing processes or industrial operation." *Id.*, ¶13.

Issue II: **Does the standard pollution exclusion in a homeowner's insurance policy apply to pollutants that result from "biological processes," or is the exclusion limited to industrial waste?**

Answered by the Circuit Court: The circuit court initially concluded that the pollution exclusion did not apply because an accumulation of bat guano was not "traditional pollution." (P-Appx. 22; R.24:27.) Upon a motion for reconsideration, the circuit court agreed with Auto-Owners that animal excrement constituted "waste" and was therefore a "pollutant" within the meaning of Auto-Owners' pollution exclusion. (P-Appx. 11-14; R.26.)

Answered by the Court of Appeals: The Court of Appeals ruled that "biological processes are not part of the [pollution] exclusion" and that the term "waste" is limited to "superfluous

material produced during or left over from a manufacturing process or industrial operation." *Hirschhorn*, 330 Wis. 2d 232, ¶¶13, 15.

STATEMENT OF THE CASE

This is a coverage dispute under a homeowner's insurance policy involving the interpretation and application of a standard pollution exclusion. The Hirschhorns made a claim under a homeowner's policy issued by Auto-Owners after they allegedly were forced to demolish their vacation home in northern Wisconsin due to a "penetrating and offensive odor" emanating from an accumulation of bat guano that (allegedly) rendered the home uninhabitable. (P.Appx. 30; R1:3.) Auto-Owners' policy excludes from coverage damage caused directly or indirectly by the "discharge, release, escape, seepage, migration or dispersal of pollutants", (P-Appx. 27; R.8, Ex. 2:10), which the policy defines as "any solid, liquid, gaseous or thermal irritant or contaminant, including ... waste." (P-Appx. 26; R.8, Ex. 2:2.)

Auto-Owners moved for summary judgment based on the pollution exclusion in its policy.[1] The circuit court initially denied the motion, reasoning that this was not a "traditional pollution" case. (P-Appx. 22; R.24:27.) However, upon reconsideration, the circuit court ruled that the exclusion applied because a "penetrating and offensive odor" caused by an accumulation of animal excrement was an "irritant," a "contaminant," and "waste," such that it met the policy definition of "pollutant." (P-Appx. 12-13; R.26:2-3.) The Court of Appeals reversed, ruling that the term "pollutant" in Auto-Owners' homeowner's policy applied only to industrial contaminants, and not contaminants resulting from "biological processes." *Hirschhorn*, 330 Wis. 2d 232, ¶¶10, 14-15.

This Court should reverse the Court of Appeals decision and hold that Auto-Owners' homeowner's policy provides no coverage for the Hirschhorns' loss because a "penetrating and offensive

[1] Auto-Owners also argued that the Hirschhorns' loss was not the result of an "accidental direct physical loss to covered property" and that the exclusions for vermin and inadequate maintenance applied. (*See* R.6, R. 23, & R. 24: 5-20, 26-27).

odor" emanating from an accumulation of bat guano that allegedly rendered the home uninhabitable falls squarely and unambiguously within the pollution exclusion in Auto-Owners' policy. The Court should further hold that the term "pollutant" in Auto-Owners' homeowner's policy is not limited to "traditional" industrial waste and that it includes substances that meet the policy definition regardless of whether they result from a "biological process."

Given the broad wording of the pollution exclusion in Auto-Owners' homeowner's policy, a reasonable insured would *not* read the exclusion as limited to industrial refuse This is so because a "penetrating and offensive odor" emanating from bat guano satisfies the definition of "pollutant" in the policy on two separate bases.

First, a "penetrating and offensive odor" emanating from an accumulation of bat guano falls within the language in the exclusion covering the "release, escape, seepage, migration or dispersal" of a "gaseous . . . irritant or contaminant, including . . .

fumes . . . gasses . . . ." Second, bat guano satisfies the portion of the definition covering the "release, escape, seepage, migration or dispersal" of a "solid, liquid . . . irritant or contaminant, including . . . waste." In other words, *both the bat guano itself and the fumes emanating therefrom are excluded under the plain language of Auto-Owners' pollution exclusion*.

A reasonable insured would *not* conclude that the term "pollutant," as defined in Auto-Owners' pollution exclusion, does not apply to pollutants that result from "biological processes," such as feces and urine. Indeed, the Consumer Products Safety Commission expressly recognizes animal excrement as a common household "biological contaminant." A reasonable insured who alleged that his home was rendered uninhabitable by a "penetrating and offensive odor" emanating from an accumulation of bat guano would understand that the alleged loss is excluded because the loss results directly from the "release and discharge" of a "gaseous" "irritant" and "contaminant" emanating from "waste."

A pollution exclusion is not ambiguous merely because it is broad. *See Richland Valley Prods., Inc. v. St. Paul Fire & Cas. Co.*, 201 Wis. 2d 161, 169-173, 548 N.W.2d 127 (Ct. App. 1996) (ruling that the undefined term "contaminant" in policy exclusion was unambiguous). Under *Peace v. Northwestern National Insurance*, 228 Wis. 2d 106, 140, 596 N.W.2d 429 (1999), a pollution exclusion should be given its plain and ordinary meaning, and should not be interpreted according to a "terms-of-art" approach that limits the exclusion to "traditional" forms of "industrial and environmental pollution." Further, under *United States Fire Insurance Co. v. Ace Baking Co.*, 164 Wis. 2d 499, 476 N.W.2d 280 (Ct. App. 1991), "foul" odors caused by a foreign substances (in that case, fabric softener) fall within the definition of "pollutant" in a pollution exclusion.

Also, a number of decisions from other jurisdictions recognize excrement to be a "pollutant" within the meaning of a standard pollution exclusion. The Hirschhorns have cited no case in which any court has interpreted a standard pollution exclusion in a

homeowner's policy to apply to only industrial pollution and not pollution caused by "biological processes."

By focusing on the origin of the pollutant, rather than whether its characteristics satisfy the policy definition, the Court of Appeals' decision below results in the inexplicable conclusion that the pollution exclusion applies only to risks that are not related to the type of property insured. In other words, under the Court of Appeals decision, only pollutants that are unrelated to homeownership fall within the scope of the pollution exclusion in a homeowner's policy. This holding fundamentally alters the nature of the standard *homeowner's* pollution exclusion such that it does not cover household pollutants and has exposed insurers to a whole new category of risks. The Court of Appeals decision forces insurers to provide coverage for damages caused by common household pollutants, such as bacteria, viruses, fungi, mold, dust mites, sewage containing any form of excrement, human or animal, and virtually all unwanted organic substances.

This result is wholly at odds with the language of the pollution exclusion.

Based on the clear, unambiguous language in Auto-Owners' policy, the well-established rules for construing insurance contracts, and established precedent, Auto-Owners' pollution exclusion has only one meaning: It excludes from coverage any loss resulting "resulting directly or indirectly" from the "discharge, release, escape, seepage, migration or dispersal of" "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste"—regardless of the source of the substance. No reasonable person can read the pollution exclusion in Auto-Owners' homeowner's policy, including the policy definition of "pollutants," and conclude the exclusion does not apply to damage caused by a "penetrating and offensive odor" emanating from unwanted animal feces and urine inside the structure. Therefore, this Court should reverse the decision of

the Court of Appeals and hold there is no coverage for the Hirschhorns' loss under Auto-Owners' policy.

A. Factual Summary

The facts in this case are undisputed and brief. Auto-Owners issued a policy of homeowner's insurance to Joel and Evelyn Hirschhorn, covering their summer vacation home in Lake Tomahawk, Oneida County. They listed the properly for sale in May, 2007, at which time their real estate broker inspected the premises. The broker performed another inspection in July, 2007, and noticed the presence of bat guano at the house. The broker investigated further and discovered the presence of bats at the residence. The broker attempted to clean the premises and remove the bats, but when the Hirschhorns stayed in the property in August of 2007, they noticed a "penetrating and offense odor" that they claimed made the premises uninhabitable. The Hirschhorns then hired a contractor to inspect the premises and provide a remediation quote. The contractor determined that the odor was caused by an accumulation of bat urine and feces

between the siding and the walls of the house. The Hirschhorns filed a property loss notice with Auto-Owners, which Auto-Owners denied. *Hirschhorn*, 330 Wis. 2d 232, ¶¶2-3.

The Hirschhorns then filed suit against Auto-Owners. After suit was initiated, the Hirschhorns demolished the house, purportedly because the "penetrating and offensive" odor made the house uninhabitable and unmarketable. (Complaint, ¶9: P-Appx. 30; R.1:3.) The Complaint specifically alleges that "the home became uninhabitable and unsaleable due to the penetrating and offensive odor" and that the "drapes, carpet, fabrics, and furniture were rendered unusable as a result of the absorption of the bat guano odor." (*Id.*)

Auto-Owners' policy contains a standard "pollution exclusion" used in homeowner's policies that excludes from coverage any loss "resulting directly or indirectly" from any of the following: "discharge, release, escape, seepage, migration or dispersal of **pollutants** . . . " (P-Appx. 27; R.8, Ex.2:10.) The term "pollutants" is defined to mean "any solid, liquid, gaseous or thermal irritant

or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste." "Waste" includes, but is not limited to, "materials to be recycled, reconditioned or reclaimed." (P-Appx. 26 R.8, Ex.2:2.)

B. Procedural Posture

Auto-Owners moved for summary judgment after the parties conducted limited discovery on the issue of coverage. Auto-Owners advanced several arguments in support of its motion for summary judgment, including that the Hirschhorns' loss fell within the policy's pollution exclusion. The circuit court initially denied Auto-Owners motion for summary judgment and concluded that the pollution exclusion did not apply, reasoning:

> When we talk about pollution, it's usually a leakage or seeping from a polluted area into some other area causing damage. And we don't have that same situation here. We have the damage actually being caused by things coming into the structure … which isn't the same as the traditional pollution cases.

(P-Appx. 22; R.24:27.)

However, the circuit court subsequently granted Auto-Owners' motion for reconsideration and ruled that the pollution exclusion applied because a "penetrating and offensive odor" caused by an

accumulation of animal excrement was an "irritant," a "contaminant," and "waste," such that it met the policy definition of "pollutant":

> Under the Auto-Owners policy, "pollutant means any solid, liquid, gaseous or thermal irritant or contaminant, including ... waste."
>
> Excrement is certainly understood to be "waste." Dictionary definitions confirm that "waste" includes excretions such as feces or urine. Waste, or pollution, was carried into the Hirschhorn residence by a force of nature and was deposited there as a solid and liquid contaminant. The substances rendered the interior of the residence offensive to the extent that Ms. Hirschhorn couldn't breathe in the house. In fact, the house was a total loss due to this pollution.
>
> According to *Peace,* to qualify as a "pollutant", the bat excrement would also have to be the result of a "discharge, release, escape, seepage, migration or dispersal" of the pollutant which directly or indirectly caused the loss. There can be no other conclusion but that the offensive substances, the pollutants, were carried into the residence by bats and discharged or released in the attic. The substances subsequently seeped or were disbursed throughout the residence to cause the loss.
>
> Clearly, the pollution exclusion of the policy applies and this court erred in finding to the contrary from the bench.

(P-Appx. 12-13; R.26:2-3.) Therefore, the Court dismissed the Complaint. (P-Appx. 10; R.28.)

The Hirschhorns appealed, and the Court of Appeals reversed. *Hirschhorn*, 330 Wis. 2d 232. The Court of Appeals analogized

animal excrement to the normally benign carbon dioxide that was addressed in *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 2d 224, 230, 564 N.W.2d 728 (1997), and concluded that a reasonable insured would not consider substances resulting from a "biological process" to be "waste" under the policy:

> Here, we conclude excreted bat guano is akin to exhaled carbon dioxide, both biologically and as a reasonable insured homeowner would view it regarding the pollution exclusion. One could review the pollution exclusion as a whole and reasonably interpret "pollutant" as not including bat guano excreted inside a house. . . .
>
> . . . .
>
> However, waste, in its context here listed as an example of a pollutant, would not unavoidably be interpreted as excrement. Substituting the terms makes this evident: "smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gasses and [excrement]." As the saying goes, "one of these things is not like the others."
>
> The policy definitions of "pollutant" and "waste" are further informed by the policy's exclusionary clause itself, which omits coverage for the "discharge, release, escape, seepage, migration or dispersal of pollutants." None of those terms particularly suggest the movement of excrement. Rather, the bodily processes by which wastes such as carbon dioxide, urine, or feces move out of an organism would more commonly be described as respiration, elimination, excretion, or some other term suggesting a biological process. Thus, at best, the clause's action words do not suggest to the reader a biological process, and they may even suggest that *biological processes are not part of the exclusion.* Therefore, because a person might reasonably interpret the pollution exclusion as not contemplating bat guano, coverage is not excluded.

Hirschhorn, 330 Wis. 2d 232, ¶¶10, 14-15 (footnotes omitted) (emphasis added).

The Court of Appeals restricted the meaning of "waste" by picking one dictionary definition from among several available and limiting the definition of "waste" to "damaged, defective, or superfluous material produced during or left over from a manufacturing processes or industrial operation." *Id.*, ¶13. Thus, the Court of Appeals' decision essentially stands for the proposition that pollutants that result from "biological processes" do not fall within the scope of the standard homeowner policy pollution exclusion and that the term "waste" is limited to industrial refuse.

STANDARDS OF REVIEW

Questions of insurance coverage are reviewed *de novo*, without deference to the circuit court. *Schaefer v. Gen. Cas. Co.*, 175 Wis. 2d 80, 84, 498 N.W.2d 855 (Ct. App. 1993). Insurance policies are interpreted by applying well-established rules of construction.

Courts first look to the insuring clause of a policy to determine if it provides coverage for the loss alleged; if so, relevant exclusions are examined; and, finally, any exceptions to those exclusions are considered to determine if coverage for losses otherwise excluded is restored. *Sass v. Acuity*, 2009 WI App 32, ¶5, 316 Wis. 2d 752, 757, 765 N.W.2d 582. In undertaking this analysis, the policy is "construed to ascertain and effectuate the parties' intent." *Ace Baking* 164 Wis. 2d at 502.

Clear contractual provisions "must be construed as [they] stand[]." *Id.* "If the language of an insurance policy is unambiguous, a court will not rewrite the policy by construction and will interpret the policy according to its plain and ordinary meaning to avoid imposing contract obligations that the parties did not undertake." *Frost v. Whitbeck*, 2002 WI 129, ¶19, 257 Wis. 2d 80, 654 N.W.2d 225. Courts may not "add words" to a policy to arrive at a favored construction. *Folkman v. Quamme*, 2003 WI 116, ¶42, 264 Wis. 2d 617, 665 N.W.2d 857. A policy "'should not be rewritten by construction to bind an insurer to a

risk ... it [never] contemplate[d] or [intended] to cover, and for which it was not paid.'" *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶19, 326 Wis. 2d 729, 786 N.W.2d 78 (quoting *Limpert v. Smith*, 56 Wis. 2d 632, 640, 203 N.W.2d 29 (1973)).

Policy provisions that have more than one reasonable meaning are considered ambiguous and are construed in favor of coverage. *Varda v. Acuity*, 2005 WI App 167, ¶8, 284 Wis. 2d 552, 558, 702 N.W.2d 65. However, "any ambiguity must be genuine." *Bulen v. West Bend Mut.,* 125 Wis. 2d 259, 264, 371 N.W.2d 392 (Ct. App. 1985). Thus, a policy is not rendered ambiguous anytime an insured is able to conjure up "any interpretation that is grammatically plausible and creates coverage . . . ." *State Farm Mut. Auto. Ins. Co. v. Langridge*, 2004 WI 113, ¶47, 275 Wis. 2d 35, 683 N.W.2d 75. An interpretation cannot be reasonable if it conflicts with the nature of the insurance provided under the policy or frustrates the purpose of the policy at issue. *Blum,* 326 Wis. 2d 729, ¶23; *Muehlenbein v. West Bend Mut. Ins. Co.*, 175 Wis. 2d 259, 265, 499 N.W.2d 233 (Ct. App. 1993). Stated

differently, "the mere fact that a word has more than one meaning does not necessarily make the word 'ambiguous' if only one meaning comports with the parties' reasonable expectations." *Ace Baking* 164 Wis. 2d at 503.

ARGUMENT

A. Under The Plain Meaning of Auto-Owners' Pollution Exclusion, There is no Coverage for Losses Resulting From an Accumulation of Bat Guano or From The Odors Emanating Therefrom.

The pollution exclusion in Auto-Owners' homeowner's policy plainly informs an insured that the policy does not provide coverage for any loss "resulting directly or indirectly" from any of the following: "discharge, release, escape, seepage, migration or dispersal of **pollutants**. . . ." (P-Appx.27; R.8, Ex. 2:10.) The term "pollutants" is defined to mean "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste." "Waste" includes, but is not limited to, "materials to be recycled, reconditioned or reclaimed." (P-Appx. 26; R.8, Ex. 2:2.) The

pollution exclusion thus contains two requirements: 1) The damage alleged must have been caused by the "discharge, release, escape, seepage, migration or dispersal" of a substance; and 2) The substance at issue must meet the definition of "pollutants." Based on the allegations in the Hirschhorns' Complaint and the definition of "pollutants," no reasonable insured could conclude that the loss alleged is not excluded under the pollution exclusion.

The Hirschhorns' Complaint alleges they were forced to demolish their vacation home because the "penetrating and offensive" "resulting from the accumulation of bat guano between the siding and the walls of the home." (Complaint, ¶9: P-Appx.30; R.1:3.) The Complaint specifically alleges that "the home became uninhabitable and unsaleable due to the penetrating and offensive odor" and that the "drapes, carpet, fabrics, and furniture were rendered unusable as a result of the absorption of the bat guano odor." (*Id.*) Under the plain

language of Auto-Owners' policy, there is no coverage for the alleged loss.

1. *The Bat Guano and Odor Emanating Therefrom Are Alleged to Have Been Discharged, Released, and Dispersed Throughout The Hirschhorns' Home.*

There can be no serious dispute that the bat feces and urine that were deposited between the walls of the Hirschhorns' home and the attic were "discharge[d], release[d], . . . or "disperse[d]" throughout the house. Likewise, there can be no serious argument that the "penetrating and offensive odor" emanating from bat urine and feces was "discharge[d], release[d] . . . or "disperse[d]" throughout the house or that the odor did not "escape, seep[], or migrat[e]" from the source of the bat guano to all areas of the house, including the Hirschhorns' furniture.

Both the "penetrating and offensive odor" emanating from the bat guano and the bat guano itself were "discharge[d], release[d], . . . and "disperse[d]" throughout the Hirschhorns' home. Therefore, the first requirement of the pollution exclusion is unambiguously satisfied. As to the second requirement, no

reasonable insured can dispute that both the bat guano and the odor emanating therefrom constitute "irritants," "contaminants," and "waste," thus satisfying the definition of "pollutants" in Auto-Owners' policy.

2. *A "Penetrating and Offensive" Odor From Bat Guano is a "Gaseous" "Irritant" and "Contaminant" That Was "Released" and "Dispersed" Throughout the Hirschhorns' Home.*

The Hirschhorns cannot reasonably dispute that the "penetrating and offensive odor" alleged in their Complaint qualifies as a "gaseous . . . irritant or contaminant, including . . . fumes, . . . gases and waste." The Complaint specifically alleges that "the [Hirschhorns'] home became uninhabitable and unsaleable due to the penetrating and offensive odor" and that the "drapes, carpet, fabrics, and furniture were rendered unusable as a result of the absorption of the bat guano odor." (Complaint, ¶9: P-Appx.30; R.1:3.)

By its very nature, a "penetrating and offensive odor" falls within the meaning of the term "gasses" and "fumes." It also unquestionably qualifies as an "irritant" and "contaminant." The

Complaint plainly asserts that that the odor from the bat guano "penetrated"—i.e. "contaminated"—the house and the Hirschhorns' personal belongings and that the smell irritated them to such an extent that the house became uninhabitable.

In *Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co.*, 201 Wis. 2d 161, 169-170, 548 N.W.2d 127 (Ct. App. 1996), the Court of Appeals defined "contamination" as an "impairment" or "impurity" "'resulting from mixture or contact with a foreign substance[.]'" (quoted source omitted). The fouling of the Hirschhorns' house and personal belongings as a result of rancorous odors emanating from animal feces satisfies this definition of "contamination." The foul and rancorous odor of animal feces and urine throughout the house certainly resulted from the house's contact with a "foreign substance"—the guano—and the odor certainly rendered the home "impure" and uninhabitable.

Moreover, no reasonable person can dispute that a "penetrating and offensive odor" that ruins furniture and renders

a house unlivable is an "irritant" to the occupants of the home. Given that case law has recognized that odors from generally benign substances such as fabric softener can constitute "pollutants," *Ace Baking Co.*, 164 Wis. 2d at 500, it would be patently unreasonable to conclude that a "penetrating and offensive odor" from animal excrement is not a pollutant, as that term in defined in Auto-Owners' policy.

3. *Bat Guano is a "Solid," "Liquid" "Contaminant" and "Irritant" That Was "Released" and "Dispersed" Throughout The Home and Also Constitutes "Waste."*

Additionally, the bat guano itself qualifies as a "pollutant" under the definition in Auto-Owners' policy, as animal urine and feces are encompassed within the meaning of the phrase "solid [or] liquid . . . irritant or contaminant, including . . . waste." Clearly, bat feces and urine are a "solid" and "liquid", respectively, that were allegedly "release[d] [and] "dispers[ed]" inside the walls of the Hirschorns' home and in the attic.

Bat guano undoubtedly satisfies the definition of "contaminant" in *Richland Valley Products*, 201 Wis. 2d at 169-

170, as it is a "foreign substance" that rendered the Hirschhorns' home "impure" and uninhabitable. Likewise, the guano "irritated" the Hirschhorns to such an extent that they deemed it necessary to demolish the house.

Further, contrary to the Court of Appeals' conclusion, the guano itself also constitutes "waste." While the term "waste" is not expressly defined in the policy, it has a common and ordinary meaning that includes animal excrement. The *American Heritage College Dictionary* 1548 (4th ed. 2004), defines "waste" to include:

> 4a. An unusable or unwanted substance or material. . . .6. The undigested residue of food eliminated from the body. . . .3. Excreted from the body . . . .

Additionally, the *Merriam Webster Dictionary* 591-92 (1995), defines "waste" to include:

> 6: material (as feces), produced but not used by a living organism. . . .
> . . . .4: excreted from or stored in inert form in a living organism as a by product of a vital activity <-matter from birds>

Certainly, bat guano is "unwanted" in the context of homeownership. Regardless of any commercial uses of bat guano,

an ordinary, reasonable homeowner would not consider bat guano to be a desirable or wanted substance in or around his/her home. Similarly, there can be no doubt that bat guano is "excreted" and includes "feces."

While there are other definitions for "waste" that refer to garbage and industrial refuse, the fact that a word has multiple definitions does not render it ambiguous under Wisconsin law. *Ace Baking*, 164 Wis. 2d at 503. Similarly the fact that Auto-Owners' policy states that the term "waste" includes "materials to be recycled, reconditioned or reclaimed," (P-Appx. 26; R.2, Ex. 8:2.), does not limit the term "waste" to those examples. *See Richland Valley Prods.*, 201 Wis. 2d at 172 (rejecting the "trial court['s] conclu[sion] that [based on] the wording 'contamination including fungal or bacterial contamination' in St. Paul's policy that the exclusion is restricted to fungal or bacterial contamination.")

Because both the odors emanating from the accumulation of bat guano and the bat guano itself fall within Auto-Owners'

policy definition of "pollutant," there is no coverage for the Hirschhorns' loss under the plain language of the policy. Any attempt to "construe" the policy to find coverage is unreasonable, as it cannot be squared with the actual policy language in the pollution exclusion and the allegations in the Hirschhorns' Complaint. The fact that the loss alleged by the Hirschhorns qualifies under more than one of the categories of "pollutants" in the policy demonstrates that no reasonable homeowner could conclude there was coverage for this loss.

B. The Pollution Exclusion is Not Ambiguous Merely Because it is Broad, And No Reasonable Insured Could Conclude That a "Penetrating and Offensive Odor" Emanating From Bat Guano Does Not Fall Under an Exclusion Covering "Gases", "Irritants", and "Waste.

The Court of Appeals and the Hirschhorns claim that the pollution exclusion is ambiguous because the terms "pollutants" and "waste" are broadly defined, and allegedly an insured could conclude that the scope of the exclusion is more limited. This type of argument was expressly rejected by the court of appeals in *Richland Valley Prods.,* 201 Wis. 2d 161. There, a business

owner sought coverage under its property insurance policy after its products (ice cream and "frozen water novelties") were damaged due to mixing of brine and ammonia in its cooling system. *Id.* at 165. The insurer denied coverage under the policy's contamination exclusion, arguing that the combination of chemicals in the cooling system that damaged the products constituted "contamination."

The court of appeals agreed and held that the loss alleged fell within the broad definition and common understanding of the word "contamination" and that "contamination" was not limited to spoiled foodstuffs. The court of appeals explained: ""'Contamination' may describe damage to food, . . . but 'contamination' is by no means limited to food spoilage.'" *Id.* at 170 (citations and quoted sources omitted). Similarly, here, the fact that "waste" and "pollutants" may include industrial refuse does not mean they can be read reasonably as being limited to industrial refuse.

The court in *Richland Valley Products* also refused to rule that the term "contamination" should be construed narrowly, in accordance with the examples of contaminants set forth in the policy. It specifically rejected the circuit court's reasoning "that contamination had not occurred because . . . the galvanizing broke loose, in "a very short process, ... [and] the conditions listed in the contamination exclusion clause, "mold, wet or dry rot, rust, corrosion or contamination," . . . are slow processes that occur over time." *Id.* at 172. Moreover, the court of appeals refused to limit the term "contaminants" to examples in the policy such as "fungal or bacterial contamination," noting that such a limitation could not be supported in light of the broad definition of "contaminants." *Id.* at 173.

Following the analytical framework of *Richland Valley Products*, the pollution exclusion in Auto-Owners' policy cannot be considered ambiguous merely because it extends to a large class of "pollutants" and a variety of "waste" is encompassed within the definition. Bat guano is encompassed within the

ordinary definition of "waste." A "penetrating and offensive odor" emanating from bat guano constitutes a "discharge, release, escape, seepage, migration or dispersal" of a "solid, liquid, gaseous. . . irritant or contaminant, including . . . fumes, . . . gases and waste." Therefore, Auto-Owners' policy is not ambiguous merely because the pollution exclusion encompasses a wide variety of "pollutants" and several forms of "waste" other than animal excrement.

The analysis is not, as the Court of Appeals stated, whether "waste, in its context here listed as an example of a pollutant, would not unavoidably be interpreted as excrement." *Hirschhorn*, 330 Wis. 2d 232, ¶15. The proper analysis is whether in the context of the pollution exclusion, the term "waste" *includes* animal excrement. Stated differently, *the fact that the term "waste" includes substances other than animal feces, does not make the exclusion ambiguous as to whether it applies to animal feces*. *See also Varda v. Acuity*, 2005 WI App 167, ¶18, 284 Wis .2d 552, 563, 702 N.W.2d 65 (refusing to find

policy term "motorized land conveyance" ambiguous as to a riding lawnmower: "We see no similar linguistic ambiguity in the phrase motorized land conveyances. A riding mower works on land, has a motor, and carries or transports its operator.").

Even assuming, *arguendo*, that the term "waste" is ambiguous, the loss alleged by the Hirschorns is nonetheless unambiguously excluded under the remainder of the pollution exclusion. No reasonable person can claim that a "penetrating and offensive odor" from animal feces ruined his furniture and made his house uninhabitable and yet contend that the odor and feces are not "solid, liquid, [or] gaseous . . . irritant[s] or contaminant[s]." (P-Appx. 27; R.8, Ex.2:10.) No reasonable person can claim that a house that was rendered uninhabitable due to a "penetrating and offensive" odor emanating from animal feces, was not damaged by the "discharge, release, escape, seepage, migration or dispersal" of a "solid, liquid, [or] gaseous . . . irritant or contaminant, including . . . fumes . . . . [and] gases." To conclude otherwise would "be 'a disservice to the English

language[.]'" *Peace,* 228 Wis. 2d at 135 (quoting *Auto-Owners Ins. Co. v. Hanson,* 588 N.W.2d 777, 779 (Minn. Ct. App. 1999) (following *Board of Regents v. Royal Ins. Co.,* 517 N.W.2d 888 (Minn. 1994))).

C. No Reasonable Person Can Read Auto-Owners' Pollution Exclusion and Conclude That it Applies Only to Industrial Waste or That The Exclusion Does Not Cover Pollution Resulting From Biological Processes.

1. *The Artificial Restrictions on the Definitions of "Pollutants" and "Waste" Imposed by The Court of Appeals Have No Basis in The Policy Language.*

The Court of Appeals' interpreted Auto-Owners' pollution exclusion so that the term "waste" included only industrial "garbage, rubbish," and restricted the definition of "pollutants" to exclude those that are not the result of "biological processes." *Hirschhorn*, 330 Wis. 2d 232, ¶¶13, 15. These limitations cannot be supported by any reasonable reading of the text of the pollution exclusion.

There is no exception in the policy for "waste" or other "pollutants" that result from biological processes. Nothing in the

text of the policy even remotely "suggest[s] that biological processes are not part of the exclusion." *Hirschhorn*, 330 Wis. 2d 232, ¶15. Likewise, there is no language in the policy referring to industrial garbage or rubbish. In short, the restrictions imposed by the Court of Appeals have no basis in the text of the policy exclusion. Indeed, it is apparent that the Court of Appeals simply picked a dictionary definition of the word "waste" it preferred and then applied that definition to alter the terms of Auto-Owners' policy. *See Hirschhorn*, 330 Wis. 2d 232, ¶13 (limiting the definition of "waste" to "damaged, defective, or superfluous material produced during or left over from a manufacturing processes or industrial operation.")

This Court has cautioned that in examining dictionary definitions, "'a court has to be careful not to select a friendly definition it likes from the many offered . . . .' Otherwise, . . . 'resort to a dictionary can be, as Justice Scalia has written of the use of legislative history, "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's

friends."'" *Zarder v. Humana Ins. Co.*, 2009 WI App 34, ¶14 n.1, 316 Wis. 2d 573, 765 N.W.2d 839 (quoting *Noffke v. Bakke*, 2009 WI 10, ¶60, 315 Wis. 2d 350, 760 N.W.2d 156 (Abrahamson, C.J., dissenting)) (in turn quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring)).

Here, the Court of Appeals' reliance on one particular dictionary definition of "waste" and its artificial restriction of the term "pollutants" simply cannot be squared with the actual text of the pollution exclusion in Auto-Owners' policy. There is no language in either the pollution exclusion or the definition of "pollutants" that even remotely suggests the exclusion is limited only to non-biological industrial pollution.

Moreover, an insured cannot rely on colloquial understandings of a clearly defined policy term to create an ambiguity in the policy. The fact that "poop does not pop into one's mind," *Hirschhorn*, 330 Wis. 2d 232, ¶12, when the terms "waste" and "pollutant" are used in common speech cannot override the fact that animal excrement is encompassed within the express

language of the policy definition of "pollutant." As this Court stated in *Peace*, 228 Wis. 2d at 136, "'pollutants'—is specifically defined in the policy; the definition cannot be undone by different notions of 'pollution' outside the policy." (Emphasis added.) *See also Ace Baking* 164 Wis. 2d at 503 (alternative meaning of words cannot create ambiguity when the meaning is specifically defined in the policy).

2. *The Court of Appeals Interpretation of the Policy is Not Reasonable Because it Conflicts With the Purpose and Nature of the Risks Insured Under a Homeowners' Policy.*

In *Langridge,* 275 Wis. 2d 35, ¶47, this Court cautioned that when examining competing definitions of term in an insurance policy, "[a] court must be careful not to lose sight of the goal of judicial construction, which is to advance the reasonable expectations of the parties." In *Blum*, this Court re-affirmed that a interpretation of an insurance policy that is grammatically possible cannot be reasonable if it conflicts with the nature of the insurance provided under the policy or frustrates the purpose of the policy at issue. *Blum,* 326 Wis. 2d 729, ¶23.

Here, the Court of Appeals' restrictive interpretation of Auto-Owners' pollution exclusion conflicts with the nature and purpose of a homeowner's policy and is patently unreasonable when considering the types of losses commonly suffered by homeowners. It seems self-evident that the purpose of a homeowner's policy of property damage insurance is to insure against certain risks associated with home ownership. Interpreting an exclusion assumes the risk falls within the original grant of coverage. *Sass*, 316 Wis. 2d 752, ¶5. Thus, the purpose of an exclusion in a homeowner's insurance policy is to exclude coverage of certain risks *associated with home ownership*.

The Court of Appeals interpreted Auto-Owners' pollution exclusion so that it applies only to industrial "garbage [or] rubbish," that is not the result of "biological processes." *Hirschhorn*, 330 Wis. 2d 232, ¶¶13, 15. Such a construction makes absolutely no sense in the context of a homeowner's policy of property damage insurance. While certainly homes can be

affected by the presence of latent chemical industrial waste, homes are subject to a variety of different types of pollutants, both chemical and biological, that have nothing to do with toxic industrial waste.

Under the Court of Appeals' interpretation, a plethora of common, household pollutants such as mold, fungi, sewage, dust-mites, spores, and other non-chemical, non-industrial pollutants are written out of the pollution exclusion. Indeed, the class of household "biological pollutants" is quite broad. An online publication from the Environmental Protection Agency lists a number of airborne biological pollutants found in homes, including radon, various combustion pollutants, nitrogen dioxide, and a variety of volatile *organic* compounds. *Care For Your Air: a Guide to Indoor Air Quality*, Envtl. Prot. Agency, EPA 404/f-08/008, September 2008, available at http://www.epa.gov/iaq/pubs/careforyourair.html, *last visited* Apr. 9, 2011. (P-Appx. 102-03.)

In addition, the Consumer Products Safety Commission includes the following in their list of common, "biological contaminants" found in homes: "bacteria, molds, mildew, viruses, animal dander and cat saliva, house dust mites, cockroaches, and pollen." *The Inside Story: A Guide to Indoor Pollution*, Consumer Prod. Safety Comm'n & Ennvtl. Prot. Agency, CPSC Document # 450 (available at http://www.cpsc.gov/cpscpub/pubs/450.html#Refguide), *last visited* Apr. 9, 2011. Notably, this document specifically includes "***urine from rats and mice***" as a "biological contaminant." *Id.* (emphasis added). (P-Appx.112.)

Under the Court of Appeals' decision, all of these common household pollutants fall outside the pollution exclusion because they result from "biological processes." It is simply not reasonable to conclude that a broadly-drafted pollution exclusion in a *homeowner's* policy is limited to non-biological *industrial* pollution.

The effect of the Court of Appeals' decision is that the pollution exclusion in Auto-Owners' policy (and every other homeowner's policy in Wisconsin that contains an analogous exclusion) operates to exclude *only* risks of pollution that relate to industrial waste, but not other types of pollution more common to residential households. In other words, *under the Court of Appeals' "construction" of Auto-Owners' policy, the pollution exclusion applies only to risks that are not related to the type of property insured*. This was never the intent of the pollution exclusion; nor does such a reading comport with the broad language utilized in the exclusion.

D. There is no Support or Precedent for The Court of Appeals' "Biological Processes" Exception to The Pollution Exclusion

The Court of Appeals relied almost exclusively upon this Court's decision in *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 2d 224, 564 N.W.2d 728 (1997), for the proposition that biological contaminants do not fall within the purview of the standard pollution exclusion. However, nothing in *Donaldson*

supports this conclusion. *Donaldson*, 211 Wis. 2d at 226-227, merely held that the standard pollution exclusion in a CGL policy was ambiguous as to whether the policy provided coverage for "personal injury claims arising from the inadequate ventilation of exhaled carbon dioxide in an office building . . . ." *Donaldson* made no broad proclamation regarding pollutants that result from "biological processes."

Despite the narrow holding of *Donaldson*, the Court of Appeals concluded that "excreted bat guano is akin to exhaled carbon dioxide, both biologically and as a reasonable homeowner would view it regarding the pollution exclusions." *Hirschhorn*, ¶10. Nothing could be further from the truth.

To begin with, in *Donaldson*, 211 Wis. 2d at 233, this Court reasoned that the pollution exclusion was ambiguous because "[e]xhaled carbon dioxide can achieve an injurious concentration in a poorly ventilated area, but it would not necessarily be understood by a reasonable insured to meet the policy definition of a 'pollutant.'" The same cannot be said of "penetrating and

offensive odors" caused by an accumulation of bat guano in a house. Carbon dioxide is a substance present in all places where one or more humans congregate. Most ordinary people expect there to be some level of carbon dioxide in an enclosed area. *Donaldson* recognized that carbon dioxide is generally not harmful or a pollutant and it was only because the building in that case was poorly ventilated that accumulations of carbon dioxide became a problem.

In contrast, foul and rancorous odors emanating from animal feces and urine are NOT expected to be present in a home. There are no circumstances under which "penetrating and offensive odors" coming from animal excrement *in a home* would be considered benign or not harmful. The presence of an accumulation of bat guano in a home that gives off "penetrating and offensive odors" will *always* be harmful. There are no circumstances under which a reasonable homeowner would want or expect the presence of bat guano in his or her home.

In the context of home ownership and a homeowner's policy of insurance, accumulations of animal feces are just not comparable to carbon dioxide emitted by human beings. Therefore, *Donaldson* does not support either the Court of Appeals' specific holding that odor emanating from bat guano is not a pollutant, or its more sweeping conclusion that a standard pollution exclusion has no application to any form of pollutant resulting from a "biological process."

E. The Court of Appeals' Interpretation of Auto-Owners' Policy Conflicts With *Peace* and *Ace Baking*

1. *Peace Rejected The Notion That The Term "Pollutants" is Limited to Traditional Industrial Pollution.*

In addition to lacking any support in existing precedent, the Court of Appeals' decision in this case is in conflict with this Court's decision in *Peace v. Northwestern National Insurance*, 228 Wis. 2d 106, 596 N.W.2d 429 (1999). In *Peace*, this Court adopted a narrow reading of *Donaldson*, and ruled that a standard pollution exclusion encompassed lead paint chips in a

house. *Id.* at 137-38. This court in *Peace* adopted a "plain meaning" when applying the pollution exclusion and refused to follow a line of cases that narrowly interpreted the exclusion by using a "terms-of-art" approach that focused on the "traditional" meaning of the term "pollution" in industry. *Id.* at 135-36. The Court held: "The key term in the clause—'pollutants'—is specifically defined in the policy; the definition cannot be undone by different notions of 'pollution' outside the policy." *Id.* at 136.

Thus, the Court of Appeals' statement that "poop does not pop into one's mind," *Hirschhorn*, 330 Wis. 2d 232, ¶12, when reading the pollution exclusion in Auto-Owners' policy in the abstract misses the point. A reasonable insured that suffers a loss from bat guano would read the policy and see that bat guano falls within the definition of "waste" and that a "penetrating and offensive odor" from bat guano constitutes a gaseous "irritant" and "contaminant" within the plain language of the policy.

More importantly, this court in *Peace* expressly *rejected* the view that "'pollution exclusion clauses refer only to industrial and

environmental pollution.'" *Peace*, 228 Wis. 2d at 140 (quoting, and disagreeing with, *Sphere Drake Ins. Co. v. Y.L. Realty Co.*, 990 F. Supp. 240, 243 (S.D.N.Y. 1997)). This is plainly inconsistent with the Court of Appeals' ruling that "biological processes are not part of the [pollution] exclusion" and that the term "waste" is limited to "superfluous material produced during or left over from a manufacturing process or industrial operation." *Hirschhorn*, ¶¶13, 15.

2. *Ace Baking Adopted a Broad Definition of "Pollutant" and Concluded Fabric Softener Satisfied The Definition.*

The Court of Appeals' decision below is also inconsistent with *United States Fire Insurance Co. v. Ace Baking Co.*, 164 Wis. 2d 499, 476 N.W.2d 280 (Ct. App. 1991). In *Ace Baking*, the insurer appealed from a judgment that held it liable to its insured "for contamination of Ace Baking's products and packaging as a result of their having been stored in a warehouse near a supply of fabric softener." *Id.* at 500. United States Fire Insurance's policy excluded losses "caused or resulting from . . . [r]elease, discharge

or dispersal of 'pollutants.'" *Id.* at 502. The circuit court concluded that "pollutants" should be given a narrow meaning and that an ordinary insured would understand the word to mean "something that would adversely affect the environment or a person's health"—not contamination of food by a fragrance in fabric softener. *Id.* at 502.

The court of appeals disagreed, holding that the term "pollutants" in the pollution exclusion "reasonably and fairly encompassed" contamination of Ace Baking's products by a foreign substance. *Id.* at 504-05. The court of appeals explained that the definition of "pollutant" included substances that make something else "physically impure or unclean." *Id.* at 505. Thus, it held that even though linalool might be a valued ingredient in some substances, it nonetheless "fouled Ace Baking's products" and therefore "it was a 'pollutant' in relation to those products, and coverage for the resulting damages is excluded . . . ." *Id.*

The Court of Appeals' decision is inconsistent with *Ace Baking* in a number of ways. First, *Ace Baking* recognizes that "the mere

fact that a word has more than one meaning does not necessary make the word 'ambiguous.'" *Id.* at 503. The court in *Ace Baking* therefore interpreted the terms of the policy before it by providing the words with their common and ordinary meanings and asking whether the loss at issue was "reasonably and fairly encompassed" within the scope of those terms. The court in *Ace Baking* did not apply an artificial restriction to the language in the policy. Further, it did not restrict the scope of the pollution exclusion to "traditional" chemical pollution of the environment. *Ace Baking* recognized that even naturally occurring substances can constitute "pollutants" in the right circumstances: "[W]ater can 'pollute' oil and thus, foul the engine." *Id.* at 505.

Ace Baking recognized that the term "pollutant" was a broad term that encompassed any substance that contaminated another and that linalool fell within the definition of "pollutant" because its odor contaminated—"fouled"—the insured's product. In the present case, the Hirschhorns' Complaint specifically alleged that "the home became uninhabitable and unsaleable due to the

penetrating and offensive odor" emanating from the bat guano that had accumulated between the siding and wall of their home. (Complaint, ¶9; A-Appx.30; R.1 at 2.) If the odor from a chemical in fabric softener constitutes a "pollutant," then surely a "penetrating and offensive odor" caused by the presence of animal excrement is "reasonably and fairly encompassed" within the meaning of that term. If relatively benign substances such as water and fabric softener can be "pollutants" if they contaminate another substance, then it follows even more so that a "penetrating and offensive odor" emanating from animal excrement that ruins a house is a "pollutant."

There is no doubt that bat guano is "reasonably and fairly encompassed" within the definition of "waste," that it is both an "irritant" and a "contaminant," and that it therefore falls within the policy definition of "pollutants." However, the Court of Appeals below inserted an artificial limitation of those terms and restricted their meaning to exclude any pollutants caused by a "biological process" and limited the definition of "waste" to

industrial rubbish. Much like the circuit court in *Ace Baking*, the Court of Appeals below erroneously restricted the definition of "pollutants" to those items people traditionally associate with the colloquial use of the term.

In short, the analytical framework adopted by the Court of Appeals in the present case is entirely inconsistent with the framework utilized by the court in *Ace Baking*. Moreover, the results of the two decisions cannot be reconciled. It would be a curious state of affairs if the law recognized that an otherwise pleasant-smelling substance such as fabric softener constitutes a pollutant but held that rancorous fumes emanating from animal excrement were not.

F. Several Decisions From Foreign Jurisdictions Have Concluded That Excrement is a "Pollutant" Under a Standard Pollution Exclusion, as Excrement is a "Contaminant," an "Irritant," and "Waste."

Finally, the Court of Appeals' decision in this case is inconsistent with several cases from other jurisdictions that

recognize excrement constitutes "waste" and a "pollutant" under a standard pollution exclusion.[2]

In *WPC Industrial Contractors, Ltd. v. Amerisure Mutual Insurance Corp.*, 720 F. Supp. 2d 1377 (S.D. Fla. 2009), the court considered whether a pollution exclusion in a CGL policy applied to a homeowner's claim against a contractor that constructed a sewage system that repeatedly backed up, deposited fecal material in the plaintiffs' house, and rendered it unsafe to occupy. *Id.* at 1379. The contractor sought coverage from its insurer, and the insurer denied a duty to defend based on the pollution exclusion in the policy. *Id.*

The policy excluded coverage for "'[b]odily injury' or 'property damage' which would not have occurred in whole or in part but for the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." *Id.* at 182. The policy defined "pollutants" as "'any solid, liquid, gaseous or thermal irritant or contaminant, including smoke,

[2] For the Court's convenience, the foreign case law cited in this section has been included as part of the appendix, in alphabetical order.

vapor, soot, fumes, acid, alkalis, chemicals, and waste." *Id.* This language is nearly identical to that in Auto-Owners' policy. [3]

The district court concluded that the language of the pollution exclusion was unambiguous and that because the plaintiffs alleged property damage due to fecal contaminant, there was no duty to defend under the policy.

> Fecal contaminant is a "pollutant" within the meaning of the CGL Policy because it is a solid irritant and contaminant, which falls within the CGL Policy's definition of a "pollutant." Harris claims that the property damage to her house, and bodily injury to herself and her family, was caused by fecal contaminate from sewer backups. Thus, the Pollution Exclusion applies because Harris alleges that the property damage and bodily injury was caused by the discharge or dispersal of a pollutant. Therefore, Amerisure has no duty to defend.

Id. at 1382 (citations omitted) (emphasis added).

Similarly, in *Grosse Pointe Park v. Michigan Municipal Liability and Property Pool*, 702 N.W.2d 106, 113-14 (Mich. 2005), the court interpreted a pollution exclusion with nearly the same language as Auto-Owners' policy and held:

---

[3] In all the cases cited herein, the pollution exclusions are nearly identical to that contained in Auto-Owners' policy, except that the second reference to "gases and liquids" in the definition of "pollutants" in Auto-Owners' policy is not included in these cases. Thus, to the extent there is any difference, Auto-Owners' exclusion is broader than those discussed above.

> "Waste is commonly understood to include sewage. ***In other words, "waste" is commonly understood to include urine and feces*** . . . .
>
> We believe that the term "waste" in this policy is not patently ambiguous and the text of the policy fairly admits but one interpretation.

(Emphasis added) (footnotes omitted).

Likewise, in *United States Fire Ins. Co. v. City of Warren*, 176 F. Supp. 2d 728, 732 (E.D. Mich. 2001), the court construed a pollution exclusion containing substantially the same language and definition of "pollutants" as does Auto-Owners' policy thusly:

> Any backup of raw sewage into the homeowners' properties from Defendant' sewer would be a discharge of pollution. This is so because "***raw sewage is clearly a contaminant***" that would be covered by an exclusion from coverage of any "[l]oss caused by release, discharge, or dispersal of contaminant or pollutants.

(Emphasis added.) *See also Royal Insurance Company v. Bithell*, 868 F. Supp. 878, 882 (E.D. Mich. 1993) ("[T]here is no question that the raw sewage that leaked into the defendants' home is a 'release, discharge, or dispersal of contaminants or pollutants.'").

In *Philadelphia Indemnity Insurance Company v. Yachtsman's Inn Condominium Association*, 595 F. Supp. 2d 1319 (S.D. Fla. 2009), a worker was exposed to "feces, raw sewage and battery acid" that was accumulated on Yachtsman's

premises. *Id.* at 1320. Yatchtsman's insurer brought a declaratory judgment action, claiming that there was no coverage under the pollution exclusion in its policy. *Id.* at 1321. Again, the policy definition of "pollutants" was identical to that used in Auto-Owners' policy. *Id.* The court concluded the pollution exclusion applied and barred coverage, reasoning:

> First, the substances at issue-feces, raw sewage, and battery acid-fall within the policy pollutant definition of "any solid, liquid, gaseous or thermal *irritant or contaminant.*" In determining whether a substance is an irritant or contaminant, "the court should look to see if the disputed substance is alleged to have had a *particular effect* commonly thought of as 'irritation' or 'contamination.'" . . . .
>
> Second, the examples expressly included in policy exclusion definition of pollutant even further support that the pollution exclusion was intended to encompass the types of substances alleged in Mr. Boone's complaint. The policy defines "pollutants" not only as "any solid, liquid, gaseous or thermal irritant or contaminant," it continues by offering specific types of substances that can constitute such art "irritant or contaminant." Specifically, the definition of pollutant excludes substances "including *smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.*" Following a plain meaning interpretation of the Policy language, the Court finds that . . . "raw sewage and feces" is included in the definition of "waste" as "materials to recycled, reconditioned or reclaimed."

Id. at 1324 (citations omitted) (emphasis added).

Several other decisions have concluded that fecal matter and foul odors constitute a "pollutants" under a standard pollution

exclusion. *See e.g., Deni Assocs. v. State Farm Fire & Cas. Co.,* 711 So. 2d 1135 (Fla. 1998) (fumes from ammonia constituted an "irritant or contaminant"); *CBL & Assocs. Mgmt., Inc. v. Lumbermens Mut. Cas. Co.*, No. 1:05-CV-210, *not reported in F. Supp. 2d*, 2006 WL 2087625 at **2,7 (E.D. Tenn. July 25, 2006) ("sewage, debris, waste and water [shooting] out of the sink drains" fit definition of "waste" and "contaminants" under standard pollution exclusion).

In summary, several jurisdictions recognize that feces and excrement, as well as foul odors, fall within the plain meaning of the definition of "pollutants" in a standard pollution exclusion as being "irritants," "contaminants," and/or "waste." Moreover, neither the Court of Appeals nor the Hirschhorns have found any any decision from another state that has held that the standard pollution exclusion is inapplicable to pollutants caused by a "biological process."

CONCLUSION

For these reasons, Auto-Owners respectfully requests that this Court reverse the Court of Appeals' decision and hold that Auto-Owners' policy provides no coverage for Hirschhorns' loss because a "penetrating and offensive odor" emanating from an accumulation of bat guano that allegedly rendered the home uninhabitable falls squarely and unambiguously with the pollution exclusion in Auto-Owners' policy. The Court should further hold that the term "pollutant" in Auto-Owners' policy is not limited to industrial waste and includes pollutants resulting from a "biological process."

Respectfully submitted this 14th day of April, 2011.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) & (c) as to form and certification for a brief and appendix produced with a proportional serif font (Century 13 pt for body text and 11 pt for quotes and footnotes).

The length of this brief is 9,127 words.

Dated: April 14th, 2011.

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ELECTRONIC FILING CERTIFICATION

I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated: April 14th, 2011.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: April 14th, 2011.

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STATE OF WISCONSIN
SUPREME COURT

JOEL HIRSCHHORN AND EVELYN F. HIRSCHHORN,
Plaintiffs-Appellants,

Appeal No. 2009AP002768

v.

Cir. Ct. Case No. 2008CV000202

AUTO-OWNERS INSURANCE COMPANY,
Defendant-Respondent-Petitioner

APPENDIX OF DEFENDANT-RESPONDENT-PETITIONER AUTO-OWNERS INSURANCE COMPANY

REVIEW OF A FINAL JUDGMENT OF THE CIRCUIT COURT FOR ONEIDA COUNTY, JUDGE MARK MANGERSON, DISMISSING PLAINTIFFS-APPELLANTS' COMPLAINT

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APPENDIX TABLE OF CONTENTS

COURT OF APPEALS
DECISION
DATED AND FILED

October 19, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2768 Cir. Ct. No. 2008CV202

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JOEL HIRSCHHORN AND EVELYN F. HIRSCHHORN,

PLAINTIFFS-APPELLANTS,

V.

AUTO-OWNERS INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County: MARK MANGERSON, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Joel and Evelyn Hirschhorn appeal a judgment dismissing their insurance coverage and bad faith claims against Auto-Owners Insurance Company. The Hirschhorns argue the circuit court misinterpreted their homeowner's insurance policy's pollution exclusion clause when it concluded the

policy did not cover damage caused by bat guano. Because we conclude the pollution exclusion language is ambiguous in this regard, we construe it in favor of coverage, and reverse and remand.

BACKGROUND

¶2 The Hirschhorns resided out of state but owned a vacation home in Oneida County. They listed the home for sale in May 2007, at which time they, along with a real estate broker, inspected the home and found no signs of bats. In July, the broker noticed bat guano on the house, and inspecting further, discovered the presence of bats. The broker undertook to remove the bats and clean the premises, but when the Hirschhorns stayed at the home in August they noticed a "penetrating and offensive odor" in the home. The Hirschhorns subsequently obtained a remediation estimate from a contractor, but the contractor could not guarantee he could remove the odor.

¶3 The Hirschhorns filed a property loss notice with Auto-Owners on October 23, 2007. Auto-Owners denied the claim three days later, without conducting an investigation or inspecting the house. The denial letter stated the policy did not cover the accumulation of bat guano[1] because it was "not sudden and accidental" and resulted from faulty, inadequate, or defective maintenance. In a revised position letter dated February 22, 2008, Auto-Owners also cited the policy's pollution exclusion. By that time, the Hirschhorns had demolished the house and begun construction of a new home.

[1] We assume the bats deposited both feces and urine in the home. Therefore, to be clear, when we refer to "guano," the term includes both.

¶4 Eventually, the Hirschhorns sued Auto-Owners, asserting claims for breach of contract and bad faith. Auto-Owners moved for summary judgment, arguing the loss was not covered because it was not "accidental direct physical loss to covered property" and also because three exclusions applied (1) faulty or inadequate maintenance, (2) vermin, and (3) pollution. The circuit court denied the motion in an oral ruling, concluding there was coverage.[2] The court observed, "[T]his isn't a pollution case ...." It continued:

> When we talk about pollution, it's usually a leakage or seeping from a polluted area into some other area causing damage. And we don't have that same situation here. We have the damage actually being caused by things coming into the structure ... which isn't the same as the traditional pollution cases.

However, after Auto-Owners moved for reconsideration and revised its arguments, the court held that excrement fell into the category of "waste" and, therefore, was a pollutant under the exclusion. Because there was no coverage under the policy, the court also concluded there could be no bad faith claim and dismissed the Hirschhorns' case. The Hirschhorns now appeal, arguing the circuit court misinterpreted the pollution exclusion.

DISCUSSION

¶5 The interpretation of an insurance policy presents a question of law that we decide independent of the circuit court. ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 230, 564 N.W.2d 728 (1997). Our goal is to ascertain and carry out the intent of the parties. ***Peace v. Northwestern Nat'l Ins.***

[2] Auto-Owners does not cross-appeal and challenge the circuit court's conclusions that there was an initial grant of coverage or that the maintenance or vermin exclusions did not apply.

Co., 228 Wis. 2d 106, 120-21, 596 N.W.2d 429 (1999). "Policy language is interpreted according to its plain and ordinary meaning as understood by a reasonable insured." *Id.* at 121. We resolve any ambiguities in a policy in favor of coverage, and narrowly construe exclusion clauses against the insurer. *Donaldson*, 211 Wis. 2d at 230. "[W]ords or phrases in an insurance policy are ambiguous if, when read in context, they are susceptible to more than one reasonable interpretation." *Id.* at 231.

¶6 The Hirschhorns' policy excludes coverage for "loss resulting directly or indirectly from: ... discharge, release, escape, seepage, migration or dispersal of pollutants ...." The policy defines pollutants as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gasses and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

¶7 The same pollution exclusion clause was analyzed in both *Donaldson* and *Peace*. In *Donaldson*, 211 Wis. 2d at 231, 235, the supreme court found the clause ambiguous as it applied to exhaled carbon dioxide. However, in *Peace*, 228 Wis. 2d at 121-22, 130, the court found the clause unambiguous as it applied to lead paint particles. Whether the exclusion unambiguously applies to excreted bat guano as a "pollutant" is an unresolved question. As the court observed in *Peace*, "Language inevitably creates some ambiguity. ... Whether the nuances and imprecision of general language equal ambiguity as a matter of law is a determination influenced by perception and perspective. A court must do its best to ascertain the objective expectations of the parties from the language in the policy." *Id.* at 134. That court also recited the following definitions relating to the policy definition of pollutant:

> A "contaminant" is defined as one that contaminates. *American Heritage Dictionary of the English Language* 406 (3d ed. 1992). "Contaminate" is defined as "1. To make impure or unclean by contact or mixture." ***Id.*** at 406.
>
> An "irritant" is defined as the source of irritation, especially physical irritation. ***Id.*** at 954. "Irritation" is defined, in the sense of pathology, as "A condition of inflammation, soreness, or irritability of a bodily organ or part." ***Id.*** at 954.

¶8 ***Donaldson*** was a "sick building" case in which an insurance company sought to exclude liability for the consequences of an inadequate air exchange system. *See* ***Peace***, 228 Wis. 2d at 136. After the building defect caused an excessive accumulation of carbon dioxide in the work area, the insurer attempted to categorize exhaled carbon dioxide as a pollutant. A divided court of appeals concluded that the policy definition of "pollutant" unambiguously included exhaled carbon dioxide because it is a gaseous substance which, at higher concentrations, can become an irritant. ***Donaldson***, 211 Wis. 2d at 231. Disagreeing, the supreme court observed:

> *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.* Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results.
>
> ....
>
> [I]nadequately ventilated carbon dioxide from human respiration would not ordinarily be characterized as a "pollutant." Exhaled carbon dioxide can achieve an injurious concentration in a poorly ventilated area, but it would not necessarily be understood by a reasonable insured to meet the policy definition of a "pollutant."
>
> The reach of the pollution exclusion clause must be circumscribed by reasonableness, lest the contractual promise of coverage be reduced to a dead letter.

Id. at 232-33 (emphasis added). The court continued:

> It is also significant that, unlike the nonexhaustive list of pollutants contained in the pollution exclusion clause, exhaled carbon dioxide is universally present and generally harmless in all but the most unusual instances. In addition, the respiration process which produces exhaled carbon dioxide is a necessary and natural part of life. We are therefore hesitant to conclude that a reasonable insured would necessarily view exhaled carbon dioxide as in the same class as "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

Id. at 234.

¶9 In ***Peace***, the court acknowledged that lead had many beneficial uses, including its intentional addition to paints. ***Peace***, 228 Wis. 2d at 116, 123. However, in contrast to the italicized ***Donaldson*** language above, the court stated, "It is a rare substance indeed that is *always* a pollutant; the most noxious of materials have their appropriate and non-polluting uses." ***Peace***, 228 Wis. 2d at 128 (quoting ***United States Fire Ins. Co. v. Ace Baking Co.***, 164 Wis. 2d 499, 505, 476 N.W.2d 280 (Ct. App. 1991)). Ultimately, the court concluded lead paint satisfied the definition of pollutant, observing, "There is little doubt that lead derived from lead paint chips, flakes, or dust is an irritant or serious contaminant." ***Id.*** at 125. Contrasting the abundant and generally benign carbon dioxide in ***Donaldson***, the court stated lead paint particles "are widely, if not universally, understood to be dangerous and capable of producing lead poisoning. The toxic effects of lead have been recognized for centuries." ***Id.*** at 137 (footnote omitted).

¶10 Here, we conclude excreted bat guano is akin to exhaled carbon dioxide, both biologically and as a reasonable insured homeowner would view it regarding the pollution exclusion. One could review the pollution exclusion as a whole and reasonably interpret "pollutant" as not including bat guano excreted

inside a house. Therefore, strictly construing the exclusion and resolving ambiguities in favor of coverage, we conclude the pollution exclusion does not eliminate coverage in this case.

¶11 The Hirschhorns argue that, reviewing the exclusion as a whole, a reasonable insured would not understand the accumulation of excreted bat guano in their home's attic and walls to constitute pollution excludable from coverage. Breaking down the policy language into its parts and reviewing the dictionary definitions of the various terms, Auto-Owners responds that the exclusion is unambiguous because: bat waste is "waste," the accumulated waste was both a "contaminant" and "irritant" because it gave off an odor so penetrating and offensive that the house had to be razed, and the waste was discharged or released into the home. Again, the policy defines "pollutant" as an:

> irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gasses and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

¶12 Essentially, the Hirschhorns invoke the *ejusdem generis* rule, which requires that words in a list be interpreted in light of the other listed terms.[3] The only exemplar in the definition of pollutant here that suggests inclusion of bat

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[3] Ejusdem generis means:

> Of the same kind, class, or nature.
>
> [T]he "ejusdem generis rule" is, that where general words follow an enumeration of ... things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

BLACK'S LAW DICTIONARY 608 (rev. 4th ed. 1968).

guano is "waste." Indeed, waste *can* mean excrement. But in the context it is presented here, when a person reading the definition arrives at the term "waste," poop does not pop into one's mind. Nor does it come to mind when one continues to the listed items that waste includes.

¶13 While ***Donaldson*** recognized the terms irritant and contaminant are extremely broad, waste is even more so. Review of any comprehensive dictionary reveals numerous definitions of waste, even when used, as here, as a noun. Eventually, everything is waste. Waste may also be intangible; for example, there may be wasted time, wasted energy, wasted opportunity, wasted money, and wasted words. Of course, the policy definition of waste is informed, and limited by, its context. Reviewing the various dictionary definitions in that context, the most likely interpretation of waste is: "damaged, defective, or superfluous material produced during or left over from a manufacturing process or industrial operation ...." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2580 (unabr. Merriam Webster 1993). Perhaps, the meaning might also include the more general definitions: "garbage, rubbish." ***Id.***

¶14 However, waste, in its context here listed as an example of a pollutant, would not unavoidably be interpreted as excrement. Substituting the terms makes this evident: "smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gasses and [excrement]." As the saying goes, "one of these things is not like the others."[4]

[4] The popular phrase originated from the educational children's television show, Sesame Street: "One of these things is not like the others, One of these things just doesn't belong, Can you tell which thing is not like the others[,] By the time I finish my song?" *See* Metrolyrics, http://www.metrolyrics.com/one-of-these-things-is-not-like-the-others-lyrics-sesame-street.html.

¶15 The policy definitions of "pollutant" and "waste" are further informed by the policy's exclusionary clause itself, which omits coverage for the "discharge, release, escape, seepage, migration or dispersal of pollutants." None of those terms particularly suggest the movement of excrement. Rather, the bodily processes by which wastes such as carbon dioxide, urine, or feces move out of an organism would more commonly be described as respiration, elimination, excretion, or some other term suggesting a biological process. Thus, at best, the clause's action words do not suggest to the reader a biological process, and they may even suggest that biological processes are not part of the exclusion. Therefore, because a person might reasonably interpret the pollution exclusion as not contemplating bat guano, coverage is not excluded.[5]

By the Court.—Judgment reversed and cause remanded; costs limited.

Recommended for publication in the official reports.

[5] After briefing, the Hirschhorns filed "additional authority" consisting of "several articles and statutes" relating to bats and bat guano. Auto-Owners objected pursuant to WIS. STAT. RULE 809.19(11), disputing that the submissions were "pertinent authorities" under RULE 809.19(10). We agree. Further, the Hirschhorns' cover letter fails to set forth the requisite information. *See id.* Additionally, the Hirschhorns' appendix is needlessly lengthy, including nonessential parts of the record, such as complete trial briefs. *See* WIS. STAT. RULE 809.19(2)(a). Therefore, we strike the Hirschhorns' "additional authority" filing, and direct that the Hirschhorns shall not recover costs incurred for printing and assembling their appendix. *See* WIS. STAT. RULES 809.25(1)(a), 809.83(2).

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

ONEIDA COUNTY FILED
OCT 19 2009
CLERK OF CIRCUIT COURT

JOEL HIRSCHHORN and
EVELYN F. HIRSCHHORN,

Plaintiffs,

v.

AUTO-OWNERS INSURANCE COMPANY,

Defendant.

JUDGMENT

Case No. 08-CV-202

(FINAL JUDGMENT FOR THE PURPOSE OF APPEAL)

Based on the Court's Decision and Order on Motion for Reconsideration on file herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that Defendant Auto-Owners Insurance Company's motion for reconsideration is **GRANTED** and Plaintiffs' Complaint is **DISMISSED.** Defendant Auto-Owners Insurance Company, W6207 Aerotech Drive, Appleton, Wisconsin, shall have and recover its costs and disbursements jointly against either plaintiff, Joel Hirschhorn, 4065 Battersea Road, Coconut Grove, Florida, or Evelyn F. Hirschhorn, 4065 Battersea Road, Coconut Grove, Florida, as taxed and allowed in the amount of Two Thousand seven hundred twelve and 25/100ths Dollars ($2712.25).

THIS JUDGMENT IS FINAL FOR THE PURPOSE OF APPEAL AND IS HEREBY ENTERED ACCORDINGLY.

Dated this 19th day of Oct., 2009.

BY THE COURT:

Honorable Mark A. Mangerson
Circuit Court Judge, Br. II

COPY

STATE OF WISCONSIN CIRCUIT COURT BRANCH II

Joel Hirschhorn, et al
Plaintiff,

vs.

Auto-Owners Insurance Company
Defendant.

DECISION AND ORDER ON MOTION FOR RECONSIDERATION

Case No. 2008CV202

On April 6th, 2009, in a ruling from the bench after extensive oral argument, this court found that the Auto-Owners policy of home-owners coverage in affect during the relevant period provided coverage for loss of the plaintiff's entire structure due to the accumulation of bat guano in the attic and walls of the building. Coverage and the applicability of exclusionary language had been extensively briefed by counsel.

Auto-Owners has since filed a Motion for Reconsideration of that decision, supported by a brief; the plaintiffs have responded with their brief. The court has reviewed all pleadings to date and the transcript of the April 6th hearing.

This court affirms its ruling on the initial issue of coverage under the terms of the policy. The definition of "occurrence" under the policy includes "continuous or repeated exposure to substantially the same generally harmful conditions." The loss here was caused by the ability of bats to

continuously enter the plaintiffs' structure and deposit guano and urine within. The entry of bats into the structure was fortuitous, therefore causing an "accidental direct physical loss". The entry of the bats and the deposit of guano and urine were fortuitous because the entry was dependent on the chance that bats would be in the neighborhood, would pick the insured's home for occupation and would find a point of entry.

Assuming an additional cause of the entry is by the bats a structural defect or faulty maintenance, the ensuing loss exception clearly applies. In that regard, *Arnold v. Cincinnati Ins. Co.* 204 WI App 195, 276 Wis.2d 762, 688 N.W. 2d 708 appears to be nearly directly on point. This court declines Auto-Owners' invitation to reverse its self on these findings.

Auto-Owners also asserts that the court gave short shrift to the case law and arguments concerning the pollution exclusion of the policy. In a cogent brief, Auto-Owners contends that the court did an inadequate analysis under the pollution exclusion of the policy. Having reviewed all arguments and the briefs on this issue and *Peace v. Northwestern National Mutual Ins. Co.* 228 Wis. 2d 106, 596 N.W. 2d 429 (1999), this court agrees. *Peace* defined a pollutant to include any one of four types of irritants or contaminants. Under the Auto-Owners policy, "pollutant means any solid,

liquid, gaseous or thermal irritant or contaminant, including ... waste."

Excrement is certainly understood to be "waste." Dictionary definitions confirm that "waste" includes excretions such as feces or urine. Waste, or pollution, was carried into the Hirschhorn residence by a force of nature and was deposited there as a solid and liquid contaminant. The substances rendered the interior of the residence offensive to the extent that Ms. Hirschhorn couldn't breathe in the house. In fact, the house was a total loss due to this pollution.

According to *Peace*, to qualify as a "pollutant", the bat excrement would also have to be the result of a "discharge, release, escape, seepage, migration or dispersal" of the pollutant which directly or indirectly caused the loss. There can be no other conclusion but that the offensive substances, the pollutants, were carried into the residence by bats and discharged or released in the attic. The substances subsequently seeped or were disbursed throughout the residence to cause the loss.

Clearly, the pollution exclusion of the policy applies and this court erred in finding to the contrary from the bench.

ORDER

On reconsideration, this court finds and declares that damages

suffered by the plaintiffs as a result of the deposit of bat guano and urine in the attic of their structure are not covered by the provisions of the Auto-Owners home-owner's policy due to the pollution exclusion language of that policy. As a result of this finding, the bad faith claim against Auto-Owners is without merit.

For the foregoing reasons, IT IS HEREBY ORDERED that the case is DISMISSED.

This is a final order for the purposes of appeal.

Dated this 18th day of September, 2009

BY THE COURT:

Honorable Mark A. Mangerson
Circuit Court, Branch II

IN THE CIRCUIT COURT OF ONEIDA COUNTY

STATE OF WISCONSIN

JOEL HIRSCHHORN and EVELYN F. HIRSCHHORN,
Husband and Wife,

Plaintiffs,

vs. Case No. 08-CV-202

AUTO-OWNERS INSURANCE COMPANY,
a foreign insurance company,

Defendant.

ORAL ARGUMENTS

Monday, April 6, 2009

before the Honorable Mark A. Mangerson, Judge Presiding

Oneida County Courthouse, Branch II

Rhinelander, Wisconsin

Reported by Theresa Schiff, RPR/CRR/CSR

Official Court Reporter, Branch II

MR. KLINGBERG: Given the lack of a mediacy in the loss for a long time, Judge. This is not an ensuing loss. This occurs -- the chain of causation is rather direct. They get in through the defective area, they excrete, it accumulates, they get in and in and in and in recurrently. It accumulates. That's indirectly or directly -- take your pick -- due to that defective condition.

THE COURT: Okay.

MR. WIESNESKE: As Mr. Klingberg points out, the Arnold case says there has to be a cause in addition to the excluded loss. In this case, if we just had -- if we just had gaps in the siding, there wouldn't be any damage to the Hirschhorns and the interior walls and the attic of the Hirschhorn house. There was an additional cause and that was the entry of the bats. The bats was the additional cause here. It's in the causal chain.

THE COURT: Well, you're at the point where I jotted this note ten minutes ago. And that is that you two gentlemen are talking about two different causes. And as we know in tort law or contract law or even criminal law, there can be more than one cause of an event. You have to have a substantial factor. The event has to be -- the cause has to be a

substantial factor in producing the event.

If the structure had no holes through which the bats could gain entrance, there wouldn't have been any damage. And apparently for several years the house stood where it stood on that lot with the holes and bats didn't get entrance. That's a clear inference from the evidence since everyone says they never viewed any bat droppings on the deck until late in 2006.

So you can have the structure with the holes and no damage because there aren't any bats around. Or you can have the bats and no holes in the structure for them to gain entry and they won't hang around. They'll go to some other structure or some bridge or something to hang around. So we're talking about two different causes here contributing together to the damage to the interior of the premises.

An occurrence here, according to the terms of the policy, includes "continued or repeated exposure to harmful conditions." Given that language, it seems clear that the cause of the loss need not be sudden or abrupt. It can be a cause over a longer period of time. And that has generally been recognized by the federal case which was cited which talks about manifestation of the repeated or

continued cause.

According to the terms of the policy in case law -- excuse me, according to the terms of the policy, the policy pays for an accidental, direct, physical loss. An occurrence includes continued or repeated exposure to harmful conditions. There need not be a sudden or abrupt event.

The insurance company here argues that for there to be an accident, there has to be an element of chance. There has to be fortuity involved. The event cannot be anticipated. It is not predictable. The risk that we're talking about is not known to a reasonable person or expected by a reasonable person.

For the reasons I just recited, the fact that in northern Wisconsin you have a lot of bats but they may not be in your neighborhood and you need to have holes in your structure, I'm finding that this was an accidental, physical loss. It was an occurrence occasioned by repeated exposure of the structure to bats and their ability to gain entrance and the repeated dropping of bat guano in the premises and bat urination in the premises.

While it's true that there are a lot of bats in northern Wisconsin, it does not

necessarily follow that bats will infest your home or that you should anticipate that they will infest your home especially in great number quantity to the damage that was done here; that is, causing total destruction of the premises. It appears to me from the undisputed facts that the loss did not become apparent until the homeowners could smell the results of the repeated entry by the bats and they actually contracted with someone to remove the siding. That's when the damage became apparent. That is the manifestation of a continued or repeated exposure under the terms of this policy.

I don't believe that -- so I'm finding generally there's coverage. I don't believe this is a situation where the maintenance exclusion applies because I don't think this was a situation of maintenance at all. When one thinks of maintenance, one thinks of continuous repair or continuous replacement of minor parts of a structure brought on by aging or weather or things of that sort. This doesn't appear to be maintenance at all but rather a failure by the insured to recognize the significance of an apparent structural defect as it coincided with bat entry.

Before they noticed bat droppings on

the deck, any structural problem or lack of structural integrity was of no significance whatsoever, and when they saw the bat droppings, they didn't put one plus one together. So it's not really a maintenance issue. When the bat droppings were noticed in significant enough quantity to trigger some response, it wasn't maintenance. They were attempting to correct an apparent structural defect.

When in late 2006 Mr. Johnson used the bucket of water and killed 25 bats and then did some caulking, there was every reason to believe that he had remedied the situation. Any reasonable person in that situation would think it was the end of the story. But apparently it wasn't. The bats were getting in other openings, apparently openings in the siding. And I think under all the circumstances it wouldn't be reasonable for them to do anything they did. They thought they killed all the bats and sealed up the hole or two where the bats entered. Then they found more droppings the next year, in the fall of 2007, and by then it appears that most, if not all, of the damage had been done.

So it's not a maintenance issue by any stretch of the imagination. They attempted to exterminate the problem and/or at least keep the

problem out of the structure and they were unfortunately unable to do so, but that's not maintenance. That's not what the policy, in my estimation, is speaking of when it talks about maintenance. So I'm finding that the maintenance exclusion doesn't apply.

I'm also finding that the vermin exclusion doesn't apply. There's debate in the briefs as to whether bat are vermin. I did my own little research of what constitutes vermin, and vermin are discussed generally the same way in various dictionaries, but vermin tend to be things that are unwanted and are perceived to be dangerous or irritating or maybe threatening in some respects. The policy here has an exclusion for birds, vermin, rodents or insects, damage caused by those creatures. I'll note initially that we cannot use the usual statutory construction tools here because birds, vermin, rodents and insects are not similar enough to say that bats fall into the same general classification. Those creatures are very different. So we can't use the statutory construction method whose Latin name I cannot recite.

MR. KLINGBERG: Ejusdem generis.

THE COURT: Ejusdem generis. We can't use

that because these creatures aren't alike enough to say that bats fall into the same category, and there's much dispute in the record, in the briefs as to how valuable bats are versus what a nuisance they are, but it's a question. I can't tell from reading the policy if bats are vermin, and the policy, therefore, is ambiguous in that respect. And if there's an ambiguity, it's construed against the draftsman, which would be American Family, and that exclusion would not apply to prevent coverage.

Finally, this isn't a pollution case, not according to the case law recited in the briefs here. When we talk about pollution, it's usually a leakage or a seeping from a polluted area into some other area causing damage. And we don't have that same situation here. We have the damage actually being caused by things coming into the structure and the deposit being actually made in the structure, which isn't the same as the traditional pollution cases.

I note that the policy does provide coverage for bacteria, dry rot, wet rot. This certainly seems to be more akin to that type of situation where something causes deterioration of the structure from within.

So I'm finding that under the provisions of this policy there's coverage. I am not going to rule on the issue of bad faith. The plaintiff has requested that I find that there's bad faith. I can't do that because that takes a determination of the reasonableness of Auto-Owners Insurance Company in responding to the claim, and I think that's a jury issue.

In regard to the defendant's claim for specific findings in regard to the amount of damages -- excuse me, the plaintiffs' request that I make findings. They submitted affidavits setting the loss above policy limits, and I see no contrary affidavits, and I'm wondering why you haven't submitted any, Mr. Klingberg.

MR. KLINGBERG: Because we had a motion to stay and the Court granted that motion to stay. We were going to address at this hearing under this case just the question of coverage. Once the question of coverage is decided, we would address the issue of liability and damages both of which are significantly in dispute.

THE COURT: Well, what I said about cause I think puts that issue before the jury. I think there are a couple different causes here. I don't know how

this is going to work if we try the case, because you can't hold the negligence of an insured against the insured on a casualty loss like this. I don't know how their negligence is going to play in. Can you enlighten me on that, Mr. Klingberg?

MR. KLINGBERG: Well --

THE COURT: Or are you going to go after Mr. Johnson or Mr. Choinski for their negligence in bat eradication?

MR. KLINGBERG: This case was postured by me to present to this Court an issue as to whether or not the loss, which is alleged to be -- alleged to be an accumulation of guano resulting in penetrating an offensive odor which rendered the home uninhabitable and unsalable. The issue was, did that alleged loss trigger coverage? I argue no, but I did not concede that that alleged loss was present or that it occurred. I assumed it to be the case for your coverage determination.

So now that coverage has been decided, the issue is whether or not that accumulation of guano, which is obviously there, generated a penetrating offensive odor. There are a lot of factual issues there. Whether that accumulation of guano could not be rehabbed, whether the odor could

STATE OF WISCONSIN)

SS

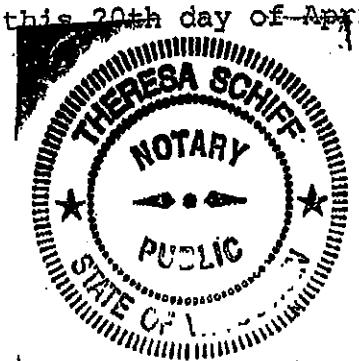
COUNTY OF ONEIDA)

I, Theresa Schiff, a Notary Public in and for the State of Wisconsin, do hereby certify that the preceding proceedings were recorded by me and reduced to writing under my personal direction.

I further certify that said proceedings were taken at the Oneida County Courthouse, Branch II, Rhinelander, Wisconsin.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

In witness whereof I have hereunto set my hand and affixed my seal of office at Rhinelander, Wisconsin, this 20th day of April, 2009.



Theresa Schiff, RPR/CRR/CSR
Notary Public
In and for the State of Wisconsin.

My commission expires 01-15-12.

d. with respect to any vehicle covered by this policy:
   (1) any employee of a person in a., b. or c. above, while engaged in the employment of that person; or
   (2) any other person **you** permit to use the vehicle while on an **insured premises**.

e. any person or organization legally responsible for animals or **watercraft** covered by this policy and owned by a person in a., b. or c. above. However, **we** will cover that person or organization only with respect to those animals or **watercraft**. **We** will not cover any person nor organization using or having custody of animals or **watercraft** in the course of any **business** nor without permission of the owner.

6. **Insured premises** means:

   a. the **residence premises**;

   b. any structures or grounds **you** use in connection with **your residence premises**;

   c. any other premises **you** acquire during the policy term and which **you** intend to use as a **residence premises**;

   d. that part of any other premises where **you** reside and which is shown in the Declarations;

   e. any part of a premises not owned by any **insured** but where any **insured** may be temporarily residing;

   f. any part of a premises not owned by any **insured** which any **insured** may rent for non-business purposes, such as banquet halls and storage facilities;

   g. vacant land, other than farmland, owned by or rented to any **insured**;

   h. Cemetery plots or burial vaults owned by any **insured**;

   i. land owned by or rented to any **insured** on which a one or two family dwelling is being constructed as a residence for the **insured**; and

   j. 200 or less acres of farmland on which there are no buildings when such land is farmed by anyone other than any **insured**.

7. **Motor vehicle** means a motorized land vehicle. **Motor vehicle** does not include a **recreational vehicle**.

8. **Occurrence** means an accident that results in **bodily injury** or **property damage** and includes, as one **occurrence**, all continuous or repeated exposure to substantially the same generally harmful conditions.

9. **Personal injury** means:

   a. libel, slander or defamation of character;

   b. false arrest, detention or imprisonment, or malicious prosecution;

   c. invasion of privacy; or

   d. wrongful eviction or wrongful entry.

   Personal injury does not include **bodily injury**.

10. **Pollutants** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

11. **Property damage** means damage to or destruction of tangible property including resulting loss of use of that property.

12. **Recreational vehicle** means a motorized land vehicle designed primarily for recreational purposes but not designed for travel on public roads. **Recreational vehicle** does not include **watercraft**.

13. **Relative** means a person who resides with you and who is related to **you** by blood, marriage or adoption. **Relative** includes a ward or foster child who resides with **you**.

(6) Failure of any **insured** to use all reasonable means to protect covered property at and after the time of loss or when the covered property is endangered.

(7) War, including any undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these.

(8) Nuclear action, meaning nuclear reaction, radiation, radioactive contamination, however caused and whether controlled or uncontrolled, or any consequence of any of these. Nuclear action includes the discharge of a nuclear weapon, even if accidental. Loss caused by nuclear action is not considered loss by the perils of Fire, Explosion or Smoke. Direct loss by fire resulting from nuclear action is covered.

(9) An action by or at the direction of any **insured** committed with the intent to cause a loss.

b. **Coverage A - Dwelling and Coverage B - Other Structures**

Except as to ensuing loss not otherwise excluded, we do not cover loss resulting directly or indirectly from:

(1) Weather conditions which contribute in any way with any events excluded in exclusions 3.a.(1) through 3.a.(9) above to cause the loss;

(2) Acts or decisions of any person, group, organization or governmental body, or their failure to act or decide.

(3) Faulty, inadequate or defective:

(a) construction, reconstruction, repair, remodeling or renovation;

(b) materials used in construction, reconstruction, repair, remodeling or renovation;

(c) design, workmanship or specifications;

(d) siting, surveying, zoning, planning, development, grading or compaction; or

(e) maintenance;

of a part or all of the **residence premises** or any other property.

(4) (a) wear and tear, marring, scratching or deterioration;

(b) inherent vice, latent defect or mechanical breakdown;

(c) rust, corrosion or electrolysis, mold or mildew, or wet or dry rot;

(d) smog, smoke from agricultural smudging or industrial operations;

(e) settling, shrinkage, bulging or expansion, including resultant cracking of pavement, patios, foundations, walls, floors or ceilings;

(f) birds, vermin, rodents or insects;

(g) animals owned or kept by any **insured**; or

(h) discharge, release, escape, seepage, migration or dispersal of **pollutants** unless caused by a peril we insure against under Coverage C - Personal Property. This exclusion does not apply to ADDITIONAL COVERAGE, o. Heating Fuel Damage.

If because of any of these, water escapes from a plumbing, heating, air conditioning or automatic fire protection sprinkler system or domestic appliance, we cover loss caused by the water. We also cover the cost of tearing out and replacing any part of the covered building necessary to repair the system or

STATE OF WISCONSIN CIRCUIT COURT ONEIDA COUNTY

JOEL HIRSCHHORN and EVELYN F. HIRSCHHORN,
Husband and wife,
4065 Battersea Road
Coconut Grove, FL 33133

Plaintiffs,

vs.

ONEIDA COUNTY
FILED
MAY 15 2008
CLERK OF CIRCUIT COURT

AUTO-OWNERS INSURANCE COMPANY,
A Foreign Insurance Corporation
c/o Rodney Van Dyk, Registered Agent
W6207 Aerotech Drive
Appleton, WI 54912,

Case No. 08CV302
Code No. 30303

Defendant.

COMPLAINT

NOW COME the Plaintiffs, Joel Hirschhorn and Evelyn F. Hirschhorn, by their attorneys, O'Melia, Schiek & McEldowney, S.C., and as and for their Complaint against the Defendant, Auto-Owners Insurance Company, alleges as follows:

FIRST CAUSE OF ACTION: BREACH OF INSURANCE CONTRACT

1. That the Plaintiffs are adult residents of Miami-Dade County, Florida, having a residence address of 4065 Battersea Road, Coconut Grove, Florida 33133.

2. That the Defendant, Auto-Owners Insurance Company, is a foreign insurance corporation organized under the Laws of the State of Michigan and authorized to transact business in the State of Wisconsin and is engaged in the business of writing home owner's insurance, among other things. Its principal place of business is at 6101 Anacapri Drive, P.O. Box 30660, in the City of Lansing, County of Eaton, State of Michigan. Its registered agent for Service of Process is Rodney Van Dyk, of W6207 Aerotech Drive, Appleton, Wisconsin 54912.

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3. At all times material hereto the Plaintiffs were, and still are, the owners of certain real property located at 7212 Poplar Road, in the Town of Lake Tomahawk, County of Oneida, State of Wisconsin (hereinafter referred to as the "insured premises").

4. On May 21, 2004, the Defendant issued to the Plaintiffs insurance policy number 45-055-170-00 insuring the dwelling, outbuildings and personal property at the insured premises against risk of accidental, direct and physical loss, otherwise known as its "Premier Homeowner's Policy". A copy of said policy is attached hereto and marked as "Exhibit A" and made a part hereof.

5. The above-mentioned policy number 45-055-170-00 issued by the Defendant to the Plaintiffs was subsequently renewed each year on or before May 21st and the Plaintiffs paid in consideration therefore the annual premiums. The last renewal was from a policy period of 5-21-07 to 5-21-08. The most recent policy declarations indicate that the policy limits covering the dwelling at the insured premises were $184,500.00; other structures, $27,675.00 and personal property, $129,150.00.

6. The premises have been a vacation home for the Hirschhorn Family since 1981. Regular inspections and maintenance have been performed on the house since 1981. Over the past several years either a next door, or nearby, neighbor or house cleaner would access the house at least 1-2 times per month year round to inspect, confirm no damage to the interior and exterior of the home, and/or clean or otherwise make any and all necessary repairs and improvements/maintenance to the house.

7. Between January 1, 2006 and mid-August, 2007, Plaintiffs occupied the home for less then 30 days. Despite the few days spent at their vacation home, due to Plaintiff Evelyn F. Hirschhorn's allergies and sensitivities to odor and dust, Plaintiffs continued their usual and rigorous inspections, maintenance and cleaning routine, at a minimum of one time per month, often two or more times per month.

8. In early May, 2007, the Plaintiff, Joel Hirschhorn, met with a real estate broker for the purpose of listing the insured premises for sale. On or about May 10, 2007, the listing agreement was signed. Between May-August 2007, the insured premises were available to be shown and shown by the real estate broker. During that time, Plaintiffs maintained their usual, regular maintenance, inspection and cleaning procedures. Sometime in mid-to-late July of 2007, the real estate broker, while inspecting the house in anticipation of the Hirschhorn family visit August 9-14, 2007, noticed bat guano on the side of the house facing east towards the lake. Upon further inspection, the real estate broker detected the presence of bats and undertook an effort to remove same and clean the premises.

9. Between August 9 and 14, 2007, the Hirschhorn family stayed in the insured premises, during which time they noticed a penetrating and offensive odor emanating from the home. After leaving the home on August 14, 2007, Plaintiffs arranged for a further and more detailed inspection of the home by a contractor who determined that the cause of the penetrating and offensive odor was damage to the insured premises, resulting from the accumulation of bat guano between the siding and the walls of the home. Consequently, the home became uninhabitable and unsaleable due to the penetrating and offensive odor, particularly when the sun shone on the house. In addition, the drapes, carpets, fabrics and fabric furnishings in the home were rendered unusable as a result of the absorption of the bat guano odor.

10. By reason of the continuous or repeated exposure to the previously unknown and not detected until mid-to-late July, 2007 accumulation of bat guano, the dwelling structure was a total loss, as well as a significant portion of the contents of the dwelling structure. In addition, the free standing garage had to be leveled and removed as it was esthetically incongruent with the anticipated dwelling which included an attached garage. As a result of and by reason of which the Plaintiffs sustained damages in the following sums:

a. Dwelling	$184,500.00
b. Outbuilding (garage)	$ 24,000.00
c. Personal Property	$100,000.00
TOTAL	**$308,500.00**

11. Plaintiffs duly performed all of the conditions of said policy on their part by notifying the Defendant of the loss within a reasonable time after discovery. On or about October 26, 2007, the Defendant notified the Plaintiffs that it was not liable upon said policy and thereby the Defendant waived any presentation of Plaintiffs' proofs of loss.

12. After giving the Defendant a reasonable opportunity to inspect the insured premises, the Plaintiffs had the house and garage razed and the contents either given away to various local charities, people in need, or otherwise disposed of by having said contents discarded at an appropriate trash fill site.

13. The Defendant was, at the time of the commencement of this action, indebted to the Plaintiffs on said policy for said loss and damage in the sum of $308,500.00 and interest; and although, after the same became due and payable before the commencement of this action and the Plaintiffs demanded such payment, the Defendant has neglected and refused, and still neglects and still refuses to pay the same or any part thereof.

SECOND CAUSE OF ACTION: BAD FAITH

14. For the sake of brevity, the Plaintiffs incorporate all of the foregoing allegations as if restated herein in full.

15. That there was no reasonable basis for the Defendant's denial of the Plaintiffs' claim for benefits under their policy and the Defendant either knew or recklessly failed to ascertain that the claim should have been paid.

WHEREFORE, the Plaintiffs demand judgment against the Defendant as follows:

A. A money judgment in the sum of $308,500.00 for compensatory damages, together with interest from October 26, 2007;

B. Punitive damages in an amount to be determined by the Court;

C. Plaintiffs' actual costs, attorney fees and disbursements incurred in prosecuting the present action

D. Such other and further relief as the Court deems just and equitable under the circumstances.

Dated this 13th day of May, 2008.

O'MELIA, SCHIEK & McELDOWNEY, S.C.
Attorneys for the Plaintiffs,
Joel and Evelyn F. Hirschhorn

Lawrence J. Wiesneske
State Bar No.: 1009638

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Rhinelander, WI 54501
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HIR0007

United States District Court,
E.D. Tennessee,
Southern Division.
CBL & ASSOCIATES MANAGEMENT, INC.,
Plaintiff,
v.
LUMBERMENS MUTUAL CASUALTY COMPANY and Travelers Property Casualty Company of America, Defendants.
No. 1:05-CV-210.

July 25, 2006.

Cynthia D. Hall, Everett L. Hixson, Jr., Shumacker, Witt, Gaither & Whitaker, PC, Chattanooga, TN, for Plaintiff.

Clay H. Phillips, Michael L. Hahn, Bollinger, Ruberry & Garvey, Chicago, IL, David Edward Harvey, Farris, Mathews, Branan, Babango, Hellen & Dunlap, Nashville, TN, Amanda G. Branam, Gerard M. Siciliano, Luther-Anderson, PLLP, Chattanooga, TN, Paul Owens, Weissman, Nowack, Curry & Wilco, P.C., Atlanta, GA, for Defendants.

MEMORANDUM AND ORDER

HARRY S. MATTICE, JR., District Judge.

*1 Plaintiff CBL & Associates Management, Inc. ("CBL") brings this action against Defendants Lumbermens Mutual Casualty Company ("Lumbermens") and Travelers Property Casualty Company of America ("Travelers"), alleging that Lumbermens and Travelers breached their respective insurance contracts by refusing to provide a defense in an underlying state court action. In addition to damages resulting from such breaches of contract, Plaintiff seeks a declaration of Defendants' rights and duties under their respective insurance contracts.

Before the Court are Lumbermens' Motion for Judgment on the Pleadings and Travelers' Motion for Judgment on the Pleadings.

For the reasons explained below, Lumbermens' Motion for Judgment on the Pleadings is **GRANTED,** and Travelers' Motion for Judgment on the Pleadings is **GRANTED.**

I. STANDARD

The standard of review applicable to a motion for "judgment on the pleadings" pursuant to Federal Rule of Civil Procedure 12(c) is the same as the standard of review applicable under Rule 12(b)(6). *Grindstaff v. Green,* 133 F.3d 416, 421 (6th Cir.1998).

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint that fails to state a claim upon which relief can be granted. The purpose of Rule 12(b)(6) is to permit a defendant to test whether, as a matter of law, the plaintiff is entitled to relief even if everything alleged in the complaint is true. *Mayer v. Mylod,* 988 F.2d 635, 638 (6th Cir.1993). A complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Arrow v. Fed. Reserve Bank,* 358 F.3d 392, 393 (6th Cir.2004). The complaint must contain either "direct or inferential allegations respecting all the material elements to sustain a recovery...." *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir.1988) (internal quotations and citations omitted). The Court must determine not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support his claims. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). In making this determination, the Court must construe the complaint in the

light most favorable to plaintiff and accept as true all well-pleaded factual allegations. *Arrow,* 358 F.3d at 393; *Mixon v. Ohio,* 193 F.3d 389, 400 (6th Cir.1999). The Court need not accept as true mere legal conclusions or unwarranted factual inferences. *Id.*

II. FACTS

Viewing the facts in the light most favorable to Plaintiff and accepting as true all well-pleaded factual allegations [FN1], the relevant facts are as fol- lows.

> FN1. All written instruments that are exhibits to the complaint are considered part of the complaint for purposes of the Court's consideration of these motions. Fed.R.Civ.P. 10(c). Thus, the AVC Lease and the insurance policies issued by Lumbermens and Travelers, which were included as exhibits to the complaint, are considered part of the complaint. In addition, although Plaintiff did not attach as an exhibit to the complaint in this case Mr. Wight's underlying complaint, such underlying complaint is considered part of the pleadings in this case because it is referred to in Plaintiff's complaint and is central to Plaintiff's claims. *Weiner v. Klais & Co.,* 108 F.3d 86, 89 (6th Cir.1997).

CBL operates and manages the Cherryvale Mall (the "Mall") in Rockford, Illinois, which is owned by CBL/Cherryvale I, LLC ("CBL/Cherryvale"). (Court Doc. No. 1, Compl. ¶ 6.) CBL/Cherryvale acquired the Mall on January 31, 2001, and CBL has been managing the Mall since that time. *(Id.* ¶ 7.) At the time CBL/Cherryvale acquired the Mall, space F34 was leased to American Vision Centers, Inc. ("AVC") and subleased to Donald Wight. *(Id.* ¶ 9.) The lease to AVC (the "AVC Lease") was entered into on January 28, 1997, between the then-owner and AVC. *(Id.* ¶ 10.) The sublease to Wight was entered into on February 1, 1997, and incorporated into the AVC Lease. *(Id.)* CBL/Cherryvale assumed the AVC Lease when it purchased the Mall in 2001. *(Id.)*

*2 At the time of the execution of the AVC Lease in 1997, both the then-owner and AVC were aware of a plumbing problem, and the AVC Lease provided that the "LANDLORD agrees to promptly repair the existing plumbing problem at the PREMISES, at LANDLORD's expense, whereby the storm sewer is mistakenly connected to the PREMISES sewer system." *(Id.* ¶ 11; *id.* Ex. A.)

In 2002, Wight vacated space F34. *(Id.* ¶ 13.) On April 10, 2003, CBL/Cherryvale and AVC entered into a Lease Termination Agreement which terminated the AVC Lease. (*Id.* ¶ 14.) Also on April 10, 2003, CBL/Cherryvale and AVC entered into a Release and Indemnity Agreement which released and discharged AVC from various claims related to the plumbing problems. (*Id.*)

On April 29, 2003, Wight filed an action in the Circuit Court for Winnebago County in Rockford, Illinois. *(Id.* ¶ 16; *see also* Court Doc. No. 1, Notice of Removal Ex. B.) In that action, Wight seeks damages for breach of contract, breach of fiduciary duty, negligence, breach of the covenant of quiet enjoyment, fraud in the inducement, negligent infliction of emotional distress, and negligent misrepresentation against AVC and other defendants, all stemming from the plumbing problem in space F34 that "caused sewage, debris, waste and water to shoot out of the sink drains and flood [space F34] during rainfalls" (Notice of Removal, Ex. B ¶ 11) and AVC's failure to correct the plumbing problem *(id.* ¶ 15). CBL has been providing a defense to AVC in this Illinois litigation. (Compl.¶ 19.)

Lumbermens and Travelers each issued insurance contracts to CBL for certain periods of time, and CBL claims that these insurance contracts obligate Lumbermens and Travelers to provide a defense to AVC on behalf of CBL in this underlying Illinois litigation. *(Id.* ¶¶ 21, 28, 39, 46.)

Lumbermens issued Policy No. 5AA 059 240-00 to CBL with effective dates from 12/31/2001 to 12/31/2002. *(Id.* ¶ 21; *id.* Ex. B.) Travelers issued Policy No. TJ-GLSA-487D7495-TIL-02 to CBL with effective dates from 12/31/2002 to 12/31/2003. *(Id.* ¶ 39; *id.* Ex. C.) Both policies provide coverage, albeit for different periods of time, for bodily injury and property damage. *(Id.* Exs. B, C.) In order for "bodily injury" and "property damage" to be covered under the policies, such "bodily injury" or "property damage" must have (1) been caused by an "occurrence" that takes place in the "coverage territory" and (2) occurred during the policy period. *(Id.)* "Bodily injury" is defined under both policies as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." *(Id.)* "Property damage" is defined under both policies as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured." *(Id.)* Both insurance contracts contain a pollution exclusion related to bodily injury and property damage, which provides that bodily injury and property damage "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants ... [a]t or from any premises, site or location which is or was at any time owned or occupied by or rented or loaned to [or managed by [FN2]], any insured...." *(Id.)* In both policies, the term "pollutants" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *(Id.)*

> FN2. This portion of the definition ("and managed by") appears only in the Travelers policy. (Compl.Ex. C.)

*3 Both policies also provide coverage, albeit for different periods of time, for personal and advertising injury liability. *(Id.)* To be covered under the policies, "personal injury" must have been caused by "an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by you or for you." *(Id.)* "Advertising injury" under the policies must have been caused by "an offense committed in the course of advertising your goods, products or services." *(Id.)* In addition, the offense related to either a personal or advertising injury must have been committed in the "coverage territory" during the policy period. *(Id.)* "Personal injury" is defined as follows in both policies:

> injury, other than "bodily injury," arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
>
> d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
>
> e. Oral or written publication of material that violates a person's right of privacy.

(*Id.*) "Advertising injury" is defined as follows in both policies:

> injury arising out of one or more of the following offenses:
>
> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's good *[sic],* products, or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of copyright, title or slogan.

(*Id.*)

The Travelers policy contains a pollution exclusion applicable to the personal and advertising injury liability coverage. Such exclusion provides that the policy does not provide coverage for personal injury or advertising injury "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." *(Id.* Ex. C.) "Pollutants" are "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *(Id.)* The Lumbermens policy excludes from the personal and advertising injury liability coverage any personal injury or advertising injury "[f]or which the insured has assumed liability in a contract or agreement." *(Id.* Ex. B.)

III. ANALYSIS

Travelers seeks a judgment on the pleadings on two bases: (1) Travelers has no duty to defend AVC because the pollution exclusions in the Travelers insurance policy bar coverage for Wight's alleged damages; and (2) Wight's damages are not covered by the Travelers insurance policy because such damages were a "known loss." Lumbermens seeks a judgment on the pleadings on several bases: (1) Lumbermens is not required to defend AVC on CBL's behalf under the bodily injury and property damage liability coverage of the policy because (a) CBL is not legally obligated to defend or indemnify AVC under the AVC Lease, (b) the policy does not require Lumbermens to pay any amounts arising from CBL's obligations under the release and indemnity agreement, (c) there was no occurrence as defined in the policy, and (d) Lumbermens has no duty to defend AVC because the pollution exclusions in the policy bar coverage for Wight's alleged damages; and (2) Lumbermens is not required to defend AVC on CBL's behalf under the personal and advertising injury liability coverage because CBL is not legally obligated to reimburse AVC for the damages claimed by Wight and, to the extent CBL may be legally obligated, the policy excludes coverage for such damages.

A. Jurisdiction over Declaratory Judgment Claims

*4 At the outset, the Court recognizes that, when faced with a declaratory judgment claim, it must determine whether to exercise its discretion to hear such a claim by analyzing the five factors outlined in *Grand Trunk. See* 28 U.S.C. §§ 2201-2202; *Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir.1984). In this instance, there are claims before the Court other than the declaratory judgment claims: Plaintiff brings two breach of contract claims in addition to its two declaratory judgment claims. The Court has independent jurisdiction over the breach of contract claims, so even if the Court were to decline to exercise jurisdiction over the declaratory judgment claims, the breach of contract claims would remain before the Court. *See Snodgrass v. Provident Life & Accident Ins. Co.*, 147 F.3d 1163, 1167-68 (9th Cir.1998) ("The appropriate inquiry for a district court in a Declaratory Judgment Act case is to determine whether there are any claims in the case that exist independent of any request for purely declaratory relief, that is, claims that would continue to exist if the request for a declaration simply dropped from the case."). Consequently, in the interest of avoiding piecemeal litigation, the Court should entertain the declaratory judgment claims in this action. *See id.; Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225-26 (9th Cir.1998) ("[W]hen other claims are joined with an action for declaratory relief (e.g., bad faith, breach of contract, breach of fiduciary duty, rescission, or claims for other monetary relief), the district court should not, as a general rule, remand or decline to entertain the claim for declaratory relief."); *Behrens v. Donnelly*, No. Civ. 05-00453 HMS/KS, 2006 WL 897573, at *7-8 (D.Haw. Mar. 31, 2006).

Such result is dictated by an analysis of the *Grand Trunk* factors. In determining whether to entertain jurisdiction over a declaratory judgment action, the Sixth Circuit has directed district courts to consider the following factors:

> (1) whether the declaratory action would settle the (2) controversy; whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata[";] (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Grand Trunk, 746 F.2d at 326. Weighing these factors as a whole, it is apparent that this Court should exercise jurisdiction over Plaintiff's declaratory judgment claims.

Although the Court's determination with respect to these declaratory judgment claims would not settle any issues pending in the underlying state controversy and would not serve a useful purpose in clarifying the legal relations at issue in such state action, *U.S. Fire Ins. Co. v. Albex Aluminum, Inc.*, 161 Fed. App'x 562, 564-65, 2006 WL 41185, at *3 (6th Cir. Jan. 6, 2006) (per curiam), these factors are only part of the analysis. There is no evidence of procedural fencing in this case, so that factor weighs neither in favor of exercising nor in favor of declining jurisdiction.

*5 The final two factors weigh heavily in favor of exercising jurisdiction. First, the retention of jurisdiction over these claims would reduce friction between federal and state courts. If the Court were to decline jurisdiction over the declaratory judgment claims, this Court would be deciding precisely the same issues with respect to the breach of contract claims as a state court would be deciding with respect to the declaratory judgment claims. Such a situation has the potential to increase friction between state and federal courts, particularly if the courts were to reach different conclusions. *State Auto. Mut. Ins. Co. v. Turner Funeral Home, Inc.*, No. 1:05-CV-61, 2006 WL 686872, at *5 (E.D.Tenn. Mar. 13, 2006); *Ohio Cas. Ins. Co. v. Kentucky*, No. 4:05CV-085-M, 2005 WL 2656745, at *3 (W.D.Ky. Oct. 17, 2005). Second, the presence of the breach of contract claims also prevents the Court from concluding that any alternative remedy would be better or more effective. Splitting the claims between this Court and a state court does not create the optimal situation; on the contrary, it exposes the parties to the possibility of inconsistent decisions. *See Ohio Cas. Ins. Co.*, 2005 WL 2656745, at *3. Because the risk of inconsistent results would be so great if the Court were to decline jurisdiction over the declaratory judgment claims, *see Ohio Cas. Ins. Co.*, 2005 WL 2656745, at *3, the Court concludes that, in this instance, the fourth and fifth factors outweigh the other factors, and this Court must exercise its jurisdiction to hear these claims along with the breach of contract claims.

B. Applicable Law

In cases arising under the Court's diversity jurisdiction under 28 U.S.C. § 1332, the Court must apply the choice of law rules of the state in which the Court sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 501 (6th Cir.2003). In Tennessee, the law of the place where a contract is made governs the construction and validity of the contract. *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 465, 466 (Tenn.1973). In this instance, the insurance contracts at issue were delivered in Tennessee. Accordingly, the Court will apply Tennessee law to interpret those insurance contracts.

C. Duty to Defend

In determining whether Lumbermens and Travelers breached their respective duties to defend, the Court is guided by the principle that an insurer's duty to defend an insured is determined by the allegations in the complaint filed against the insured. *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, No. M2004-01233-COA-R3-CV, 2005 WL 2293009, at *3 (Tenn.Ct.App. Sept. 20, 2005). "An insurer has a duty to defend when its policy arguably covers the claims raised against the insured." *Id.* If the allegations in the underlying complaint leave doubt as to whether the allegations require the insurer to defend, the doubt should be resolved in favor of the insured. *Id.*

D. Pollution Exclusions

*6 Defendants present multiple arguments in support of their respective contentions that their insurance policies do not obligate them to defend AVC on CBL's behalf. One of those arguments-that the pollution exclusions in their respective policies bar coverage-is common to both Defendants. Consequently, the Court will address that argument first, before proceeding to the other individual arguments.

Both Defendants contend that the pollution exclusions in their respective policies bar coverage for the damages claimed by Mr. Wight in the underlying state litigation because those damages arise from the intrusion of sewage and waste into space F34. Specifically, they contend that Mr. Wight's allegation that the plumbing problem "causes sewage, debris, waste and water to shoot out of the sink drains" constitutes the discharge, dispersal, seepage, migration, release, or escape of pollutants. Travelers contends that the pollution exclusions in its policy bar both bodily injury and property damage coverage and personal and advertising injury liability coverage, while Lumbermens contends only that the pollution exclusion in its policy bars bodily injury and property damage coverage. As described above, the language of all three pollution exclusions is nearly identical in all respects. Plaintiff contends that the pollution exclusions do not apply to the damages claimed by Mr. Wight because the exclusions apply only to traditional environmental pollutants and not to sewage and waste. Thus, the key inquiry is whether sewage and waste are encompassed by the term "pollutants."

The Tennessee courts have not yet determined the meaning of the pollution exclusion. In such a situation, this Court must discern from all available sources how the Tennessee courts would decide the issue if confronted with it. *McClain v. Northwest Cmty. Corr. Ctr. Judicial Corr. Bd.*, 440 F.3d 320, 328 (6th Cir.2006). Thus, the Court will begin its analysis by applying the Tennessee rules of contract interpretation. *See supra* Part III.B.

Under Tennessee law, courts must construe insurance contracts in the same manner as any other contract. *American Justice Ins. Reciprocal v. Hutchison,* 15 S.W.3d 811, 814 (Tenn.2000). "The language of the policy must be taken and understood in its plain, ordinary and popular sense." *Id.* Where language is susceptible to more than one reasonable interpretation, the language is ambiguous. *Id.* at 815. If such ambiguous language limits the coverage of the insurance policy, that language must be construed in favor of the insured. *Id.* In determining the "plain, ordinary and popular" meaning of language, courts may refer to dictionary definitions. *Id.*

As noted above, the insurance policies at issue define "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." (Compl.Exs.B, C.) The terms "irritant," "contaminant," and "waste" are not defined in the respective policies. Thus, the Court will examine the dictionary definitions of those terms.

*7 "Irritant" is defined as "a source of irritation." *American Heritage Dictionary of the English Language* 926 (4th ed.2000). "Irritation" is defined as "a condition of inflammation, soreness, or irritability of a bodily organ or part." *Id.* "Contaminant" is

defined as "one that contaminates." *Id.* at 396. "Contaminate" means "to make impure or unclean by contact or mixture." *Id.* "Waste" means "an unusable or unwanted substance or material, such as a waste product," "garbage; trash," or "the undigested residue of food eliminated from the body; excrement." *Id.* at 1942.

In the underlying complaint, Mr. Wight describes his damages as being caused by "sewage, debris, waste and water [shooting] out of the sink drains and [flooding space F34]." (Notice of Removal Ex. B ¶ 11.) He also describes such sewage, debris, waste, and water as "unsanitary" *(Id.* ¶ 12), as causing space F34 to become "contaminated" *(id.* ¶ 16), and as creating "hazardous and unsafe" *(id.* ¶ 17) and "dangerous" *(id.* ¶ 22) conditions in space F34.

In the context of these allegations in the underlying complaint, the Court concludes that the pollution exclusion is unambiguous and excludes from coverage the damages claimed by Mr. Wight. While the materials present in space F34 do not fall under the definition of "irritant," it is clear that they do fall under the definitions of both "contaminant" and "waste." First, the materials at issue are "contaminants" because they clearly make space 34 impure or unclean. Mr. Wight alleges in his complaint that such materials "contaminated" the space and made it "unsanitary." Such allegations fit square within the definition of "contaminant." Second, the materials at issue are clearly "waste," as the definition of waste specifically includes sewage and also includes debris, which could be characterized either as garbage or trash or as an unusable or unwanted substance or material. In sum, the plain, ordinary meaning of the pollution exclusion leads to the conclusion that it applies to the damages caused by the materials named in Mr. Wight's complaint.

The Court is aware that there are two distinct lines of cases interpreting the pollution exclusion-one line supporting Plaintiff's argument and one line supporting Defendants' argument. In the first line of cases, the pollution exclusion clause is found, based on the original purposes behind the inclusion of such clause in insurance policies and the use of terms of art from environmental law, to be applicable only to traditional environmental pollutants. *See, e.g., Nautilus Ins. Co. v. Jabar,* 188 F.3d 27, 30-31 (1st Cir.1999) (Maine law); *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.,* 132 F.3d 526, 530-31 (9th Cir.1997) (Montana law); *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.,* 47 F.3d 34, 38 (2d Cir.1995) (New York law); *Regional Bank of Colo., N.A. v. St. Paul Fire & Marine Ins. Co.,* 35 F.3d 494, 498 (10th Cir.1994) (Colorado law); *Lumbermens Mut. Cas. Co. v. S-W Indus., Inc.,* 23 F.3d 970, 981-82 (6th Cir.1994) (Ohio law); *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.,* 976 F.2d 1037, 1043-44 (7th Cir.1992) (Illinois law); *C.H. Heist Caribe Corp. v. Am. Home Assurance Co.,* 640 F.2d 479, 482-83 (3d Cir.1981) (Virgin Islands law); *Westchester Fire Ins. Co. v. City of Pittsburg,* 794 F.Supp. 353, 355 (D.Kan.1992) (Kansas law); *Minerva Enters., Inc. v. Bituminous Cas. Corp.,* 851 S.W.2d 403, 404 (Ark.1993); *MacKinnon v. Truck Ins. Exch.,* 71 P.3d 1205, 1216-17 (Cal.2003); *Am. States Ins. Co. v. Koloms,* 687 N.E .2d 72, 489, 494 (Ill.1997); *Thompson v. Temple,* 580 So.2d 1133, 1135 (La.Ct.App.1991); *Western Alliance Ins. Co. v. Gill,* 686 N.E.2d 997, 999 (Mass.1997); *West Am. Ins. Co. v. Tufco Flooring E ., Inc.,* 409 S.E.2d 692, 699-700 (N.C.Ct.App.1991).

***8** In the second line of cases, the pollution exclusion clause is found to be applicable to all types of pollution that fall under the letter of the clause, not just traditional environmental pollutants. *See, e.g., U.S. Fire Ins. Co. v. City of Warren,* 87 Fed. App'x 485, 490 (6th Cir.2003) (Michigan law); *Assicurazioni Generali, S.p.A. v. Neil,* 160 F.3d 997, 1004-06 (4th Cir.1998) (Maryland law); *Reliance Ins. Co. v. Moessner,* 121 F.3d 895, 900-02 (3d Cir.1997) (Pennsylvania law); *Certain Underwriters at Lloyd's London v. C.A. Turner Constr. Co.,* 112 F.3d 184, 188 (5th Cir.1997) (Texas law); *American States Ins. Co. v. Nethery,* 79 F .3d 473, 477 (5th Cir.1996) (Mississippi law); *Longaberger*

Co. v. U .S. Fidelity & Guar. Co., 31 F.Supp.2d 595, 603-04 (S.D.Ohio 1998) (Ohio law); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1138 (Fla.1998); *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 779-81 (Minn.Ct.App.1999); *Cook v. Evanson*, 920 P.2d 1223, 1226 (Wash.Ct.App.1996); *Peace ex rel. Lerner v. Northwestern Nat'l Ins. Co.*, 596 N.W.2d 429, (Wis.1999).

Plaintiff urges the Court to adopt the reasoning of the first line of cases and conclude that the pollution exclusion applies only to traditional environmental pollutants. The Court concludes, however, that Tennessee courts, if faced with this issue, would adopt the reasoning of the second line of cases and would conclude that the pollution exclusion applies to all types of pollution, including sewage, and not just to traditional environmental pollutants. This result is in accordance with and dictated by the Tennessee rules of construction for interpreting insurance policies.[FN3]

> FN3. The Court is aware that, when a novel or unsettled question of state law arises, it is within the Court's discretion to *sua sponte* certify such question to the highest court of the state. *Elkins v. Moreno*, 435 U.S. 647, 662 *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir.1995). In the case at bar, the Tennessee courts have not yet addressed the precise question at issue. Tennessee does, however, have well-established principles that govern the interpretation of insurance contracts. *See Transamerica Ins. Co.*, 50 F.3d at 372. Accordingly, the Court relies on such principles to interpret the exclusion at issue, and the Court declines to certify the question of the meaning of the exclusion to the Tennessee Supreme Court.

The conclusion reached in the first line of cases is "premised on a technical rather than an ordinary reading of the exclusion, ascribing to the reader a knowledge of 'terms of art' in environmental law...." *Auto-Owners Ins. Co.*, 588 N.W.2d at 779. Such a technical reading of the exclusion is not in accord with the rules of construction in Tennessee, which require the Court to determine the "plain, ordinary and popular meaning" of the language at issue. Although there is evidence that the exclusion was originally inserted into insurance policies with the intent that it apply to traditional environmental pollutants, *see, e.g., Koloms*, 687 N.E.2d at 79-82, the Court may not consider such evidence when it has concluded that the exclusion is unambiguous, as the Court has done in this instance. *See also McKusick v. Travelers Indem. Co.*, 632 N.W.2d 525, 531 (Mich.Ct.App.2001) ("Although we recognize that other jurisdictions have considered the terms "discharge," "dispersal," "release," and "escape" to be environmental terms of art, thus requiring the pollutant to cause traditional environmental pollution before the exclusion is applicable, we cannot judicially engraft such limitation. This Court must enforce the insurance policy in accordance with its terms as interpreted in light of their commonly used, ordinary, and plain meaning.").

*9 Thus, because the Court finds that the pollution exclusion unambiguously applies to sewage and the other materials named in the underlying complaint in this action, the Court concludes that Lumbermens and Travelers have no duty to defend AVC on behalf of CBL in the underlying litigation with respect to any coverages to which the exclusion applies. The Court need not address Defendants' other arguments regarding the relevant coverages.

Accordingly, Travelers' Motion for Judgment on the Pleadings is **GRANTED**, and Plaintiff's causes of action against Travelers for breach of contract and seeking a declaratory judgment are **DISMISSED WITH PREJUDICE.** Lumbermens' Motion for Judgment on the Pleadings is **GRANTED** with respect to Plaintiff's causes of action against Lumbermens for breach of contract and seeking a declaratory judgment relative to the bodily injury

and property damage coverage, and such causes of action are **DISMISSED WITH PREJUDICE.** What remains are Plaintiff's causes of action against Lumbermens for breach of contract and seeking a declaratory judgment relative to the personal and advertising injury liability coverage, to which the pollution exclusion does not apply.

E. Lumbermens' Personal and Advertising Injury Liability Coverage

Lumbermens contends that it is not required to defend AVC on CBL's behalf in the underlying litigation with respect to the personal and advertising injury liability coverage in the Lumbermens policy because (1) AVC waived its right to defense or indemnity by CBL when it entered into the AVC Lease, which specifically waives all claims AVC may have against CBL as a result of water coming into space F34, flooding, or the failure of the plumbing or sewer system, and (2) to the extent AVC did not waive its right to defense or indemnity as to all claims, CBL's assumption of liability relative to those particular claims excludes those claims from coverage. CBL contends that it is legally obligated by the AVC Lease to provide defense and indemnity to AVC for damages arising from CBL's failure to make certain repairs to space F34 and that, therefore, Lumbermens is required to provide such defense.

The Lumbermens policy requires Lumbermens to "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury'.... [Lumbermens] will have the right and duty to defend any 'suit' seeking those damages." (Compl.Ex.B.) As noted above, "personal injury" includes injury arising out of, *inter alia,* wrongful eviction. *(Id.)* The underlying complaint in this matter alleges a cause of action against AVC for breach of the covenant of quiet enjoyment, which brings the injuries arising therefrom within the definition of "personal injury." (Compl.¶¶ 56-68.) The question, then, is whether the damages arising from Mr. Wight's "personal injury" are covered by the insurance policy.

Central to this inquiry are two sections of the AVC Lease. Article 9, Section 5 of the lease reads as follows:

> *10 LANDLORD [CBL] shall not be responsible or liable for and TENANT [AVC] hereby expressly waives all claims against LANDLORD for injury to persons or damage to TENANT's property resulting from (i) water, snow or ice being upon or coming through the roof, walls, windows or otherwise; (ii) wind, water or flooding; (iii) any act, omission or negligence of co-tenants or other persons or occupants of the Shopping Center; (iv) the acts of any owners or occupants of adjoining or contiguous property; or (v) failure of the electrical system, the heating or air conditioning systems, or the plumbing and sewer systems. LANDLORD shall not be liable for any damage occasioned by its failure to keep the PREMISES in repair unless LANDLORD is obligated to make such repairs under the terms hereof, notice of the need for such repairs has been given LANDLORD, a reasonable time has elapsed and LANDLORD has failed to make such repairs.

(Compl. Ex. A art. 9, § 5.) Article 10, Section 1 of the AVC Lease reads, in pertinent part, as follows:

> LANDLORD agrees to promptly repair the existing plumbing problem at the PREMISES, at LANDLORD's expense, whereby the storm sewer is mistakenly connected to the PREMISES sewer system.

(Compl. Ex. A art. 10, § 1.)

Lumbermens contends that the waiver in Article 9, Section 5 by AVC of all claims against CBL for damages resulting from water, flooding, or the failure of the plumbing or sewer systems negates any legal obligation by CBL to defend or indemnify AVC. Since the personal injury coverage only applies to damages that CBL is legally obligated to pay, Lumbermens argues that the waiver bars cov-

erage for any damages suffered by Mr. Wight as a result of the flooding of space F34 and the failure of the plumbing system.

CBL argues in response that an analysis of Article 5, Section 9 of the AVC Lease to determine CBL's legal obligation is incomplete without referencing Article 10, Section 1. CBL points out that Article 5, Section 9 relieves CBL of legal liability with respect to damages resulting from CBL's failure to repair, *unless* CBL undertook an obligation to repair elsewhere in the AVC Lease. CBL argues that Article 10, Section1 represents just such an undertaking. Thus, CBL asserts that it is legally obligated with respect to the damages claimed by Mr. Wight, which he alleges were caused by the failure to repair the plumbing system. Lumbermens does not appear to contest this conclusion.

Taking Article 9, Section 5 and Article 10, Section 1 together, it is clear that, if CBL is liable for any damages claimed by Mr. Wight, such liability could only stem from the CBL's agreement to repair the plumbing system because without such agreement to repair, such damages would fall under the main waiver provision. Thus, the Court assumes for the purpose of the remainder of its analysis that CBL, as a result of the agreement to repair in Article 10, Section 1, is legally obligated with respect to the damages claimed by Mr. Wight.

*11 Lumbermens contends that, even if CBL is obligated under Article 10, Section 1 of the lease, the Lumbermens policy excludes coverage for such obligations. As support for this contention, Lumbermens points to the assumed-liability exclusion under the personal and advertising injury liability coverage, which bars coverage for personal injury "[f]or which the insured has assumed liability in a contract or agreement." (Compl.Ex.B.) As explained above, it is clear from the record that CBL did assume liability in the AVC Lease for its failure to repair. CBL even appears to acknowledge its assumption of liability, arguing in its brief that "[w]hen CBL assumed the obligations under the Lease with AVC ..., it assumed **all obligations** of the Lease including ... liability to AVC for its alleged failure to repair the plumbing problems." Thus, under the first sentence of the assumed-liability exclusion, the damages claimed by Mr. Wight are excluded from coverage because CBL's liability with respect to those damages stems was assumed in a contract or agreement.

In their briefs, neither party addressed the second sentence of the assumed-liability exclusion, which states that the exclusion "does not apply to liability for damages that the insured would have in the absence of the contract or agreement." (Compl.Ex.B.) Thus, under the assumed-liability exclusion, although the insured may have assumed certain liabilities in a contract, the insured will still receive coverage under the insurance policy if the insured would have been liable even in the absence of the contract. In this instance, this exception to the assumed-liability exclusion requires the Court to determine whether CBL would have been liable for the damages resulting from the failure to repair the plumbing system, even in the absence of the provision in the AVC Lease obligating CBL to repair the system.

Tennessee has indicated its adoption of the principles stated in the Restatement of Torts regarding the obligations of landlords and tenants. *See, e.g., Denton v. Hahn,* No. M2003-00342-COA-R3-CV, 2004 WL 2083711, at *4 (Tenn.Ct.App. Sept. 16, 2004). The relevant section of the Restatement provides that a landlord is not liable to a tenant or to others on the premises for injuries caused by dangerous conditions that existed when the tenant took possession. *Restatement (Second) of Torts* § 356 (1965). Several exceptions to this general rule exist: (1) when the landlord contracts to repair the dangerous condition *(id.* § 357); (2) when the landlord does not disclose the existence of a dangerous condition to the tenant *(id.* § 358); (3) when the premises is leased for a purpose involving public admission, in which case the landlord is liable for injuries caused to persons who enter the premises for that purpose *(id.* § 359); (4) when the landlord

retains control over a portion of the premises used by the tenant *(id.* § 360); (5) when the landlord retains control over a portion of the premises that is necessary to safely use of the other portion of the premises *(id.* § 361); and (6) when the landlord is negligent in making repairs and the land is made more dangerous or given a deceptive appearance of safety *(id.* § 362).

*12 As discussed above, the exception related to a landlord's contract to repair is at issue in this case. The remainder of the exceptions, however, are not at issue. First, this is not a situation in which the landlord failed to disclose a dangerous condition to the tenant. In this instance, all parties knew about the problems with the plumbing system. Second, although the premises may have been leased for a purpose involving public admission, the injuries at issue are not those of persons who entered the premises for that purpose. Third, there is no evidence that the landlord retained control over any portion of the premises-either a portion of the premises used by the tenant or necessary for the safe use of the tenant's portion of the premises. Fourth, there is no allegation that the premises were made more dangerous by the landlord's failure to repair the plumbing system; on the contrary, the same conditions existed both before and after the promise to repair. Thus, the only exception to the general rule at issue in this case is the contract to repair.

Consequently, CBL is liable for the damages at issue only as a result of its agreement to repair in Article 10, Section 1 of the AVC Lease, without which the damages at issue would have fallen under the main waiver provision of the AVC Lease. Because CBL is liable for damages resulting from its failure to repair only as a result of its assumption of liability in the AVC Lease, such damages are excluded from coverage under the assumed-liability exclusion. While CBL may be liable to AVC and/or Mr. Wight for any damages stemming from its failure to repair the plumbing system, the Lumbermens policy does not provide coverage to CBL for those damages.

Accordingly, Lumbermens' Motion for Judgment on the Pleadings is **GRANTED** with respect to Plaintiff's causes of action against Lumbermens for breach of contract and seeking a declaratory judgment relative to the personal and advertising injury liability coverage, and such causes of action are **DISMISSED WITH PREJUDICE.**

IV. CONCLUSION

For the reasons stated above, Travelers' Motion for Judgment on the Pleadings [Court Doc. No. 25] is **GRANTED,** and Plaintiff's causes of action for breach of contract and seeking a declaratory judgment against Travelers are **DISMISSED WITH PREJUDICE.** Lumbermens' Motion for Judgment on the Pleadings [Court Doc. No. 39] is **GRANTED,** and Plaintiff's causes of action for breach of contract and seeking a declaratory judgment against Lumbermens are **DISMISSED WITH PREJUDICE.**

In accordance with Federal Rule of Civil Procedure 54(d)(1), Defendants are entitled to recover their costs of this action.

The Clerk is directed to close the file in this case.

SO ORDERED this 25th day of July, 2006.

E.D.Tenn.,2006.
CBL & Associates Management, Inc. v. Lumbermens Mut. Cas. Co.
Not Reported in F.Supp.2d, 2006 WL 2087625 (E.D.Tenn.)

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711 So.2d 1135, 23 Fla. L. Weekly S59, 28 Envtl. L. Rep. 21,069
(Cite as: 711 So.2d 1135)

Supreme Court of Florida.
DENI ASSOCIATES OF FLORIDA, INC., Petitioner,
v.
STATE FARM FIRE & CASUALTY INSURANCE COMPANY, Respondent.
E.C. FOGG, III, et al., Petitioners,
v.
FLORIDA FARM BUREAU MUTUAL INSURANCE COMPANY, Respondent.
Nos. 89115, 89300.

Jan. 29, 1998.
Rehearing Denied June 11, 1998.

Actions were brought to resolve coverage dispute as to whether pollution exclusion of comprehensive general liability (CGL) insurance policies applied to indoor air contamination from ammonia spill and insecticide accidentally sprayed on bystanders. The Circuit Courts, Seventeenth and Fifteenth Judicial Circuits, Broward and Palm Beach Counties, Harry G. Hinckley, Jr., and Robert M. Gross, JJ., entered summary judgment finding coverage. Insurers appealed. The District Court of Appeal, Farmer, J., 678 So.2d 397, reversed and certified question of great public importance. Review was granted. The Supreme Court, Grimes, Senior Justice, held that: (1) doctrine of reasonable expectations is unnecessary and is not adopted; (2) absolute pollution exclusion is unambiguous; and (3) ammonia spilled from blueprint machine in office building and insecticide Ethion 4 Miscible sprayed on bystanders were "pollutants."

Affirmed.

Wells, J., concurred in part, dissented in part, and filed opinion in which Overton, J., concurred.

West Headnotes

[1] Insurance 217 ⚿2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases
Absolute pollution exclusion in comprehensive general liability (CGL) insurance policy is clear and unambiguous.

[2] Insurance 217 ⚿1835(2)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1835 Particular Portions or Provisions of Policies
217k1835(2) k. Exclusions, Exceptions or Limitations. Most Cited Cases
Exclusions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of insured, but this rule applies only when genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to ordinary rules of construction.

[3] Insurance 217 ⚿1832(1)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) k. In General. Most Cited Cases
Rule requiring interpretation of ambiguous policy provisions in favor of insured does not allow courts to rewrite contract, add meaning that is not present, or otherwise reach results contrary to intentions of

parties.

[4] Insurance 217 ⚿2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases
Absolute pollution exclusion in comprehensive general liability (CGL) insurance policy is not limited to environmental or industrial pollution.

[5] Insurance 217 ⚿1823

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1823 k. Exceptions, Exclusions or Limitations. Most Cited Cases
Court cannot place limitations upon plain language of policy exclusion simply because it thinks it should have been written that way.

[6] Insurance 217 ⚿2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases
Drafting history of pollution exclusion of comprehensive general liability (CGL) insurance policy cannot be considered in interpreting the clause unless court concludes that policy language is ambiguous.

[7] Insurance 217 ⚿2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases
Failure of absolute pollution exclusion of comprehensive general liability (CGL) insurance policy to define words "irritant" and "contaminant" did not render clause ambiguous.

[8] Evidence 157 ⚿452

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k449 Nature of Ambiguity or Uncertainty in Instrument
157k452 k. Latent Ambiguity. Most Cited Cases
Principle of latent ambiguity allowing clarification by parol evidence was inapplicable to absolute pollution exclusion of comprehensive general liability (CGL) insurance policy; in pollution exclusion cases, there is only one underlying spill, dispersal, or discharge incident, and question is simply whether it falls within language of exclusion.

[9] Insurance 217 ⚿1817

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1815 Reasonableness
217k1817 k. Reasonable Expectations. Most Cited Cases
Doctrine of reasonable expectations upholding insured's objectively reasonable expectations as to scope of coverage is unnecessary and is not adopted; ambiguities are construed against insurer, applying the doctrine to unambiguous provision would rewrite contract, and construing insurance policies upon determination as to whether insured's subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation.

[10] Insurance 217 ⚿1816

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1815 Reasonableness
217k1816 k. In General. Most Cited Cases
Insurance policies will not be construed to reach absurd result.

[11] Insurance 217 ⚿2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases
Ammonia spilled from blueprint machine in office building and insecticide Ethion 4 Miscible sprayed on bystanders were "pollutants" within meaning of absolute pollution exclusion of comprehensive general liability (CGL) insurance policies; they thus provided no coverage.

***1136** Scott A. Mager of Kluger, Peretz, Kaplan & Berlin, P.A., Fort Lauderdale, Gary S. Gaffney of the Law Offices of Gary S. Gaffney, Davie, for Petitioner Deni Associates of Florida, Inc.

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Elizabeth K. Russo and Kimberly L. Boldt of Elizabeth Russo & Associates, P.A., Miami, and Green & Ackerman, P.A., Fort Lauderdale, for Respondent State Farm Fire & Casualty Insurance Com- pany.

Bonita Kneeland Brown of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., for Respondent Florida Farm Bureau Mutual Insurance Company.

David K. Miller of Broad and Cassel, Tallahassee, and Samantha Boge of Stowell Anton & Kramer, Tallahassee, for Amicus Curiae Associated Builders and Contractors, Inc.

Daniel Y. Sumner and Elizabeth G. Arthur of the Florida Department of Insurance, Tallahassee, for Amicus Curiae The Florida Department of Insurance.

Raymond T. Elligett, Jr. and Amy S. Farrior of Schropp, Buell & Elligett, P.A., Tampa, for Amicus Curiae Academy of Florida Trial Lawyers.

Betsy E. Gallagher of Gallagher & Howard, Tampa, for Amicus Curiae Florida Defense Lawyers Association.

Ronald L. Kammer of Hinshaw & Culbertson, Miami; Laura A. Foggan and John C. Yang of Wiley, Rein & Fielding, Washington, D.C., for Amicus Curiae Insurance Environmental Litigation Association.

Keith E. Hope of Keith Hope, P.A., Key Biscayne, for Amicus Curiae the Florida Fruit & Vegetable Association.

Joseph J. Gleason, Lakeland, for Amicus Curiae Florida Citrus Mutual.

GRIMES, Senior Justice.

We review *State Farm Fire & Casualty Insurance Co. v. Deni Associates of Florida, Inc.*, 678 So.2d 397, 404 (Fla. 4th DCA 1996), in which the court certified the following as a question of great public importance:

> 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?

We have jurisdiction under article V, section 3(b)(4) of the Florida Constitution. In addressing this question, the court below decided two unrelated cases which involved the same issue.

Deni Associates of Florida, Inc. (Deni), an architectural engineering firm, was one of several tenants in a two-story commercial building. In the course of moving equipment in the building, ammonia was accidentally spilled from a blueprint machine. Responding to a 911 call, the fire department evacuated the building, set up ventilators, and broke windows in order to expedite ventilation. ***1137** The building was turned back over to the building manager six hours later. Thereafter, claims were made against Deni for personal injuries sustained from inhalation of the ammonia fumes. Claims were also made by several cotenants seeking reimbursement for loss of income due to evacuation of the building. Deni carried a comprehensive general liability (CGL) policy with State Farm Fire and Casualty Insurance Company.

E.C. Fogg and others, doing business as the partnership of Land-O-Sun Groves (Land-O-Sun), contracted with Colony Services, Inc. (Colony) to aerially spray chemical insecticide furnished by Land-O-Sun on its citrus groves. In the course of spraying, the helicopter splashed insecticide on two men who were standing on adjacent property. The two men subsequently sued Land-O-Sun and Colony for injuries allegedly suffered as a result of being exposed to the insecticide. Land-O-Sun carried a CGL policy with Florida Farm Bureau Mutual Insurance Company.

In both instances, the insurance companies disputed coverage based upon a pollution exclusion provision in their respective policies. In the ensuing declaratory judgment actions, the trial courts in both cases entered summary judgments against the insurance companies. Sitting en banc, the Fourth District Court of Appeal unanimously reversed the judgment in favor of Land-O-Sun and by a split decision reversed the judgment in favor of Deni.

Both pollution exclusion clauses are substantially the same. They exclude from liability coverage any personal injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants." [FN1] Further, each policy contained the following language:

> FN1. The State Farm policy contained the additional words "seepage," "ingestion," and "spill."

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

In its opinion, the court rejected a rule of construction employed in many jurisdictions known as the doctrine of reasonable expectations. The court pointed out that this doctrine had not been adopted in Florida and that in any event because there was no ambiguity in the exclusions, there was no reason to analyze the expectations of the insureds. However, the court chose to pose the certified question with respect to the doctrine of reasonable expectations.

At the outset, we note that the certified question presupposes an ambiguity, whereas the court held that no such ambiguity existed. Notwithstanding, we believe that the legal efficacy of the pollution exclusion is an important issue which should be decided by this Court.

Apparently, the language of this pollution exclusion, sometimes called the absolute pollution exclusion, is in widespread use throughout the country because many courts have addressed the same arguments contained in the briefs filed in the instant cases. A substantial majority of these courts have concluded that the pollution exclusion is clear and unambiguous so as to preclude coverage for all pollution related liability.[FN2] *See, e.g., Economy Preferred Ins. Co. v. Grandadam*, 275 Ill.App.3d 866 212 Ill.Dec. 190, 192, 656 N.E.2d 787, 789 (1995) ("The vast majority of courts that have examined 'absolute pollution exclusions' have found them to be clear and unambiguous."); *McGulrk Sand & Gravel, Inc. v. Meridian Mut. Ins. Co.*, 220 Mich.App. 347, 559 N.W.2d 93, 97 (1996) ("There is a definite national trend to construe such exclusions as clearly and unambiguously precluding cov-

erage for claims arising from pollution."); *Tri County Serv. Co. v. Nationwide Mut. Ins. Co.*, 873 S.W.2d 719, 721 (Tex.App.1993) ("[V]irtually all courts in other jurisdictions which have considered such an exclusion have found that it precludes all coverage of any liability arising out of the release of pollutants.").

> FN2. State Farm and Farm Bureau together with their amici have cited more than 100 cases from 36 other states which have applied the plain language of the pollution exclusion clause to deny coverage.

***1138** [1][2][3] We, too, agree that the pollution exclusion clause is clear and unambiguous. In *State Farm Mutual Automobile Insurance Co. v. Pridgen*, 498 So.2d 1245 (Fla.1986), this Court announced the rule to be followed in the interpretation of exclusionary clauses in insurance policies:

> [E]xclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured, since it is the insurer who usually drafts the policy. *See Excelsior Insurance Co. v. Pomona Park Bar & Package Store*, 369 So.2d 938, 942 (Fla.1979). However, "[o]nly when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite. It does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties."

Id. at 1248.

[4] We cannot accept the conclusion reached by certain courts that because of its ambiguity the pollution exclusion clause only excludes environmental or industrial pollution. *E.g., Westchester Fire Ins. Co. v. City of Pittsburg*, 768 F.Supp. 1463 (D.Kan.1991); *South Cent. Bell Tel. Co. v. Ka-Jon Food Stores*, 644 So.2d 357 (La.1994); *West American Ins. Co. v. Tufco Flooring East, Inc.*, 104 N.C.App. 312, 409 S.E.2d 692 (1991). In responding to such an argument, the court in *American States Insurance Co. v. F.H.S., Inc.*, 843 F.Supp. 187, 190 (S.D.Miss.1994), stated:

> 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. Moreover, the claims that have been asserted against F.H.S. fall well within the exclusion.

(Footnote omitted.)

The United States District Court for the Middle District of Florida addressed a similar argument in *West American Insurance Co. v. Band & Desenberg*, 925 F.Supp. 758 (M.D.Fla.1996), when it said:

> Band also 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. 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. 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. However, as with Band's first argument, this pollution ex-

clusion 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 761-62 (citations omitted). Likewise, in *Bernhardt v. Hartford Fire Insurance Co.*, 102 Md.App. 45, 648 A.2d 1047 (1994), *cert. granted*, 337 Md. 641, 655 A.2d 400 (1995), the court explained:

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.

*1139 648 A.2d at 1051. *See Northern Ins. Co. v. Aardvark Associates, Inc.*, 942 F.2d 189 (3d Cir.1991) (rejecting argument that pollution exclusion clause should be limited to "active polluters").

[5][6] As a court, we cannot place limitations upon the plain language of a policy exclusion simply because we may think it should have been written that way. Moreover, unless we conclude that the policy language is ambiguous, it would be inappropriate for us to consider the arguments pertaining to the drafting history of the pollution exclusion clause. *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.*, 636 So.2d 700 (Fla.1993).

[7] We also reject the argument that because the words "irritant" and "contaminant" are not defined, the policy exclusion is ambiguous. *Sargent Constr. Co. v. State Auto Ins. Co.*, 23 F.3d 1324 (8th Cir.1994). The Fifth Circuit Court of Appeals addressed such an argument in *American States Insurance Co. v. Nethery*, 79 F.3d 473, 476 (5th Cir.1996):

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 (1981). 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.

Accord Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 269 (1st Cir.1990) ("Although the terms within the definition of pollutant-'irritant' and 'contaminant'-are not defined, the drafter of a policy need not define each word in the policy ad infinitum ...."); *see Jefferson Ins. Co. v. Sea World*, 586 So.2d 95, 97 (Fla. 5th DCA 1991) ("The mere failure to provide a definition for a term involving coverage does not necessarily render the term ambiguous.").

[8] We also cannot agree with Judge Klein's suggestion [FN3] that those cases which hold the exclusion to be ambiguous when applied to the facts can be justified as clarifying a latent ambiguity. The principle which permits latent ambiguities to be clarified by parol evidence was first explained by this Court in *Perkins v. O'Donald*, 77 Fla. 710, 722, 82 So. 401, 404 (1919):

FN3. In his concurring and dissenting opinion below, Judge Klein stated that he would uphold the pollution exclusion in the Land-O-Sun case but find it inapplicable in the Deni case.

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.
> *See Ace Elec. Supply Co. v. Terra Nova Elec., 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). In the instant case, there are no alternative factual scenarios to which the pollution exclusion clause might be applied.

The Texas Supreme Court recently explained why the "latent ambiguity" doctrine could never serve as a means for circumventing the plain language of the pollution exclusion clause. *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 n. 4 (Tex.1995). The court first 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 520. However, the court explained that in the pollution exclusion cases, there is only one underlying spill, dispersal, or discharge ***1140** incident, and the question is simply whether it falls within the language of the exclusion. As the Texas 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.

[9] Finally, we address the substance of the certified question which asks whether the doctrine of reasonable expectations should be applied to interpret CGL policies. Under this doctrine, the insured's expectations as to the scope of coverage is upheld provided that such expectations are objectively reasonable. *Max True Plastering Co. v. United States Fidelity & Guar. Co.*, 912 P.2d 861 (Okla.1996). Among those courts which have adopted the doctrine, most only apply it when it can be said that the policy language is ambiguous. *Id.* Notably, a number of courts which have adopted the doctrine of reasonable expectations have refused to apply it to this very pollution exclusion because they have deemed the language of the exclusion to be unambiguous. *E.g., Constitution State Ins. Co. v. Iso-Tex, Inc.*, 61 F.3d 405, 410 (5th Cir.1995); *Park-Ohio Indus., Inc. v. Home Indem. Co.*, 975 F.2d 1215, 1223 (6th Cir.1992); *Resure, Inc. v. Chemical Distribut., Inc.*, 927 F.Supp. 190, 194 (M.D.La.1996), *aff'd*, 114 F.3d 1184 (5th Cir.1997) ; *Bituminous Cas. Corp. v. RPS Co.*, 915 F.Supp. 882, 884 (W.D.Ky.1996); *Vantage Dev. Corp. v. American Env't Tech. Corp.*, 251 N.J.Super. 516, 598 A.2d 948, 955 (1991). Yet, a few courts have invoked the doctrine even in cases where the language of the pollution exclusion was clear and unambiguous. *E.g., Regional Bank of Colorado, N.A. v. St. Paul Fire & Marine Ins. Co.*, 35 F.3d 494 (10th Cir.1994); *Island Associates, Inc. v. Eric Group, Inc.*, 894 F.Supp. 200 (W.D.Pa.1995).

We decline to adopt the doctrine of reasonable expectations.[FN4] There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged. *See Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App.3d 131, 506 N.E.2d 1192, 1197 (1986) ("[T]he reasonable expectation doctrine requires a court to rewrite an insurance contract which does not meet popular expectations. Such rewriting is done regardless of the bargain entered into by the parties to the con- tract.").

> FN4. While supporting the insureds' claim for coverage in these cases, the Florida De-

> partment of Insurance categorically opposes the adoption of the doctrine of reasonable expectations. According to its answer brief: "Adopting the reasonable expectations doctrine will negate the traditional construction guidelines and create greater uncertainty. This Court should not resort to the reasonable expectations doctrine because it will only spawn more litigation to determine the parties' expecta- tions."

Construing insurance policies upon a determination as to whether the insured's subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation. As noted in *Allen v. Prudential Property & Casualty Insurance Co.*, 839 P.2d 798, 803 (Utah 1992):

> 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.

[10][11] We see no reason to address what might be the holding under certain hypothetical situations if we interpret the pollution exclusion clause as it is written because none of those facts are before us. Suffice it to say that insurance policies will not be construed to reach an absurd result. *Travelers Indem. Co. v. Milgen Dev., Inc.*, 297 So.2d 845 (Fla. 3d DCA 1974), *dismissed*, 303 So.2d 334 (Fla.1974). Applying the unambiguous language of the pollution exclusion clause to the facts of these two cases, it is clear that the incidents at issue were excluded from coverage under the respective insurance policies.

*1141 All the claims against Deni came about when chemical fumes were released as a result of the ammonia spill. Ammonia is a colorless, gaseous alkaline compound which is extremely pungent in smell. *Webster's Third New International Dictionary* 70-71 (1976). 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) (1994). There is no doubt that the incident involved in the Deni case was excluded from coverage under the CGL policy. Other jurisdictions have also held that the pollution exclusion is applicable to ammonia leaks and spills which cause respiratory injuries to persons exposed to the ammonia fumes. *Bituminous Cas. Corp. v. RPS Co.*, 915 F.Supp. 882 (W.D.Ky.1996); *American States Ins. Co. v. F.H.S., Inc.*, 843 F.Supp. 187 (S.D.Miss.1994).

In the Fogg case, the injuries resulted from the spraying of Ethion 4 Miscible used to control mites and other pests. Ethion is recognized as a "pollutant" in regulations promulgated under Florida's "Pollutant Discharge Prevention and Control Act" [FN5] and is regulated under the "Florida Pesticide Law." [FN6] We reject Land-O-Sun's premise that when used properly Ethion causes no harm and is not a pollutant. It can obviously cause harm when it is not used properly. Thus, the pollution exclusion of the Florida Farm Bureau policy clearly precludes coverage for the incident in the Land-O-Sun case. We also note that other jurisdictions have reached the same conclusions involving pesticide sprays similar to Ethion. *Protective Nat'l Ins. Co. v. City of Woodhaven*, 438 Mich. 154, 476 N.W.2d 374, 378 (1991) ("It is almost beyond comprehension how anyone would seriously argue that such a pesticide is not an 'irritant, contaminant or pollutant.' "); *Hudson Ins. Co. v. Double D Management Co.*, 768 F.Supp. 1542 (M.D.Fla.1991); *see Federal Insurance Co. v. McNichols*, 77 So.2d 454 (Fla.1955) (upholding policy exclusion for damage caused "by chemicals or dusting powder" in claim for damage resulting from aerial spray of DDT).

> FN5. Ch. 376, Fla. Stat. (1995); Fla. Admin. Code., R. 38I-30.003.
>
> FN6. Ch. 487, Part I, Fla. Stat. (1995).

We approve the decision of the court below in both cases.

It is so ordered.

KOGAN, C.J., and SHAW, HARDING and ANSTEAD, JJ., concur.
WELLS, J., concurs and dissents with an opinion, in which OVERTON, J., concurs.WELLS, Justice, concurring and dissenting.
I concur as to the spraying case involving Florida Farm Bureau. I dissent as to the case involving the printing machine. I adopt the well-reasoned dissent of Judge Klein in the district court's opinion. I believe to do otherwise allows the exclusion to swallow the coverage, rendering the policy to no longer be a comprehensive general liability policy as it was sold to be by State Farm.

OVERTON, J., concurs.
Fla.,1998.
Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.
711 So.2d 1135, 23 Fla. L. Weekly S59, 28 Envtl. L. Rep. 21,069

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Supreme Court of Michigan.
CITY OF GROSSE POINTE PARK, Plaintiff-Appellee,
v.
MICHIGAN MUNICIPAL LIABILITY AND PROPERTY POOL, Defendant-Appellant.

Docket No. 125630.
COA No. 8.
Argued March 9, 2005.
Decided July 19, 2005.

Background: City brought action against its liability insurer for a declaratory judgment that insurer was required to indemnify city for its settlement of suit alleging discharge of overflow sewage into creek. The Circuit Court, Wayne County, Amy P. Hathaway, J., granted city's motion for summary disposition. Insurer appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Insurer's application for leave to appeal was granted.

Holdings: The Supreme Court, Michael F. Cavanagh, J., by an equally divided court held that:
(1) the sewage was pollutant within the meaning of pollution exclusion;
(2) the exclusion had no patent or latent ambiguity as to whether sewage overflow discharged into creek was pollutant;
(3) extrinsic evidence was inadmissible; and
(4) insurer was not estopped from enforcing the exclusion.

Reversed and remanded.

Young, J., concurred in result and filed opinion joined by Taylor and Markman, JJ.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

The Supreme Court reviews decisions on motions for summary dispositions de novo. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[2] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

The proper interpretation and application of an insurance policy is a question of law reviewed de novo. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[3] Insurance 217 ⚿1713

217 Insurance
217XIII Contracts and Policies
217XIII(A) In General
217k1711 Nature of Contracts or Policies
217k1713 k. Policies Considered as Contracts. Most Cited Cases

An insurance policy is much the same as any other contract. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[4] Contracts 95 ⚿147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction

95k147 Intention of Parties
95k147(1) k. In General. Most Cited Cases

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties; to this rule all others are subordinate. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[5] Contracts 95 ⇐152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases

Evidence 157 ⇐448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for Admission of Extrinsic Evidence. Most Cited Cases

If the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[6] Contracts 95 ⇐143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases

Courts will not create ambiguity where the terms of the contract are clear. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[7] Contracts 95 ⇐143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases

Ambiguity in written contracts can fairly be said to consist of two types: patent and latent. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[8] Contracts 95 ⇐143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases

A "patent ambiguity" is one that clearly appears on the face of a document, arising from the language itself. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[9] Contracts 95 ⇐143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases

A "latent ambiguity" is one that does not readily appear in the language of a document, but arises from a collateral matter when the document's terms are applied or executed. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[10] Evidence 157 ⇐452

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k449 Nature of Ambiguity or Uncertainty in Instrument
157k452 k. Latent Ambiguity. Most Cited Cases

Because the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

|11| Evidence 157 ⚿452

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k449 Nature of Ambiguity or Uncertainty in Instrument
157k452 k. Latent Ambiguity. Most Cited Cases

Where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

|12| Insurance 217 ⚿1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, Ordinary or Popular Sense of Language. Most Cited Cases

Where a term is not defined in the insurance policy, it is accorded its commonly understood meaning. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

|13| Insurance 217 ⚿2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases

Overflow sewage discharged into creek during heavy rainfall was "waste" and, therefore, "pollutant" within the meaning of pollution exclusion in city's liability policy. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

|14| Insurance 217 ⚿2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases

Pollution exclusion in city's liability policy had no patent or latent ambiguity as to whether sewage overflow discharged into creek was pollutant within meaning of pollution exclusion, even though the insurer had practice of covering basement backup claims; that practice did not render the clause susceptible to two reasonable, yet mutually exclusive, interpretations. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

|15| Contracts 95 ⚿143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases

Courts are not permitted to create ambiguity where the terms of the contract are clear. (Per

Cavanagh, J., with two judges concurring and three judges concurring in result.).

[16] Contracts 95 ⇐143(4)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(4) k. Subject, Object, or Purpose as Affecting Construction. Most Cited Cases

Contracts 95 ⇐169

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k169 k. Extrinsic Circumstances. Most Cited Cases

In construing contractual provisions, courts must give due regard to the purpose sought to be accomplished by the parties as indicated by the language used, read in the light of the attendant facts and circumstances; attendant facts and circumstances explain the context in which the words were used and may reveal the meaning the parties intended. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[17] Contracts 95 ⇐147(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(1) k. In General. Most Cited Cases

The parties' intent, when ascertained, must, if possible, be given effect and must prevail as against the literal meaning of expressions used in the agreement. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[18] Evidence 157 ⇐452

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k449 Nature of Ambiguity or Uncertainty in Instrument
157k452 k. Latent Ambiguity. Most Cited Cases

Extrinsic evidence is admissible to prove the existence of latent ambiguity in an insurance policy, and if a latent ambiguity is proven to exist, extrinsic evidence may then be used as an aid in the construction of the contract; the detection of a latent ambiguity requires consideration of factors outside the policy itself. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[19] Contracts 95 ⇐175(3)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k175 Evidence to Aid Construction
95k175(3) k. Weight and Sufficiency. Most Cited Cases

A clear and convincing standard does not apply to attempt to prove the existence of a latent ambiguity in a contract. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[20] Evidence 157 ⇐450(5)

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k449 Nature of Ambiguity or Uncertainty in Instrument
157k450 In General
157k450(5) k. Contracts in General. Most Cited Cases

Extrinsic evidence was inadmissible as an aid in the construction of unambiguous pollution exclu-

sion in city's liability policy as applied to claims for discharge of overflow sewage into creek. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[21] Estoppel 156 ⇐78(1)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k78 Contracts
156k78(1) k. In General. Most Cited Cases

The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[22] Insurance 217 ⇐3114

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3105 Claims Process and Settlement
217k3114 k. Payment of Loss. Most Cited Cases

Insurance 217 ⇐3120

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3120 k. Nonwaiver Agreements and Reservation of Rights. Most Cited Cases

Liability insurer's practice of paying sewage backup claims against city insured did not estop it from enforcing pollution exclusion as to liability for sewage overflow into creek; the insurer reserved its right to deny coverage based on the exclusion and timely notified the city at the start of the underlying litigation, and the city's alleged reliance was unjustified. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

[23] Insurance 217 ⇐3111(2)

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3105 Claims Process and Settlement
217k3111 Defense of Action Against Insured
217k3111(2) k. Defense Without Reservation of Rights. Most Cited Cases

When a liability insurer undertakes the defense of its insured, it has a duty to give reasonable notice to the insured that it is proceeding under a reservation of rights, or the insurance company will be estopped from denying its liability. (Per Cavanagh, J., with two judges concurring and three judges concurring in result.).

****108 *189** Bodman L.L.P. (by R. Craig Hupp and James A. Smith), Detroit, MI, for the plaintiff.

Pear Sperling Eggan & Daniels, P.C. (by Thomas E. Daniels and Karl V. Fink), Ypsilanti, MI, for the defendant.

MICHAEL F. CAVANAGH, J.

Plaintiff city of Grosse Pointe Park had a practice of discharging sewage into a nearby creek when its sewer system became overtaxed during, for example, heavy periods of rain. As a result of these discharges, the residents who lived near the creek filed a lawsuit against the city. Defendant Michigan Municipal Liability and Property Pool was the city's insurer and provided a defense in the lawsuit under a reservation of rights. Although the pool covered other claims regarding sewage backups into homes and businesses, the pool refused to cover claims regarding the discharges***190** into the creek on the basis of the insurance policy's pollution exclusion clause.

****109** In this insurance coverage case, we must decide whether the insurance policy's pollution exclusion clause is ambiguous and whether extrinsic evidence may be examined in this particular case to aid in the construction of the policy. We hold that this pollution exclusion clause is not ambiguous;

therefore, consideration of extrinsic evidence as a construction aid is not appropriate. Further, we conclude that the city's discharges fell within the scope of the pollution exclusion provision and, thus, coverage was properly denied on this basis.

Because we conclude that the pollution exclusion clause applies, we must also decide whether the pool is nonetheless estopped from enforcing this clause because of its practice of covering sewage backup claims or because of the manner in which it provided a defense to the city. We hold that under these facts, the pool is not estopped from enforcing the pollution exclusion clause. The pool timely reserved its rights under the policy, and the city was aware of the reservation. While the city claims to have suffered prejudice as a result of its reliance on a belief that the underlying lawsuit would be covered, this belief was not justifiable under the facts presented in this case. Accordingly, the decision of the Court of Appeals is reversed, and we remand this case to the trial court for entry of an order of summary disposition in favor of the pool.

I. Facts and Proceedings

In 1938, plaintiff city of Grosse Pointe Park entered into a contract with the city of Detroit to use Detroit's sewer system. Under the terms of the contract, Grosse Pointe Park acquired the right to pump the contents of ***191** its sewer line into an interceptor sewer for transport to Detroit's treatment plant. Further, Grosse Pointe Park was permitted under the contract to build a pump station and a discharge pipe. If Grosse Pointe Park's sewer flow exceeded eighty-four cubic feet a second and its line became overtaxed, the discharge pipe would allow Grosse Pointe Park to discharge the overflow into Fox Creek. Fox Creek is a tributary located in Detroit, but rests close to the Detroit-Grosse Pointe Park border.

At the time, Grosse Pointe Park had what is known as a combined sewer system, whereby sewage and rainwater are transported to a treatment plant in a single sewer line. If, for example, there was a heavy rainfall and the capacity of the sewer system became strained, both sewage and rainwater would flow into the basements of buildings connected to the city's sewer line. To relieve the overflow and prevent basement backups, the city would pump sewage and rainwater into Fox Creek. Beginning in about 1940, the city began discharging overflow from the combined sewer system into Fox Creek. Soon after the first discharges, residents near Fox Creek began to complain of this practice. Nonetheless, this practice continued until 1995, roughly fifty-five years. [FN1]

> FN1. Grosse Pointe Park now uses a separated sewer system, whereby sewage and rainwater are collected and transported in separate sewer lines. Further, the city has blocked the discharge pipe leading into Fox Creek.

Defendant Michigan Municipal Liability and Property Pool is a group self-insurance pool created by certain local governments. See MCL 124.5. Every year, beginning in 1985 and running through 1998, Grosse Pointe Park purchased one-year, occurrence-based liability policies from the pool. Each policy period ran from August 1 to July 31. While these ***192** policies were in effect, Grosse Pointe Park residents made numerous claims against the city for sewage backups into their homes and businesses,****110** and the pool covered these claims. At issue in this case is the policy issued on August 1, 1994, and effective through July 31, 1995.

Underlying this case is a class action filed in Wayne Circuit Court against the city by residents who lived near Fox Creek, *Etheridge v. Grosse Pointe Park* (Docket No. 95-527115NZ).[FN2] The *Etheridge* complaint was filed on September 14, 1995, and the plaintiffs alleged that their homes were flooded by the city's discharge of sewer overflow into Fox Creek on July 24, 1995. Because of this discharge, as well as the city's long-term practice of discharging into Fox Creek, the plaintiff class alleged claims for trespass, nuisance, trespass/nuisance, gross negligence, and a taking; also al-

leged were third-party beneficiary claims arising under the contracts between Grosse Pointe Park and Detroit. Grosse Pointe Park submitted the *Etheridge* complaint to the pool for defense and indemnification coverage.

> FN2. The *Etheridge* complaint also named the city of Detroit as a defendant.

On October 6, 1995, the pool sent a letter to the city, indicating that it would provide the city a defense, but that it was reserving its rights under the policy. The letter provided, in pertinent part:

> Our review of the [*Etheridge*] Complaint reveals that if judgment or damages are awarded based on certain allegations, the judgments based on those allegations may not be covered by the coverage contract. The purpose of this letter is to point out the allegations and exposures that may not be covered, and to formally advise you that we will defend the entire action, with your cooperation, but will *not* pay ***193** any damages not covered by our contract. In legal terms, we are reserving our rights to restrict payments to those owed under the coverage contract.
>
> * * *
>
> Please be advised that if there is any judgment against the City of Grosse Pointe Park for eminent domain, a discharge of any pollutants, or an intentional act, the Michigan Municipal Liability & Property Pool reserves the right not to indemnify Grosse Pointe Park for said damages.

After noting the allegations and exposures, among other things, the pool's letter referred the city to section V of the insurance policy and specifically quoted the following language from that section-the pollution exclusion clause:

> In addition to the specific exclusions in SECTION I-COVERAGES A-BODILY INJURY AND PROPERTY DAMAGE LIABILITY, B-PERSONAL AND ADVERTISING INJURY LIABILITY, C-MEDICAL PAYMENTS, D-PUBLIC OFFICIALS ERRORS AND OMISSIONS, AND E-AUTO, this coverage does not apply to:
>
> d. bodily Injury or Property Damage arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> (1) At or form [sic] any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any Member;
>
> (2) At or from any premises, site or location which is or was at any time used by or fro [sic] any Member or others for the handling, storage, disposal, processing or treatment of waste;
>
> (3) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or fro [sic] may [sic] Member or any person ****111** or organization for whom you may be legally responsible, or
>
> ***194** (4) At or from any premises, site or location on which any Member or any contractors or subcontractors working directly or indirectly on any Member's behalf are performing operations:
>
> (a) if the pollutants are brought on or to the premises, site or location in connection with such operations by such Member contractor or subcontractor; or
>
> (b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.
>
> * * *
>
> 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 pool received all the pleadings and parti-

cipated in the *Etheridge* litigation by attending meetings, hearings, and facilitation. Notably, the pool also continued to cover basement backup claims during the *Etheridge* lawsuit. Settlement was ultimately reached in the *Etheridge* lawsuit, whereby Grosse Pointe Park and Detroit would each pay the plaintiffs $1.9 million and take the necessary action to stop the discharges into Fox Creek. The pool then notified Grosse Pointe Park that indemnification coverage would be denied. Nonetheless, Grosse Pointe Park finalized the *Etheridge* settlement and filed this declaratory judgment action.[FN3] Both parties moved for summary disposition, and the trial ***195** court concluded that the pool was equitably estopped from invoking the pollution exclusion clause to deny coverage because the pool had previously paid basement backup claims without incident.[FN4] Thus, the trial court granted the city's motions for summary disposition and ordered the pool to indemnify the city for the amount of the *Etheridge* settlement. The pool appealed this decision.

> FN3. In count I, the city alleged that the pool breached the insurance contract by failing to provide coverage in the *Etheridge* lawsuit. Count II alleged that the pool breached its duty to timely investigate, decide whether the claims were covered, and timely communicate its decision to deny coverage. In counts III through V, the city alleged alternative theories seeking equitable relief. And count VI alleged a violation of the Michigan Consumer Protection Act.
>
> FN4. The trial court also dismissed counts II and VI of the complaint and dismissed counts III through V as moot in light of the relief granted under count I.

In a two-to-one decision, the Court of Appeals reversed the trial court's determination that the pool was estopped as a matter of law from denying coverage, reasoning that a question of fact existed on this issue. Unpublished opinion per curiam of the Court of Appeals, issued October 30, 2003 (Docket No. 228347). Moreover, the Court of Appeals majority concluded, among other things, that the city presented a question of fact regarding the parties' intent concerning the application and meaning of the pollution exclusion clause. Because of the pool's practice of paying basement backup claims without invoking the pollution exclusion clause, the Court of Appeals held that extrinsic evidence regarding such payments may reveal an ambiguity in the insurance policy, relying on *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.*, 197 Mich.App. 482, 496 N.W.2d 373 (1992), aff'd 445 Mich. 558, 519 N.W.2d 864 (1994), overruled on other grounds in *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 664 N.W.2d 776 (2003). ****112** Judge O'Connell dissenting in part, asserted that because the policy was unambiguous and the pool reserved its rights under the policy, (1) consideration of extrinsic evidence was unwarranted, and (2) equitable estoppel did not apply.

***196** This Court granted the pool's application for leave to appeal, limited to the issues whether: (1) sewage is a "pollutant" under the applicable insurance policy's pollution exclusion clause; (2) extrinsic evidence may be used to establish an ambiguity in this pollution exclusion clause; and (3) the pool may be estopped from asserting the pollution exclusion clause.[FN5]

> FN5. 471 Mich. 915, 688 N.W.2d 510 (2004). After granting leave to appeal and before this Court heard oral arguments in this case, we granted the pool's motion for immediate consideration but denied its motion to strike the city's brief on appeal. Unpublished order of the Supreme Court, entered March 4, 2005 (Docket No. 125630). In response to the pool's motions, the city filed a brief in opposition to the motions, a motion for immediate consideration, and a motion to supplement the record on appeal. We did not rule on the city's motions before entertaining oral ar-

guments. Thus, we take this opportunity to grant the city's motion for immediate consideration, but deny its motion to supplement the record on appeal.

II. Analysis

[1][2] We review decisions on motions for summary dispositions de novo. *American Federation of State, Co. & Muni Employees v. Detroit,* 468 Mich. 388, 398, 662 N.W.2d 695 (2003). Similarly, the proper interpretation and application of an insurance policy is a question of law that we review de novo. *Cohen v. Auto Club Ins. Ass'n,* 463 Mich. 525, 528, 620 N.W.2d 840 (2001).

A. Extrinsic Evidence and the Pollution Exclusion Clause

The Court of Appeals observed that although an insurance policy is enforced according to its terms, the contracting parties' intent controls. Further, the Court of Appeals reasoned that because the city had presented evidence that the pool repeatedly paid basement backup claims, a question of fact existed with respect to the ***197** parties' intent regarding the applicability of the pollution exclusion clause. Relying on *Michigan Millers, supra,*[FN6] the Court of Appeals concluded that the insurance policy was not "so unambiguous that no extrinsic evidence of the parties' intent ****113** can be considered." Op. at ---- n. 9. We disagree with the Court of Appeals rationale.

FN6. In *Michigan Millers,* the defendant insured submitted discovery requests to the plaintiff and other insurers, desiring information on the plaintiff's handling of certain types of insurance claims. The insurers denied the requests. The trial court agreed that the information sought was irrelevant and assessed sanctions on the defendant. On appeal, the defendant claimed that how the insurers handled past claims was relevant to show whether the term "suit," as used in the contract, was ambiguous. Stated differently, the defendant argued that extrinsic evidence would tend to show that the insurers' construction of "suit" was wrong, or at least ambiguous. The plaintiff asserted that the requested information was irrelevant because: (1) if the term is unambiguous, extrinsic evidence is not admissible to contradict the insurance policy; or (2) if the term is ambiguous, the term is construed against the insurers and in favor of the defendant. The Court of Appeals agreed with the defendant.

The Court of Appeals noted that the plaintiff's rationale ignored "a third principle of evidence. Extrinsic evidence is admissible to show the *existence* of an ambiguity." *Michigan Millers, supra* at 495, 496 N.W.2d 373 (emphasis in original). Accordingly, the Court of Appeals found that the information the defendant sought was relevant to show the insurers' prior interpretations of the term "suit." Thus, the Court of Appeals vacated the trial court's order assessing sanctions. However, the Court of Appeals noted that the purpose for which the defendant wanted the information was rendered moot because the Court of Appeals actually interpreted the term "suit" and concluded that a "suit" had been brought.

[3][4][5][6] "An insurance policy is much the same as any other contract." *Auto-Owners Ins. Co. v. Churchman,* 440 Mich. 560, 566, 489 N.W.2d 431 (1992). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." *McIntosh v. Groomes,* 227 Mich. 215, 218, 198 N.W. 954 (1924). In light of this cardinal rule, and to effectuate***198** the principle of freedom of contract, this Court has generally observed that "[i]f the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." *New Amsterdam*

Cas. Co. v. Sokolowski, 374 Mich. 340, 342, 132 N.W.2d 66 (1965); see also *Frankenmuth Mut. Ins. Co. v. Masters,* 460 Mich. 105, 111, 595 N.W.2d 832 (1999). "However, we will not create ambiguity where the terms of the contract are clear." *Id.*

[7][8][9][10][11] In light of these principles, we note that consideration of extrinsic evidence generally depends on some finding of contractual ambiguity. Ambiguity in written contracts can fairly be said to consist of two types: patent and latent. A patent ambiguity is one "that clearly appears on the face of a document, arising from the language itself." Black's Law Dictionary (7th ed). See also *Hall v. Equitable Life Assurance Society,* 295 Mich. 404, 409, 295 N.W. 204 (1940). Accordingly, resort to extrinsic evidence is unnecessary to detect a patent ambiguity. A latent ambiguity, however, is one "that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." Black's Law Dictionary (7th ed.). Because "the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist." *McCarty v. Mercury Metalcraft Co.,* 372 Mich. 567, 575, 127 N.W.2d 340 (1964). In other words, "where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract." *Id.* Thus, the question becomes whether an ambiguity exists in this insurance policy's pollution exclusion clause.

[12][13] ***199** This insurance policy provides that coverage is excluded when bodily injury or property damage results from "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants." The policy further defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." The insurance policy, however, does not specifically define "waste." Where a term is not defined in the policy, it is accorded its commonly understood meaning. *Allstate Ins. Co. v. McCarn,* 466 Mich. 277, 280, 645 N.W.2d 20 (2002) (*McCarn I*). "Waste" is commonly understood to include sewage.[FN7] In other words, "waste" is commonly understood to include urine and feces, bathwater and dishwater, toilet paper, feminine napkins and tampons, condoms, and the countless other substances typically introduced into a sewer system.

> FN7. See, e.g., *American Heritage Dictionary* (2d college ed., 1982) (defining "waste" to include "[a] useless or worthless by-product ... [g]arbage; trash ... [t]he undigested residue of food eliminated from the body").

****114** [14][15] We believe that the term "waste" in this policy is not patently ambiguous and the text of the policy fairly admits of but one interpretation.[FN8] We must observe, however, that we do not make this determination lightly. Again, the cardinal rule in the interpretation of contracts is to ascertain and give effect to the parties' intentions. *McIntosh, supra* at 218, 198 N.W. 954. We are also mindful of Professor Corbin's warning that when judges attempt to enforce a contract according to their own ***200** understanding of what is plain and clear, these judges run the risk of substituting their own judgment for the intent of the parties and, thus, making a contract for the parties that was never intended. See *Stark v. Budwarker, Inc.,* 25 Mich.App. 305, 314, 181 N.W.2d 298 (1970).[FN9] indeed, such a result would actuaLLY UNDERMINE THE FREEDOM OF contract principle. Nonetheless, we conclude that this pollution exclusion clause is not patently ambiguous because an ambiguity does not readily appear in the text of the policy. Again, courts are not permitted to "create ambiguity where the terms of the contract are clear." *Masters, supra* at 111, 595 N.W.2d 832. Therefore, we will apply this pollution exclusion clause as written unless we determine that a latent

ambiguity arises from a matter outside of the text of the policy.

FN8. See, e.g., *Raska v. Farm Bureau Mut. Ins. Co. of Michigan,* 412 Mich. 355, 362, 314 N.W.2d 440 (1982) ("Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear."). See also *Bianchi v. Automobile Club of Michigan,* 437 Mich. 65, 70-73, 467 N.W.2d 17 (1991); *Auto Club Ins. Ass'n v. DeLaGarza,* 433 Mich. 208, 213, 444 N.W.2d 803 (1989).

FN9. Professor Corbin observes:

> On reading the words of a contract, a judge may jump to the instant and confident opinion that these words have but one reasonable meaning. A greater familiarity with dictionaries and the usages of words, a better understanding of the uncertainties of languages, and a comparative study of more cases in the field of interpretation, will make one beware of holding such an opinion. A judge who believes that contract terms can have a single, reasonable meaning that is apparent without reference to extrinsic evidence of the parties' intentions "retires into that lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where [people] may express their purposes, not only with accuracy, but with fulness [sic]; and where, if the writer has been careful, a lawyer ... may sit in [a] chair, inspect the text, and answer all questions ...." Such a belief is unrealistic, for "the fatal necessity of looking outside the text in order to identify persons and things, tends steadily to destroy such illusions and to reveal the essential imperfection of language, whether spoken or written." [5 Corbin, Contracts, § 24.7, pp. 32-33 (rev. ed., 1998) (internal citations omitted).]

[16][17][18] We initially observe that it is well-established that "[i]n construing [contractual provisions] due regard must be had to the purpose sought to be accomplished *201 by the parties as indicated by the language used, read in the light of the attendant facts and circumstances. Such intent when ascertained must, if possible, be given effect and must prevail as against the literal meaning of expressions used in the agreement." *W. O. Barnes Co., Inc. v. Folsinski,* 337 Mich. 370, 376-377, 60 N.W.2d 302 (1953). Further, attendant facts and circumstances explain the context in which the words were used and may reveal the meaning the parties intended. *Sobczak v. Kotwicki,* 347 Mich. 242, 249, 79 N.W.2d 471 (1956).[FN10] In this respect,**115 the detection of a latent ambiguity unquestionably requires consideration of factors outside the policy itself. *McCarty, supra* at 575, 127 N.W.2d 340. Therefore, extrinsic evidence is admissible to prove the existence of the ambiguity, and, if a latent ambiguity is proven to exist, extrinsic evidence may then be used as an aid in the construction of the contract. *Id.;* see also *Goodwin, Inc. v. Orson E. Coe Pontiac, Inc.,* 392 Mich. 195, 209-210, 220 N.W.2d 664 (1974). In light of the attendant facts and circumstances of this case, we conclude that a latent ambiguity does not exist.

FN10. See also 5 Corbin, Contracts § 24.7, p. 31 (rev. ed., 1998) ("It is therefore invariably necessary, before a court can give any meaning to the words of a contract and can select a single meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence be admitted to make the court aware of the 'surrounding circumstances,' including the persons, objects, and events to which the words can be applied and which caused the words to be used." [internal citations omitted]); see also 2 Restatement Contracts, 2d, §§ 200-203.

[19] We are unpersuaded by Grosse Pointe Park's arguments that the pool's practice of covering basement backup claims somehow shows that this pollution exclusion clause is ambiguous. The pool's practice of paying backup claims does not render the clause susceptible to two reasonable, yet mutually exclusive, ***202** interpretations. Indeed, the pool's practice does not change our conclusions that the parties intended for coverage to be excluded when property damage results from the actual discharge of pollutants, that pollutants include waste, and that the term "waste" include urine and feces, bathwater and dishwater, toilet paper, feminine napkins and tampons, condoms, and the countless other substances typically introduced into a sewer system. Indeed, a latent ambiguity does not exist under this policy because when we consider how the clause applies or has been applied, it cannot be said that the clause was intended to have a different meaning than that reflected in the text of the policy. Accordingly, after considering factors outside the four corners of this policy, we cannot detect any latent ambiguities.[FN11] In ***203** other words, the extrinsic evidence introduced by Grosse Pointe Park does not prove the existence of a latent ambiguity. Thus, it is unnecessary to examine****116** outside factors as an aid in construing this policy.

> FN11. We disagree with Justice Young's proposal to adopt a clear and convincing standard with respect to proving the existence of a latent ambiguity. In support of this standard, Justice Young relies on a broad reading of *Quality Products & Concepts Co. v. Nagel Precision, Inc.*, 469 Mich. 362, 666 N.W.2d 251 (2003). However, *Nagel* was concerned with the circumstances under which a contract can be *waived or modified.* Accordingly, where a party alleges waiver or modification, that party is alleging that both contracting parties mutually assented to *alter or amend* the existing contract. Therefore, a clear and convincing standard in this context makes sense. This standard, however, does not necessarily make sense where a party alleges the existence of a latent ambiguity.
>
> When a party alleges the existence of a latent ambiguity, that party, contrary to Justice Young's implications, is not attempting to alter or amend the bargain struck. Rather, the party argues that application of the contract's terms would be inconsistent with the parties' intent. Thus, the party alleging the existence of a latent ambiguity is arguing that the parties' intent should be effectuated-the cardinal rule of contract interpretation. However, the party alleging the existence of a latent ambiguity is not arguing that the contract was altered or amended.
>
> Accordingly, *Nagel* is distinguishable and we believe that Justice Young's broad reading of that decision to support his view cannot withstand scrutiny. Further, the other decisions Justice Young uses to support his rationale are distinguishable as well. In our view, none of these cases supports his preference to impose a clear and convincing standard on a party arguing the existence of a latent ambiguity. While Justice Young may be inclined to broadly extend "common theme[s]," without more we must decline in this instance to adopt Justice Young's preference to impose a clear and convincing standard on contracting parties.

[20] In sum, we conclude that this pollution exclusion clause is not patently ambiguous. Further, review of extrinsic evidence neither leads to the detection nor proves the existence of a latent ambiguity. Thus, because an ambiguity does not exist, extrinsic evidence is inadmissible as an aid in the construction of this policy. Accordingly, we hold that the Court of Appeals erred when it concluded that the insurance policy was not "so unambiguous" and, thus, extrinsic evidence was generally admiss-

ible.

Because we believe that this policy's pollution exclusion clause is unambiguous, we will enforce it according to its terms and consistent with the parties' intent. When we accord "waste" the meaning intended by the parties, as well as its commonly understood meaning, we have little difficulty concluding that the city discharged "pollutants" into Fox Creek. Thus, we hold that the city's discharges fell under the purview of this insurance policy's pollution exclusion clause.

B. Estoppel

[21] Having concluded that the discharges fall under the pollution exclusion clause, we must next decide whether the pool is nonetheless estopped from enforcing the clause. "The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing***204** a specific provision contained in the contract." *Morales v. Auto-Owners Ins. Co.*, 458 Mich. 288, 295, 582 N.W.2d 776 (1998). For equitable estoppel to apply, the city must establish that (1) the pool's acts or representations induced the city to believe that the pollution exclusion clause would not be enforced and that coverage would be provided, (2) the city justifiably relied on this belief, and (3) the city was prejudiced as a result of its reliance on its belief that the clause would not be enforced and coverage would be provided. See, e.g., *Morales, supra* at 296-297, 582 N.W.2d 776.

[22] The city maintains that the pool should be estopped from enforcing the pollution exclusion clause because of the pool's practice of covering basement backup claims before, during, and after the underlying litigation in this case, without ever invoking the pollution exclusion clause. According to the city, the pool's failure to enforce this clause, as well as the manner in which the pool conducted the defense, led the city to believe that the underlying litigation would be covered. The city maintains that were it not for this belief, it would have conducted discovery and settlement negotiations differently. Thus, the city contends that it was prejudiced by its reliance on its belief that coverage would be provided in the underlying suit.

The Court of Appeals, in part, remanded this matter to the trial court for consideration of this issue, concluding that a question of fact remained whether the pool should be estopped from asserting the pollution exclusion clause. We disagree. Under the facts of this case, a reasonable trier of fact could not conclude that the city satisfied its burden.

In this case, it cannot be said that the city's reliance on the pool's actions or representations was justified. At the beginning of the underlying litigation, the pool ***205** notified the city that it would provide a defense in the underlying litigation, "but will *not* pay any damages not covered by our contract. In legal terms, we are reserving our rights to restrict payments to those owed under the coverage contract." The pool timely notified the city that if any judgment was entered against the city for the discharge of pollutants into Fox Creek, ****117** the pool was reserving the right to not indemnify, specifically quoting the pollution exclusion clause. We find the pool's reservation of rights particularly damaging to the city's estoppel theory.

[23] "[W]hen an insurance company undertakes the defense of its insured, it has a duty to give reasonable notice to the insured that it is proceeding under a reservation of rights, or the insurance company will be estopped from denying its liability." *Kirschner v. Process Design Assoc., Inc.*, 459 Mich. 587, 593, 592 N.W.2d 707 (1999). Here, the pool duly reserved its rights, and the city was aware of the reservation. Accordingly, the city was on notice that the pool might not indemnify it. Moreover, by the city's own account, the pool had never before reserved its right to contest coverage under the auspices of the pollution exclusion clause. Yet the city claims that it was justified in believing that the pool would indemnify it. We believe, however, that these facts, when viewed in the light most favorable to the city, weigh against a finding of estoppel.

The city was clearly on notice that the pool

might not provide coverage under the pollution exclusion clause. While the city was aware that the pool had never sought to enforce the pollution exclusion clause before the underlying litigation, this Court had not been presented with any evidence that the pool reserved its rights on the basis of the pollution exclusion clause with regard to any other claim. ***206** Because the pool timely notified the city at the start of the underlying litigation that it was reserving its rights, the pool specifically invoked the pollution exclusion clause, the pool had done neither before, and, arguably, the nature of the discharges differed from the nature of the basement backups, we fail to see how the city was justified in believing that indemnification would be provided in this particular case.[FN12]

> FN12. We disagree with Justice Young's expansive reading of *Kirschner, supra.* Relying on that decision, Justice Young posits that even if Grosse Pointe Park could prove all the elements for the application of estoppel, the city will still be unprotected because estoppel can never be applied to extend coverage, period. In our view, Justice Young misreads *Kirschner. Kirschner* does not set forth the inflexible rule that Justice Young prefers. Indeed, Justice Weaver's *Kirschner* opinion was careful to avoid making sweeping generalizations or extending *Ruddock v. Detroit Life Ins. Co.,* 209 Mich. 638, 177 N.W. 242 (1920), beyond its intended bounds. Further, *Kirschner, supra* at 594-595, 592 N.W.2d 707, prudently observed that in some instances, courts have applied the doctrine of estoppel to bring within coverage risks not covered by the policy. *Kirschner* then provided a few examples-examples that we believe are not exhaustive nor could reasonably be inferred to be exhaustive. Justice Young further laments that we do not give credence to the "prominent language" from *Kirschner* that emphasizes that "[t]he application of ... estoppel is limited ...." *Post* at 126 n. 35, quoting *Kirschner, supra* at 593-594, 592 N.W.2d 707. We respectfully disagree. Rather, we believe that our evenhanded reading of *Kirschner* considers *all* of the opinion's "prominent language." For example, this Court observed that the "application of waiver and estoppel is limited, and, *usually,* the doctrines will not be applied to broaden the coverage of a policy ...." *Kirschner, supra* at 594, 592 N.W.2d 707 (emphasis added).
>
> In any event, because Grosse Pointe Park's estoppel claim fails and the discharges fall under the purview of the pollution exclusion clause-as Justice Young likewise concludes-it is unnecessary to determine whether estoppel could be used to bring the discharges within coverage. In other words, because Grosse Pointe Park's estoppel claim fails, it is unnecessary to adopt Justice Young's preferred rule, decide whether coverage in this case should be expanded, or depart from this Court's prior precedent.

In sum, we find the city's position untenable. No reasonable trier of fact could conclude that the city was ***207** justified in ****118** believing that indemnification was certainly going to be provided in this case when the pool reasonably notified the city to the contrary. Because we find that the city's reliance was unjustified, the estoppel claim fails and it is unnecessary for us to consider whether the city was prejudiced by its reliance. Moreover, we believe that the manner in which the pool provided a defense in this particular case was not inconsistent with the reservation of rights or the pool's practice of paying basement backup claims. Thus, the pool is not estopped from enforcing the pollution exclusion clause, and the trial court erred in concluding otherwise.[FN13]

FN13. In *Kirschner, supra,* I joined Justice

> KELLY'S concurrence. I do not retreat from the view expressed in that opinion. Our state would be well-served by a rule that requires an insurer to timely notify the court, the insured, and other parties that it is reserving its rights under the policy. Further, a court should be empowered to refuse to effectuate an untimely reservation of rights when the court determines that the insured was prejudiced. In this case, however, the pool timely reserved its rights and the city was made aware of the reservation of rights.

Accordingly, the decision of the Court of Appeals is reversed and we remand this case to the trial court for entry of an order of summary disposition in favor of the pool. MCR 7.302(G)(1).

III. Conclusion

Under the facts of this case, we hold that the city's discharges fell within the purview of the pollution exclusion clause. This pollution exclusion clause is not ambiguous; therefore, consideration of extrinsic evidence as aid in the construction of the policy is not appropriate. Further, we hold that under these facts, the pool is not estopped from enforcing the pollution exclusion clause. Therefore, the decision of the Court ***208** of Appeals is reversed and we remand this case to the trial court for entry of an order of summary disposition in favor of the pool.

ELIZABETH A. WEAVER and MARILYN J. KELLY, JJ., concur.

CORRIGAN, J., not participating.

YOUNG, J.

Although this Court is equally divided on the appropriate legal analysis, this Court is unanimous regarding the proper result. All members of this Court agree that the insurance policy at issue is not latently ambiguous and that it must therefore be enforced as written. According to the plain language of the policy's pollution exclusion clause, it is clear that sewage is a "pollutant." Moreover, this Court is in unanimous agreement that equitable estoppel is not applicable. Accordingly, all members of this Court agree that the judgment of the Court of Appeals must be reversed and this case remanded to the trial court for entry of an order granting the Michigan Municipal Liability and Property Pool's motion for summary disposition.[FN1]

> FN1. It is important to note that neither Justice Cavanagh's opinion nor ours has garnered a majority. Therefore neither establishes binding precedent. As we stated in *People v. Anderson,* 389 Mich. 155, 170, 205 N.W.2d 461 (1973), overruled in part on other grounds by *People v. Hickman,* 470 Mich. 602, 684 N.W.2d 267 (2004), "The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties."

While all justices conclude that sewage is a "pollutant" under the clear and unambiguous language of the policy's pollution exclusion clause, the justices joining this opinion believe that principles of contract****119** enforcement require special proofs when a contracting party seeks to vary the terms of a written agreement by alleging latent ambiguity. Thus, while extrinsic evidence***209** generally may be introduced to demonstrate the existence of a latent ambiguity, we conclude that a court must presume that the contracting parties' intent is manifested in the actual language used in the contract itself unless the party alleging the existence of the latent ambiguity rebuts this presumption by proving with clear and convincing evidence that such an ambiguity does indeed exist. Here, we conclude that the city of Grosse Pointe Park has not presented clear and convincing evidence to demonstrate that a latent ambiguity actually exits. We further conclude that the Pool is not equitably estopped from denying coverage because, under the well-

established rule articulated by this Court in *Ruddock v. Detroit Life Ins. Co.*, 209 Mich. 638, 177 N.W. 242 [FN2] and reiterated in *Kirschner v. Process Design Assoc., Inc.*, 459 Mich. 587, 592 N.W.2d 707[FN3] estoppel will not be applied to expand coverage beyond the particular risks covered by the actual insurance policy itself.

FN2. 209 Mich. 638, 177 N.W. 242 (1920).

FN3. 459 Mich. 587, 592 N.W.2d 707 (1999).

I. FACTS & PROCEDURAL HISTORY

In 1938, Grosse Pointe Park and the city of Detroit entered into an agreement under which Grosse Pointe Park was permitted to discharge overflow sewage into Fox Creek, a tributary near the Grosse Pointe Park-Detroit border. Release of excess sewage into Fox Creek was necessary because Grosse Pointe Park's "combined" sewer system-a single sewer line used to transport both sewage (e.g., from toilets) and storm water runoff-would become overtaxed during periods of heavy rainfall. If Grosse Pointe Park did not use Fox Creek as a release valve during such periods, sewage would back up into the basements of homes and businesses. It is undisputed that from ***210** 1940 to 1995, Grosse Pointe Park released overflow rainwater and sewage into Fox Creek hundreds of times.[FN4]

FN4. Grosse Pointe Park has built and now operates a "separate" sewer system, which uses different lines for sewage and rainwater runoff. As such, Grosse Pointe Park no longer releases overflow sewage into Fox Creek.

Each year from 1985 to 1998, Grosse Pointe Park purchased annual "occurrence-based" commercial general liability policies from the Pool, a self-insurance pool comprised of local governments.[FN5] During this period, under successive annual***120** policies, the Pool paid numerous insurance claims submitted by Grosse Pointe Park residents for sewage backups that occurred in their ***211** basements. It did so without issuing reservation of rights letters based on the policies' pollution exclusion clauses, unlike in the present case. The particular insurance policy at issue covers the period from August 1, 1994, to August 1, 1995.

FN5. Municipal insurance pools are statutorily authorized under MCL 124.5, which provides:

(1) Notwithstanding any other provision of law to the contrary, any 2 or more municipal corporations, by intergovernmental contract, may form a group self-insurance pool to provide for joint or cooperative action relative to their financial and administrative resources for the purpose of providing to the participating municipal corporations risk management and coverage for pool members and employees of pool members, for acts or omissions arising out of the scope of their employment, including any or all of the following:

(a) Casualty insurance, including general and professional liability coverage.

(b) Property insurance, including marine insurance and inland navigation and transportation insurance coverage.

(c) Automobile insurance, including motor vehicle liability insurance coverage and security for motor vehicles owned or operated, as required by section 3101 of the insurance code of 1956, 1956 PA 218, MCL 500.3101, and protection against other liability and loss associated with the ownership of motor vehicles.

(d) Surety and fidelity insurance cover- age.

(e) Umbrella and excess insurance coverages.

The current dispute derives from an underlying class action (the *Etheridge* litigation) brought by Grosse Pointe Park residents against the city for discharges made into Fox Creek in July 1995. In the *Etheridge* complaint, filed on September 14, 1995, the class action plaintiffs sued Grosse Pointe Park under various trespass, nuisance, and negligence theories for sewage backups that occurred in their homes and businesses. In addition to basement backup claims, the *Etheridge* plaintiffs also submitted insurance claims for alleged damage caused to boats, docks, seawalls, garages, lawns, shrubbery, and outdoor furniture resulting from the city's release of sewage into Fox Creek.

On October 6, 1995, three weeks after the *Etheridge* suit was filed, the Pool provided the city a defense under a reservation of rights letter. In the letter, the Pool specifically quoted the insurance policy's pollution exclusion clause and warned the city that it had not yet determined whether it would cover any liability arising from the *Etheridge* suit. The letter concluded by stating:

> Please be advised that if there is any judgment against the City of Grosse Pointe Park for eminent domain, *a discharge of any pollutants,* or an intentional act, the Michigan Municipal Liability & Property Pool *reserves the right not to indemnify* Grosse Pointe Park for said damages. [Emphasis added.]

The Pool subsequently assigned an outside adjusting firm to monitor the *Etheridge* lawsuit. During the course of the *Etheridge* litigation, the Pool's adjuster ***212** received copies of all pleadings and attended meetings with the litigants. The Pool also paid in-house sewage backup claims involving residences and businesses unrelated to the *Etheridge* suit while the *Etheridge* litigation was proceeding. After several facilitation sessions, in August 1997, the *Etheridge* plaintiffs agreed to settle with Grosse Pointe Park for $1.9 million.[FN6]

> FN6. A similar settlement was reached with the city of Detroit, which was also named as a defendant in the class action, for $1.9 million.

Before the *Etheridge* settlement was finalized, however, the Pool informed the city that the Pool's outside counsel did not believe that the Pool was obligated to indemnify the city given the policy's pollution exclusion clause. Subsequently, the Pool formally notified the city that coverage would be denied. Nevertheless, the city proceeded to approve the $1.9 million settlement with the *Etheridge* plaintiffs a few months later.

The city then filed suit in the Wayne Circuit Court seeking a declaratory judgment that the Pool was obligated to indemnify the city for the *Etheridge* settlement. After lengthy discovery, both the Pool and the city filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). Ruling in favor of the city, the trial court held that the Pool was equitably estopped from denying coverage under the pollution exclusion clause because the Pool had paid prior backup claims made by Grosse Pointe Park residents. [FN7]

> FN7. Ruling from the bench, Judge Amy P. Hathaway stated:
>
> > It's clearly an issue of equity, which I'm not sure is going to necessarily trump the contract claim, at least in front of the Court of Appeals. But in this case we have a contract that was paid and paid and paid again under this pollutant, this sewage, and now there's a reservation of rights issue. I've got a big problem. To the point where I'm going to deny the motion, the Defendant's motion, and grant the inapplicability of the pollution exclusion based on estoppel.

***213** In a two-to-one decision, the Court of Appeals reversed the trial court's holding ****121** that the Pool was equitably estopped from invoking the pollution exclusion clause.[FN8] The Court of Appeals held that a question of fact existed with re-

gard to the estoppel claim and therefore remanded the case to the trial court for further proceedings. It also held that the Pool's payment of prior backup claims was "extrinsic evidence" of ambiguity in the insurance policy and remanded the case to the trial court to determine "the parties' intent as to the exclusion's applicability ...." Judge O'Connell dissented, arguing that extrinsic evidence should not be considered because the insurance policy was clear and unambiguous. He further argued that equitable estoppel was not applicable because the Pool timely provided the city a reservation of rights letter. We granted the Pool's application for leave to appeal. [FN9]

FN8. Unpublished opinion per curiam of the Court of Appeals, issued October 30, 2003, 2003 WL 22462088, (Docket No. 228347).

FN9. 471 Mich. 915, 688 N.W.2d 510 (2004).

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is reviewed by this Court de novo. [FN10] Similarly, the interpretation of an insurance policy is also a question of law that is reviewed by this Court de novo.[FN11]

FN10. *Oade v. Jackson Nat'l Life Ins. Co.*, 465 Mich. 244, 250-251, 632 N.W.2d 126 (2001); *Smith v. Globe Life Ins. Co.*, 460 Mich. 446, 454, 597 N.W.2d 28 (1999).

FN11. *Klapp v. United Ins. Group Agency, Inc.*, 468 Mich. 459, 463, 663 N.W.2d 447 (2003); *Archambo v. Lawyers Title Ins. Corp.*, 466 Mich. 402, 408, 646 N.W.2d 170 (2002).

***214** III. ANALYSIS

A. IS SEWAGE A "POLLUTANT" UNDER THE INSURANCE POLICY'S POLLUTION EXCLUSION CLAUSE?

The insurance policy at issue provides:

Section V General Exclusions

In addition to the specific exclusions in SECTION I-COVERAGES A-BODILY INJURY AND PROPERTY DAMAGE LIABILITY, B-PERSONAL AND ADVERTISING INJURY LIABILITY, C-MEDICAL PAYMENTS, D-PUBLIC OFFICIALS ERRORS AND OMISSIONS, AND E-AUTO, *this coverage also does not apply to:*

* * *

d. Bodily Injury or Property Damage *arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:*

* * *

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

As this Court has previously held, "The principles of construction governing other contracts apply to insurance policies." ****122** [FN12] As such, the foremost duty of a court in construing an insurance policy is to determine the intent of the contracting parties.[FN13] In doing so, a ***215** court must always begin with the actual language used by the parties in the insurance policy itself.[FN14] If the text of the insurance policy is clear and unambiguous, the contract must be enforced as written. [FN15] "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." [FN16]

FN12. *Farm Bureau Mut. Ins. Co. v. Nikkel*, 460 Mich. 558, 566, 596 N.W.2d 915 (1999).

FN13. *Quality Products & Concepts Co. v. Nagel Precision, Inc.*, 469 Mich. 362, 375, 666 N.W.2d 251 (2003); see also *Nikkel, supra* at 566, 596 N.W.2d 915; *Morley v.*

Automobile Club of Michigan, 458 Mich. 459, 465, 581 N.W.2d 237 (1998).

FN14. *Quality Products, supra* at 375, 666 N.W.2d 251.

FN15. *Id.; Wilkie v. Auto-Owners Ins. Co.,* 469 Mich. 41, 51, 664 N.W.2d 776 (2003); *Nikkel, supra* at 566, 596 N.W.2d 915.

FN16. *Quality Products, supra* at 375, 666 N.W.2d 251.

It is difficult to imagine an insurance policy that is clearer or more explicit than the one found in the present case. The pollution exclusion clause defines "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant ...." The word "contaminant," given its plain and ordinary meaning,[FN17] is "something that contaminates," and "contaminate" is defined as "to make impure or unsuitable by contact or mixture with something unclean, bad, etc.; pollute; taint ...." [FN18] It is undeniable that Fox Creek was "made impure" and "tainted" by the sewage that the city released. The record indicates that the sewage contained dirt, debris, garbage, condoms, feminine hygiene products, urine, feces, dishwater, toilet paper, cleaning fluids, and compounds containing E.coli. Therefore, because these "solid" and "liquid" materials are "contaminants," the sewage the city released is necessarily a "pollutant" under the plain terms of the insurance policy.

FN17. In *Frankenmuth Mut. Ins. Co. v. Masters,* 460 Mich. 105, 112, 595 N.W.2d 832 (1999), this Court unanimously held that courts are to "interpret [undefined] terms of an insurance contract in accordance with their 'commonly used meaning.' " (Citations omitted.)

FN18. Random House Webster's College Dictionary (1995).

This conclusion is bolstered by the fact that the pollution exclusion clause also provides specific examples***216** of "pollutants," such as "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." Given the composition of the sewage described above, it is clear that most, if not all, of these specific examples of "pollutants" were found in Fox Creek. We conclude, therefore, that the sewage released by the city into Fox Creek is within the scope of the policy's pollution exclusion clause.

B. THE ROLE OF EXTRINSIC EVIDENCE IN ILLUMINATING A LATENT AMBIGUITY

The city argues that the word "pollutant" is latently ambiguous and that extrinsic evidence must be introduced to give the word the true meaning that the parties intended. According to the city, the Pool's payment of prior basement backup claims demonstrates that the parties intended the word "pollutant" to have a meaning different than the one used in the insurance policy itself.

We find the city's argument unpersuasive. The argument that the city is advancing is actually one of equitable estoppel, not contract interpretation. The city ****123** is attempting to rely on the Pool's payment of similar basement sewer backup claims as a way to require the Pool to cover the present claim. Accordingly, the city's argument sounds more in equity than in the law of contracts. For the reasons discussed in part III(C) of this opinion, we are unpersuaded by the city's equitable estoppel argument. Nonetheless, to the extent that the city argues that a latent ambiguity exits, we disagree.

There are generally two categories of ambiguity that may arise in a contract: patent and latent. [FN19] A *patent* ambiguity is one that is "apparent upon the face of the ***217** instrument, arising by reason of inconsistency, obscurity or an inherent uncertainty of the language adopted, such that the effect of the words in the connection used is either to convey no definite meaning or a double one." [FN20] In contrast, a *latent* ambiguity " 'arises not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject

which they describe.' "[FN21]

FN19. See 11 Williston, Contracts (4th ed.), § 33:40, p. 816.

FN20. *Zilwaukee Twp. v. Saginaw-Bay City R. Co.*, 213 Mich. 61, 69, 181 N.W. 37 (1921); 11 Williston, Contracts (4th ed.), § 33:40, p. 816 ("Patent ambiguities are those that are apparent on the face of the document ....").

FN21. *Zilwaukee Twp, supra* at 69, 181 N.W. 37 (citation omitted); 11 Williston, Contracts (4th ed.), § 33:40, p. 816 ("[L]atent ambiguities are those which appear only as the result of extrinsic or collateral evidence showing that a word, thought to have but one meaning, actually has two or more meanings.").

The classic example of a latent ambiguity is found in the traditional first-year law school case of *Raffles v. Wichelhaus*, 2 Hurl & C. 906; 159 Eng. Rep. 375 (1864). In *Raffles*, two parties contracted for a shipment of cotton "to arrive ex Peerless" from Bombay. However, as it turned out, there were two ships sailing from Bombay under the name "Peerless." Thus, even though the contract was unambiguous on its face, there was a *latent* ambiguity regarding the ship to which the contract referred.

By asserting the existence of a latent ambiguity, the city illustrates an inherent tension found in contract law. On the one hand, it is well-settled law that when a contract is clear and unambiguous on its face, a court will not consult extrinsic evidence and will enforce the contract as written. [FN22] On the other hand, a party generally is permitted to introduce extrinsic evidence to demonstrate the existence of a latent ambiguity-one that is not apparent on the face of the contract.[FN23]

FN22. *Quality Products, supra* at 375, 666 N.W.2d 251; *Cruz v. State Farm Mut. Automobile Ins. Co.*, 466 Mich. 588, 594, 648 N.W.2d 591 (2002); *Nikkel, supra* at 566, 596 N.W.2d 915; *Morley, supra* at 465, 581 N.W.2d 237.

FN23. *Hall v. Equitable Life Assurance Society of the United States*, 295 Mich. 404, 408, 295 N.W. 204 (1940) ("It is a well-settled rule that extrinsic evidence is admissible to show that a latent ambiguity exists.").

***218** In balancing these two seemingly conflicting principles of contract law, a court must never cross the point at which the written contract is *altered* under the guise of contract *interpretation.* [FN24] Indeed, it is during litigation that a party's motivations are the most suspect and the party's incentives the greatest to attempt to achieve that which the party could not during the give-and-take of the contract negotiation process. As this Court stated in *Nikkel*, a "court may not read ambiguity into a policy where none exists." [FN25] Therefore, in ****124** clarifying the proper role of extrinsic evidence in illuminating a latent ambiguity, it is helpful to turn to basic principles of contract law.

FN24. *Wilkie, supra* at 51, 664 N.W.2d 776 ("This approach, where judges ... rewrite the contract ... is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written ....").

FN25. *Nikkel, supra* at 568, 596 N.W.2d 915.

As stated, the primary goal of contract interpretation is to ascertain and effectuate the intent of the contracting parties.[FN26] The law presumes that the contracting parties' intent is embodied in the actual words used in ***219** the contract itself.[FN27] A rule to the contrary would reward imprecision in

the drafting of contracts. More significant, it would create an incentive for an aggrieved party to enlist the judiciary in an attempt to achieve a benefit that the party itself was unable to secure in negotiating the original contract-a proposition this Court flatly rejected in *Wilkie.* [FN28] These principles require that, when a party asserts that a latent ambiguity exists, a court presume that the contracting parties' intent is manifested in the actual language used in the contract. The party alleging the existence of the latent ambiguity may rebut this presumption only by proving, through clear and convincing evidence, that such an ambiguity does indeed exist.

FN26. *Quality Products, supra* at 375, 666 N.W.2d 251 ("In interpreting a contract, our obligation is to determine the intent of the contracting parties."); *McIntosh v. Groomes,* 227 Mich. 215, 218, 198 N.W. 954 (1924) ("The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate."); *Mills v. Spencer,* 3 Mich. 127, 135 (1854) ("In the construction of a contract, we are to look at the intention of the parties."); 17A CJS, Contracts, § 308, p. 321 ("The primary and overriding purpose of contract law is to ascertain and give effect to the intentions of the parties ...."); 17A Am. Jur. 2d, Contracts, § 345, p. 332 ("[T]he fundamental and cardinal rule in the construction or interpretation of contracts is that the intention of the parties is to be ascertained, and effect is to be given to that intention ...."); 1 Restatement Contracts, 2d, § 201(1), p. 83 ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.").

FN27. *Michigan Chandelier Co. v. Morse,* 297 Mich. 41, 49, 297 N.W. 64 (1941)(" 'The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest.' " [citation omitted]); see also *United States ex rel Int'l Contracting Co. v. Lamont,* 155 U.S. 303, 310, 15 S.Ct. 97, 39 L.Ed. 160 (1894); 17A Am. Jur. 2d, Contracts, § 348, p. 336 ("[T]he parties are presumed to have intended what the terms clearly state.").

FN28. *Wilkie, supra* at 51, 664 N.W.2d 776.

This Court emphasized these same bedrock principles of contract law in *Quality Products,* which held that contracting parties are free, with *mutual* assent, to modify a contract notwithstanding a written anti-modification or anti-waiver clause present in the original agreement.[FN29] We recognized that the anti-modification clause contained in the written contract was presumptive of the parties' intent as a matter of law, but also that "the parties possess, and never cease to possess, the freedom to contract even after the original contract has been executed." [FN30] We held, therefore, that contracting parties are always entitled mutually to modify the underlying contract, but the party ***220** asserting that a modification has occurred must present *clear and convincing evidence* to that effect.[FN31]

FN29. *Quality Products, supra* at 372-373, 666 N.W.2d 251.

FN30. *Id.* at 372, 666 N.W.2d 251.

FN31. *Id.* at 373, 666 N.W.2d 251.

Although *Quality Products* involved contract *modification,* not contract *interpretation,* the same core principles of contract law apply in the present case. It must be presumed that the city and the Pool intended the actual language that they used in the insurance policy. We ****125** conclude, therefore, that the city, in asserting the existence of a latent ambiguity, bears the burden of proving by clear and convincing evidence that such an ambiguity actually exists.[FN32]

FN32. Justice Cavanagh asserts that we are relying on a "broad reading" of *Quality Products* and that the principles adopted by this Court in *Quality Products* should be limited to cases involving contract modification or waiver and not to cases when one party asserts the existence of a latent ambiguity. *Ante* at 115 n. 11. There is no principled basis for the distinction Justice Cavanagh draws. In both cases-a claimed contract modification/waiver and the claimed existence of a latent ambiguity-a party to a contract is asserting that the written terms of the contract should not be enforced. This Court has gone to great lengths in the past few terms to clarify the law so that contracts will be enforced *as written.* See *Wilkie v. Auto-Owners Ins. Co.,* 469 Mich. 41, 664 N.W.2d 776 (2003) ; *Klapp v. United Ins. Group Agency, Inc.,* 468 Mich. 459, 663 N.W.2d 447 (2003). By applying a clear and convincing standard of proof for latent ambiguities, this Court would simply be adhering to the common theme we articulated in *Quality Products* and all our other recent contract cases: that contracts will be enforced *as written* unless substantial evidence to the contrary is presented.

Justice Cavanagh also states that we do not cite decisions other than *Quality Products* for the clear and convincing rule discussed above. We are unaware of the bedrock jurisprudential rule on which Justice Cavanagh relies: that a legal principle duly adopted by this Court is not binding unless there are other related cases with the same holding. *Quality Products* is a binding decision of this Court and the doctrinal underpinnings of that case are applicable here. As such, it must be given due regard. Nevertheless, as we indicate above, the clear and convincing rule regarding latent ambiguities is not a new concept, but an embodiment of the precise contract principle to which this Court has steadfastly adhered in our recent contract jurisprudence: that contracts will be enforced *as written* unless compelling evidence to the contrary is offered. See *Schmalfeldt v. North Pointe Ins. Co.,* 469 Mich. 422, 428, 670 N.W.2d 651 (2003); *Klapp, supra* at 467, 663 N.W.2d 447; *Wilkie, supra* at 51-52, 62-63, 664 N.W.2d 776; *Rednour v. Hastings Mut. Ins. Co.,* 468 Mich. 241, 251, 661 N.W.2d 562 (2003); *Nikkel, supra* at 566-568, 596 N.W.2d 915.

***221** The city has failed to satisfy that burden of proof. The reality is that none of the parties to this insurance contract asserts that the term "pollutant" contained in the exclusion clause means something different when city sewage is discharged into Fox Creek or when it backs up into individual Grosse Pointe Park residences. Indeed, the Pool has conceded that the source of the pollution in both cases is the same.[FN33] Thus, the record reflects no evidence that one party contends that "pollutant" means something different from how that term is defined in the policy.

FN33. Pool reply brief at 4.

That being the case, there is no "latent ambiguity" requiring the introduction of extrinsic evidence to show that "pollutant" means something other than how it is defined in the contract. Rather, the city is attempting to bootstrap its estoppel argument-that the Pool paid similar claims involving pollutants so it is precluded from denying indemnification on this claim-to manufacture a latent ambiguity claim. Such a tactic violates basic contract construction principles and should be rejected for that reason.

C. EQUITABLE ESTOPPEL

The city argues that, even if sewage is a "pollutant" under the policy's pollution exclusion

clause, the Pool should nonetheless be equitably estopped from denying coverage. It asserts that the Pool's payment of prior basement backup claims and the Pool's involvement in monitoring the *Etheridge* litigation ***222** led the city to believe that the Pool would indemnify any eventual settlement that was reached. According to the city, it would have altered its strategy****126** in the *Etheridge* litigation had it known that the Pool would not cover the settlement and, therefore, it was prejudiced by the Pool's actions.

In general, "[t]he principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract." [FN34] Although equitable estoppel appears to be broad in theory, the doctrine is rather limited in practice. As then-Chief Justice Weaver stated in writing for the Court in *Kirschner*, "The application of ... estoppel is limited, and, usually, the doctrine[ ] will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that *were expressly excluded from the policy.*" [FN35]

FN34. *Morales v. Auto-Owners Ins. Co.*, 458 Mich. 288, 295, 582 N.W.2d 776 (1998).

FN35. *Kirschner, supra* at 593-594, 592 N.W.2d 707 (emphasis added). While Justice Cavanagh cites *Kirschner* for the proposition that an insurer may be equitably estopped from denying coverage if the insurer does not timely reserve its rights, Justice Cavanagh omits the prominent language from *Kirschner* that emphasizes that "[t]he application of ... estoppel is limited ...." *Ante* at 117.

Indeed, the rule discussed in *Kirschner* is well established in Michigan law. In *Ruddock,* the beneficiary of a life insurance policy sought to estop the insurer from invoking the policy's "military service" exclusion clause as a basis for denying payment. This Court expressly rejected the beneficiary's equitable estoppel argument, holding that estoppel will not be applied to broaden coverage beyond the specific risks covered by the policy itself. This Court stated:

> To apply the doctrine of estoppel and waiver here would make this contract of insurance cover a loss it never ***223** covered by its terms, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make.[FN36]

FN36. *Ruddock, supra* at 654, 177 N.W. 242.

By asking this Court to hold that the Pool is equitably estopped from denying coverage for the *Etheridge* settlement, the city is essentially requesting this Court to ignore the policy's pollution exclusion clause that the Pool specifically invoked in its reservation of rights letter. To do so, however, would be to alter fundamentally the nature of the bargain struck between the city and the Pool and to protect the city "against risks that were ... expressly excluded from the policy." [FN37] This Court explicitly rejected this argument in *Ruddock* and *Kirschner.* We do so again today. Equitable estoppel must not be applied to expand coverage beyond the scope originally contemplated by the parties *in the insurance policy as written.* A court must not bestow under the veil of equity that which the aggrieved party itself failed to achieve in negotiating the contract.[FN38]

FN37. See *Kirschner, supra* at 594, 592 N.W.2d 707.

FN38. Justice Cavanagh states that we are giving *Kirschner* and *Ruddock* an "expansive reading" and setting forth an "inflexible rule" regarding the application

> of estoppel. *Ante* at 117 n. 12. To the contrary, we are merely applying the well-established rule this Court adopted in *Ruddock* and reiterated in *Kirschner* that estoppel will not be applied to give the insured a benefit that was never negotiated in the first place. *Ruddock, supra* at 654, 177 N.W. 242; *Kirschner, supra* at 594, 592 N.W.2d 707. Indeed, in our view, it is Justice Cavanagh who is unduly limiting the holding of *Kirschner* by implying exceptions to the *Kirschner* rule beyond the two explicitly recognized: (1) misrepresentation by the insurer and (2) the insurer's failure to provide a timely reservation of rights. *Id.* at 594-595, 592 N.W.2d 707.

****127 *224** Because we believe that *Kirschner* and *Ruddock* are fatal to the city's estoppel claim, unlike Justice Cavanagh, we would not apply the test articulated in *Morales.* Nevertheless, to the extent that the city relies on the principles in *Morales,* its reliance is misplaced. In *Morales,* this Court applied a three-part test to determine whether equitable estoppel should apply: (1) the defendant's acts or representations induced the plaintiff's belief, (2) the plaintiff justifiably relied on its belief, and (3) the plaintiff was prejudiced as a result of its belief. [FN39]

> FN39. *Morales, supra* at 296-297, 582 N.W.2d 776.

Even assuming, arguendo, that the Pool's payment of prior basement backup claims and its involvement in monitoring the *Etheridge* suit led the city to hope that the settlement would be covered, and that the city actually relied on its mistaken belief, the city's equitable estoppel claim must fail because its reliance was not *justifiable.* Three weeks after the *Etheridge* suit was filed, the Pool sent the city a reservation of rights letter that specifically quoted the policy's pollution exclusion clause. The letter concluded by stating, "Please be advised that if there is any judgment against the City of Grosse Pointe Park for ... a discharge of any pollutants,... the Michigan Municipal Liability & Property Pool reserves the right not to indemnify Grosse Pointe Park for said damages." Moreover, the Pool frequently reminded the city during the *Etheridge* litigation that "serious coverage issues" remained. Despite all this, and *after* being notified by the Pool that coverage was formally denied, the city still proceeded to finalize the settlement with the *Etheridge* plaintiffs.[FN40] Any reliance ***225** on the part of the city, therefore, was unjustified.[FN41] Because there was no *justifiable* reliance, we need not consider whether the city suffered any prejudice on the basis of its reliance; the city's estoppel claim fails as a matter of law.

> FN40. The City Attorney for Grosse Pointe Park testified in his deposition that "a decision [was made] by the city that it was in the best interests of the city if there was to be no coverage to proceed with a settlement because we were where we were."

> FN41. Since at least 1911, in the case of *Sargent Mfg. Co. v. Travelers' Ins. Co.,* 165 Mich. 87, 130 N.W. 211 (1911), this Court has adhered to the rule that a timely reservation of rights letter will protect an insurer against an insured's claims of estoppel. This Court reiterated this fundamental rule of insurance law in *Kirschner* by noting that an insurer who complies with its "duty to give reasonable notice ... that it is proceeding under a reservation of rights" will be shielded from subsequent claims of estoppel or waiver. *Kirschner, supra* at 593, 592 N.W.2d 707. Accordingly, if an insurer timely reserves its rights, an insured will generally not be able to sustain a claim of estoppel on the basis that it altered its litigation strategy in reliance on the insurer's payment of previous claims. To conclude otherwise would be to emasculate completely the entire purpose of the reservation of rights process.

IV. CONCLUSION

Sewage is clearly a "pollutant" under the plain language of the policy's pollution exclusion clause. Moreover, while extrinsic evidence may generally be introduced to demonstrate the existence of a latent ambiguity, we conclude that a court must presume that the contracting parties' intent is manifested in the actual language used in the contract itself and that the party alleging the existence of the latent ambiguity may rebut this presumption only by proving, through clear and convincing evidence, that such an ambiguity**128 does actually exist. The city has failed to meet this burden of proof. Moreover, any reliance on *Morales* is misplaced. Under *Ruddock* and *Kirschner,* the Pool is not equitably estopped from denying coverage because estoppel will not be applied to broaden coverage beyond the particular risks specifically covered by the policy itself.

*226 The judgment of the Court of Appeals is reversed, and this matter is remanded to the trial court for entry of an order granting the Pool's motion for summary disposition.

CLIFFORD W. TAYLOR and STEPHEN J. MARKMAN, JJ., concur.

Mich.,2005.
City of Grosse Pointe Park v. Michigan Municipal Liability and Property Pool
473 Mich. 188, 702 N.W.2d 106, 61 ERC 1305

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595 F.Supp.2d 1319, 21 Fla. L. Weekly Fed. D 538
(Cite as: 595 F.Supp.2d 1319)

C

United States District Court, S.D. Florida.
PHILADELPHIA INDEMNITY INSURANCE COMPANY, a Pennsylvania Corporation, Plaintiff,
v.
YACHTSMAN'S INN CONDO ASSOCIATION, INC., and Moss and Associates Property Management, Inc., Defendants.
Case No. 08-10060-CIV.

Jan. 22, 2009.

Background: Insurer brought action seeking declaration that it had no duty under commercial general liability policy to defend or indemnify property management company or owner in worker's action to recover for personal injuries sustained when he was exposed to feces, raw sewage, and battery acid while cleaning premises. Parties filed cross-motions for summary judgment.

Holding: The District Court, James Lawrence King , J., held that worker's claim fell within scope of policy's pollution exclusion.

Insurer's motion granted.

West Headnotes

[1] Insurance 217 ⚿2268

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2267 Insurer's Duty to Indemnify in General
217k2268 k. In General. Most Cited Cases

Insurance 217 ⚿2913

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2913 k. In General; Standard. Most Cited Cases
Under Florida law, insurer's duty to defend is much broader than its duty to indemnify, and thus court's determination that insurer has no duty to defend requires finding that there is no duty to indemnify.

[2] Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases
Under Florida law, in determining whether insurer's duty to defend insured exists, court must look to allegations contained within four corners of complaint in underlying action against insured.

[3] Insurance 217 ⚿2922(1)

217 Insurance
217XXIII Duty to Defend
217k2920 Scope of Duty
217k2922 Several Grounds or Causes of Action
217k2922(1) k. In General. Most Cited Cases
Under Florida law, where complaint against insured alleges any facts that actually, or even potentially, fall within scope of coverage under policy, insurer is obligated to defend entire suit.

[4] Insurance 217 ⚿1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, Ordinary or Popular Sense of Language. Most Cited Cases
Under Florida law, insurance contracts are construed according to their plain meaning, and where policy's language is plain and unambiguous, there is no special construction or interpretation required, and policy's plain language will be given meaning it clearly expresses.

[5] Insurance 217 ⚖1832(1)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) k. In General. Most Cited Cases
Under Florida law, if insurance policy language contains any genuine inconsistency, uncertainty, or ambiguity in meaning, such language must be construed in insured's favor.

[6] Insurance 217 ⚖2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases
Under Florida law, worker's claim against building owner and property manager for personal injuries sustained when he was exposed to feces, raw sewage, and battery acid while cleaning premises fell within scope of commercial general liability policy's pollution exclusion, and thus insurer had no duty to defend or indemnify owner or manager in worker's action, even though there was no allegation of industrial pollution or environmental damage, where policy's pollutant definition included any "irritant or contaminant," and specifically included "acid" and "waste," and complaint alleged that worker suffered severe dermatological injuries as result of his exposure.
*1320 Gary I. Khutorsky, Esq., Yelena Shneyderman, Esq., Stephens Lynn Klein & McNicholas, Miami, FL, for Plaintiff.

David Harry Rogel, Esq., Becker & Poliakoff, Mark David Feinstein, Esq., Feinstein & Sorota, Miami, FL, Andrew William Bray, Esq., Andrew W. Bray, P.A., Fort Lauderdale, FL, for Defend- ants.

ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF

JAMES LAWRENCE KING, District Judge.

THIS CAUSE is before the Court upon Defendant Moss and Associates Property Management, Inc. and Plaintiff Philadelphia Indemnity Insurance Company's cross motions for summary judgment (D.E. # 12, # 15), both filed on December 12, 2008. FN1

FN1. Both Motions for Summary Judgment were filed on December 12, 2008. On December 29, 2008, Defendant Moss and Associates Property Management, Inc. filed its Response (D.E. # 19) and on December 30, 2008, Defendant Yachtsman's Inn Condo Association filed its Response (D.E. # 21). Plaintiff replied on January 12, 2009 (D.E. # 24).

As to Defendant's Motion, Plaintiff responded on December 30, 2008 (D.E. # 20). Defendant Moss and Associates Property Management, Inc. replied on January 12, 2009 (D.E. # 22).

I. BACKGROUND

Plaintiff Philadelphia Indemnity Insurance Company issued a commercial general liability policy No. PHPK 163046 ("the Policy") to Defendant Moss & Associates Property Management, Inc. ("Moss") as the named insured with a separate endorsement naming Yachtsman's Inn Condo Association, Inc. ("Yachtsman") as an additional named insured. (Compl. Dec. Relief ¶¶ 17-18). The Policy was in effect from March 21, 2006 to March 21, 2007 (D.E. # 11).

From June 12, 2006 to June 29, 2006, Milton Dale

Boone, Jr. was employed by Moss. (Compl. ¶ 4, *Milton Dale Boone, Jr. v. Yachtsman's Inn Condo. Ass'n, Inc.*, Case No. 08-CA-38P (Fla. 16th Cir.Ct.)) ("St. Ct. Compl."). White working for Moss, he was tasked with pressure cleaning the underground parking areas at Yachtsman's Inn (St. Ct. Compl. ¶¶ 4-6). During this job, Mr. Boone was allegedly "exposed to feces, raw sewage and battery acid which [Yachtsman] had allowed to accumulate and was overflowing on its premises." (St. Ct. Compl. ¶ 6). As a direct result of this exposure, Mr. Boone "suffer[ed] severe dermatological injuries." (St. Ct. Compl. ¶ 11).

On January 11, 2008, Mr. Boone filed suit against Yachtsman in the Circuit Court of the 16th Judicial Circuit in and for Monroe County, Florida alleging that Yachtsman negligently failed "to maintain its premises in a safe manner, free from ***1321** hazardous condition that would pose a risk of harm to its guests and invitees." (St. Ct. Compl. ¶ 14). Yachtsman filed a Third Party Complaint against Moss in the same state-court action on May 14, 2008. (Third Party Compl., *Milton Dale Boone, Jr. v. Yachtsman's Inn Condo. Ass'n, Inc.*, Case No. 08-CA-38P (Fla. 16th Cir.Ct.)) ("St. Ct. Third Party Compl."). The basis of Yachtsman's pleading was that it had a "contract with Moss to manage, maintain and operate Yachtsman's Inn." (St. Ct. Third Party Compl. ¶ 10). Yachtsman argued that, should it be found liable for Mr. Boone's injuries, Moss must also be held liable because "Moss employed [Mr. Boone] and directed him to perform services at the property operated by Yachtsman." (St. Ct. Third Party Compl. ¶ 6).

Although representing both Yachtsman and Moss in the state-court action pursuant to a reservation of rights (Compl. Dec. Relief ¶¶ 13, 16), Plaintiff filed its Complaint for Declaratory Relief in this Court on September 8, 2008 (D.E. # 1). Plaintiff acknowledges that it issued the Policy to Moss as the named insured, (Compl. Dec. Relief ¶ 17); however, Plaintiff now seeks a declaratory judgment against Yachtsman and Moss that there is no insurance coverage, duty to defend, or duty to indemnify Defendants for the injuries asserted by Mr. Boone in the underlying state-court action.

The Policy clearly provides insurance for liability arising from bodily injury subject to a number of exclusions to coverage (D.E. # 11). One such exclusion, known as an "absolute pollution exclusion," states:

> This insurance does not apply to ... "Bodily injury" ... arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" ... [a]t 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....

(D.E. # 11). The Policy supplements the terms of the exclusion with a definition of "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." (D.E. # 11). The Policy further defines "waste" to include "materials to be recycled, reconditioned or reclaimed." (D.E. # 11).

The Parties' pleadings both address the interpretation of the Policy's pollution exclusion. Plaintiff contends that the claims in the underlying, action that have been asserted against Yachtsman and Moss are not covered under the Policy due to the language of the pollution exclusion (Mot. Summ. J. 2). Defendants argue that summary judgment in favor of Plaintiff is inappropriate because there are issues of fact as to "the ambiguous provisions and/or terms in the [Policy's] pollution exclusion." (Def. Yachtsman's Resp. Summ. J. 9); (Def. Moss's Resp. Summ. J. 2-3).[FN2]

> FN2. Defendant Moss's Motion for Summary Judgment relies primarily on an argument that Plaintiff is precluded from denying coverage or defense of the underlying suit because it "failed to obtain independent counsel which was mutually agreeable

to the parties" as required by the Florida's Claims Administration Act, (Def. Moss Mot. Summ. J. 2). The Florida Claims Administration Act, Fla. Stat. § 627.426(2) (2008), provides that "[a] liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless: ... [the insurer] retains independent counsel which is mutually agreeable to the parties." The Court is unpersuaded by this argument. The Florida Supreme Court has interpreted the term "coverage defense" to mean "a defense to coverage that otherwise exists," not "a disclaimer of liability based on an express coverage exclusion." *AIU Ins. Co. v. Block Marina Investment, Inc.*, 544 So.2d 998, 1000 (Fla.1989).

II. STANDARD OF REVIEW

Summary judgment is appropriate where the pleadings and supporting materials*1322 establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the record as a whole could not lead a rational fact-finder to find for the nonmoving party, there is no genuine issue of fact for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party bears the burden of pointing to the part of the record that shows the absence of a genuine issue of material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 645 (11th Cir.1997). Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548; *see also Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir.1991) (holding that, to meet its burden, the nonmoving party must "come forward with significant, probative evidence demonstrating the existence of a triable issue of fact.").

On a motion for summary judgment, the court must view the evidence and resolve all inferences in the light most favorable to the nonmoving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); however, a mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment. *See id.* at 252, 106 S.Ct. 2505. If the evidence offered by the nonmoving party is merely colorable or is not significantly probative, summary judgment is proper. *See id.* at 249-50, 106 S.Ct. 2505.

Contract interpretation is generally a question of law. *Lawyers Title Ins. Corp. v. JDC (America) Corp.*, 52 F.3d 1575, 1580 (11th Cir.1995). "Questions of fact arise only when an ambiguous contract term forces the court to turn to extrinsic evidence of the parties' intent ... to interpret the disputed term." *Id.*

III. ANALYSIS

[1][2][3] Under Florida law,[FN3] the duty to defend is much broader than the duty to indemnify. *See, e.g., Jones v. Fla. Ins. Guar. Ass'n, Inc.*, 908 So.2d 435, 443 (Fla.2005). As a result, a court's determination that the insurer has no duty to defend requires a finding that there is no duty to indemnify. *See, e.g., Nova Cas. Co. v. Waserstein*, 424 F.Supp.2d 1325, 1332 (S.D.Fla.2006) (*citing Fun Spree Vacations, Inc. v. Orion Ins.*, 659 So.2d 419, 421 (Fla. 3d DCA 1995)). When a Florida court makes a determination as to whether an insurer's duty to defend the insured exists, it must look to the allegations contained within the four corners of the complaint in the underlying action against the insured. *See, e.g., Lawyers Title Ins. Corp. v. JDC (America) Corp.*, 52 F.3d 1575, 1580 (11th

Cir.1995). Where the complaint against the insured alleges any facts which actually, or even potentially, fall within the scope of coverage under the policy, the insurer is obligated to defend the entire suit. *See Kopelowitz v. Home Ins. Co.*, 977 F.Supp. 1179, 1185 (S.D.Fla.1997) (*citing MCO Envtl., Inc. v. Agric. Excess & Surplus Ins. Co.*, 689 So.2d 1114, 1115 (Fla. 3d DCA 1997)). Thus, to make a determination as to the insurer's duty to defend, the Court must apply the language ***1323** of the Policy to the facts of the underlying complaint.

> FN3. In this diversity case, the Court must ascertain and apply the substantive law of Florida in an effort to reach the same result that a Florida court would reach. *See, e.g., James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1274 n. 1 (11th Cir.2008).

[4][5] It is undisputed that no Florida court has addressed the language of a similar pollution exclusion clause specifically in terms of its application to raw sewage or to battery acid. (Pl.'s Mot. Summ. J. 9, 10); (Def. Moss Resp. Mot. Summ. J. 3). In such a situation, this Court must discern how Florida courts would decide the issue if confronted with it and interpret the Policy accordingly. "In interpreting insurance contracts, the Florida Supreme Court has made clear that 'the language of the policy is the most important factor.' " *James River Ins. Co.*, 540 F.3d at 1274 (*quoting Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So.2d 528, 537 (Fla.2005).) "Under Florida law, insurance contracts are construed according to their plain meaning." *Taurus*, 913 So.2d at 532. Where the policy's language is "plain and unambiguous, there is no special construction or interpretation required, and the plain language of the policy will be given the meaning it clearly expresses.' " *Fla. Farm Bureau Ins. v. Birge*, 659 So.2d 310, 312 (Fla. 2d DCA 1994). If the language of the policy contains any "genuine inconsistency, uncertainty or ambiguity in meaning," such language must be construed in favor of the insured. *State Farm Auto. Ins. v. Pridgen*, 498 So.2d 1245, 1248 (Fla.1986).

Both Parties agree that an essential issue in addressing the question of whether the complaint against the insured alleges facts that come within the scope of the Policy is the interpretation of the pollution exclusion. Plaintiff's primary contention is that the pollution exclusion is unambiguous and bars coverage for the damages claimed by Mr. Boone in the underlying state litigation because the damages-arising from exposure to "feces, raw sewage, and battery acid"-fall under the exclusion's language defining a pollutant (Pl's Mot. Summ. J. 11). Defendants argue that the pollution exclusion is ambiguous in the context of Mr. Boone's complaint and that, because no Florida court has specifically defined battery acid as "acid" or feces and sewage as "waste" under the exclusion, the Court should look to other jurisdictions as persuasive authority and hold that the standard language used in the pollutant exclusion does not apply. (Def. Yachtsman Resp. Mot. Summ. J. 7).

While no Florida court has addressed a pollution exclusion's application to the particular substances at issue in this case, the Florida Supreme Court has analyzed whether nearly identical policy pollution exclusions are ambiguous. In *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Co.*, 711 So.2d 1135, 1136-37 (Fla.1998), the court was confronted with determining whether spilled ammonia constituted a "pollutant" for insurance liability reasons. The pollution exclusion of the policy and the included definition of pollutants in *Deni* was nearly identical to the policy exclusion and definition of pollutants in the case before this Court.[FN4] In *Deni*, the court found that the language of the "pollution exclusion clause is clear and unambiguous." *Id.* at 1138. The court then went on to specifically reject the argument that the policy exclusion should be found to be ambiguous because certain words found in the policy definition for pollutants, namely "irritant" and ***1324** "contaminant," were not further defined. *Id.* at 1139. The court emphasized that a plain-language interpretation of the

pollution exclusion is required and that "[a]s a court, we cannot place limitations upon the plain language of a policy exclusion simply because we think it should have been written that way." *Id.* The court ultimately found that "[a]pplying 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." *Id.* at 1140.

> FN4. The pollution exclusion in *Deni* excluded liability from coverage "arising out of the actual, alleged or threatened discharge, dispersal, *release or escape* of pollutants." *Deni,* 711 So.2d at 1137 (emphasis added). In the case at bar, the policy pollution exclusion reads, "rising out of the actual, alleged or threatened discharge, dispersal, *seepage, migration, release or escape* of 'pollutants.' " (D.E. # 11) (emphasis added). The definitions of "pollutant" found in the two policies are identical.

[6] Given the law enunciated in *Deni,* this Court concludes that, in the context of the allegations by Mr. Boone, the pollution exclusion is unambiguous and excludes from coverage the damages claimed by Mr. Boone. Applying the policy's language to the context of the claim here leads the Court to believe that the plain language of the pollution exclusion encompasses the substances at issue.

First, the substances at issue-feces, raw sewage, and battery acid-fall within the policy pollutant definition of "any solid, liquid, gaseous or thermal *irritant or contaminant.* " (D.E. # 11) (emphasis added). In determining whether a substance is an irritant or contaminant, "the court should look to see if the disputed substance is alleged to have had a *particular effect* commonly thought of as 'irritation' or 'contamination.' " *Nova Casualty Co.,* 424 F.Supp.2d at 1334 (*citing Deni,* 711 So.2d at 1139). Here, the underlying complaint alleges that when Mr. Boone was exposed to the substances, he encountered a "dangerous health risk" and a "hazardous condition." (St. Ct. Compl. ¶¶ 8, 10). As a result of his exposure, he suffered "severe dermatological injuries." (St. Ct. Compl. ¶ 11). Such allegations fit the ordinary meaning of an "irritant or contaminant." *See Nova Cas. Co.,* 424 F.Supp.2d at 1334 (finding bacteria to be a contaminant because it "infected the plaintiffs' bodies or made them impure by contact...."); *U.S. Fire Ins. Co. v. City of Warren,* 176 F.Supp.2d 728, 732 (E.D.Mich.2001) (" 'raw sewage is clearly a contaminant' that would be covered by [a pollution] exclusion"); *Deni,* 711 So.2d at 1139 (finding that injuries resulted from ammonia fumes and therefore caused a particular irritating effect to the plaintiff).

Second, the examples expressly included in policy exclusion definition of pollutant even further support that the pollution exclusion was intended to encompass the types of substances alleged in Mr. Boone's complaint. The policy defines "pollutants" not only as "any solid, liquid, gaseous or thermal irritant or contaminant," it continues by offering specific types of substances that can constitute such art "irritant or contaminant." (D.E. # 11). Specifically, the definition of pollutant excludes substances "including *smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.* " (D.E. # 11) (emphasis added). Following a plain meaning interpretation of the Policy language, the Court finds that battery acid qualifies as an "acid" and "raw sewage and feces" is included in the definition of "waste" as "materials to recycled, reconditioned or reclaimed." *Cf. James River Ins. Co.,* 540 F.3d at 1277 (finding construction debris causing methane gas to be an excluded pollutant because it fell under a similar definition of "waste"). The Court concludes that Florida courts, if faced with the same issue, would not put limitations on the interpretation of what constitutes a pollutant under the pollution exclusion. *See, e.g., Deni,* 711 So.2d at 1138 (holding that, where there is no obvious indication that the pollution exclusion should be limited to industrial pollution, it would be inappropriate for the court to read such language into the contract).

***1325** Defendants urge this Court to follow other

jurisdictions and find that there are genuine issues of material fact as to whether battery acid constitutes "acid" and raw sewage constitutes "waste" under the policy pollution exclusion. Careful review of the cited authority offered by Defendants, when held to the standard set by the Florida Supreme Court in *Deni,* impels a conclusion that the pollution exclusion of this contract applies to bar Defendants' claim. In *Deni,* the court specifically held, "[w]e cannot accept the conclusion reached by certain courts that because of its ambiguity the pollution exclusion clause only excludes environmental or industrial pollution." *Deni,* 711 So.2d at 1138. Many of the cases cited by Defendants as persuasive are based on the exact reasoning expressly contradicted by the Florida Supreme Court. *See, e.g., Regent Ins. Co. v. Holmes,* 835 F.Supp. 579, 582 (D.Kan.1993) (finding that formic acid did not constitute a pollutant under the pollution exclusion because the injury at issue was to "one person and inflicted no discernable injury on the environment"); *U.S. Fidelity & Guar. Co. v. Armstrong,* 479 So.2d 1164, 1168 (Ala.1985) (holding that raw sewage did not eliminate insurance coverage because the pollution exclusion was "intended to cover only industrial pollution and contamination."); *Minerva Enters., Inc. v. Bituminous Cas. Corp.,* 312 Ark. 128, 851 S.W.2d 403, 405-06 (1993) (finding the pollution exclusion to at least be ambiguous and that the "interpretation that it was intended for industrial polluters to be a plausible one.").

IV. CONCLUSION

Because the Court interprets the pollution exclusion of the Policy to unambiguously apply to battery acid, raw sewage, and feces, the Court concludes that Plaintiff has no duty to defend or indemnify Defendants Yachtsman and Moss in the underlying litigation. Accordingly, after a careful review of the record, and the Court being otherwise fully advised it is

ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's Motion for Summary Judgment (**D.E. # 15**) be, and the same is hereby, **GRANTED.**

2. Defendant Moss and Associates Property Management, Inc.'s Motion for Summary Judgment (**D.E. # 12**) be, and the same is hereby, **DENIED.**

3. Oral argument on Parties' Cross-Motions for Summary Judgment set for February 4, 2009 at 1:00 p.m. in Key West, Florida (**D.E. # 8**) is hereby **CANCELLED.**

FINAL JUDGMENT

Pursuant to Federal Rule Civil Procedure 58, and in accordance with the reasoning stated in the Court's January 21, 2009 Order Chanting Summary Judgment for Plaintiff (D.E. # 25), it is **ORDERED, ADJUDGED and DECREED** that declaratory judgment is entered in favor of Plaintiff Philadelphia Indemnity Insurance Company and against Defendants Yachtsman's Inn Condo Association, Inc. and Moss & Associates Property Management, Inc. All pending motions are **DENIED as MOOT.** The Clerk of Court shall **CLOSE** this case.

S.D.Fla.,2009.
Philadelphia Indem. Ins. Co. v. Yachtman's Inn Condo Ass'n, Inc.
595 F.Supp.2d 1319, 21 Fla. L. Weekly Fed. D 538

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868 F.Supp. 878
(Cite as: 868 F.Supp. 878)

United States District Court,
E.D. Michigan,
Southern Division.

ROYAL INSURANCE COMPANY, Plaintiff,
v.
Thomas BITHELL and Irene Bithell, Defendants.
No. 92-CV-74191-DT.

Sept. 15, 1993.

Homeowners' insurer brought declaratory judgment suit seeking determination that policy did not provide coverage for losses incurred when raw sewage backed up into insured's home. On cross motions for summary judgment, the District Court, Duggan, J., held that: (1) soil surrounding insureds' home was not covered property under policy; (2) removal of contaminated soil was not within debris removal coverage of policy, since that provision was limited to debris of covered property; and (3) loss to structure and contents caused when raw sewage backed into home fell within exclusion for loss caused by "release, discharge, or dispersal of contaminants or pollutants."

Insurers' motion for summary judgment granted.

West Headnotes

[1] Insurance 217 ⚿1810

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1810 k. Construction as a whole. Most Cited Cases
(Formerly 217k146.2)
Under Michigan law, insurance contract must be viewed as whole in order go give meaning to its terms.

[2] Insurance 217 ⚿1822

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1822 k. Plain, ordinary or popular sense of language. Most Cited Cases
(Formerly 217k146.5(2))

Insurance 217 ⚿1827

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1827 k. Construction to be unstrained. Most Cited Cases
(Formerly 217k146.5(2))
Under Michigan law, court must look at plain and ordinary meaning of contract language in insurance policy; court may not supply forced or strained meaning to words.

[3] Insurance 217 ⚿1807

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1807 k. Function of, and limitations on, courts, in general. Most Cited Cases
(Formerly 217k146.1(1))
Under Michigan law, court cannot and will not make new contract for parties under guise of contract interpretation of insurance policy.

[4] Insurance 217 ⚿1725

217 Insurance
217XIII Contracts and Policies
217XIII(A) In General
217k1720 Validity and Enforceability
217k1725 k. Public policy. Most Cited Cases
(Formerly 217k139)

Insurance 217 ⚿1809

217 Insurance

217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1809 k. Construction or enforcement as written. Most Cited Cases
(Formerly 217k146.1(2))
Where contract language is clear and unambiguous, terms of insurance policy will be enforced as written under Michigan law, unless terms are in contravention of public policy.

[5] Insurance 217 ⇐2142(6)

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2142 Water Damage
217k2142(6) k. Sewers and drains; plumbing. Most Cited Cases
(Formerly 217k417.5(1))
Under Michigan law, damage to soil surrounding insured's home caused by public sewer backup was not covered under their homeowners' policy; policy clearly stated that coverage did not apply to land, including land on which dwelling was located.

[6] Insurance 217 ⇐2142(6)

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2142 Water Damage
217k2142(6) k. Sewers and drains; plumbing. Most Cited Cases
(Formerly 217k417.5(1))
Excavation of soil surrounding insured's home, which was necessitated when public sewer backed up, was not covered under insured's policy as removal of debris; since debris removal provision was limited to removal of "debris of covered property" and land itself was not covered property under policy.

[7] Insurance 217 ⇐2148

217 Insurance
217XVI Coverage--Property Insurance
217XVI(A) In General
217k2139 Risks or Losses Covered and Exclusions
217k2148 k. Pollution or contamination. Most Cited Cases
(Formerly 217k417.5(1))
Under Michigan law damage caused when raw sewage leaked into insured's home was "release, discharge, or dispersal of contaminants or pollutants" excluded from coverage under insureds' homeowner policy.

***878** Leonard B. Schwartz, Southfield, MI, for plaintiff.

***879** Robert R. Cleary, Lucy R. Benham, Mark E. Hallada, Troy, MI, for defendants.

OPINION

DUGGAN, District Judge.

This matter is before the Court on both plaintiff's and defendants' motions for summary judgment pursuant to F.R.Civ.P. 56. Both parties agree that the dispositive issue is whether the insurance policy issued by plaintiff, Royal Insurance Company, provides coverage for the loss incurred by defendants, Thomas and Irene Bithell ("Bithells"), when raw sewage from a sewer line beneath their home entered the house. The Court has reviewed the briefs submitted in support of and in opposition to the motions and has had the benefit of oral argument held on August 19, 1993. For the reasons set forth below, plaintiff's motion for summary judgment shall be granted.

BACKGROUND

The following facts are derived from the pleadings and supporting documents submitted by the parties

as well as information provided at oral argument. It is undisputed that defendants purchased a homeowners insurance policy ("Policy") from plaintiff, and that the Policy was in effect when defendants suffered their loss. Both parties concede that the Policy extends coverage for all risks of loss that are not specifically excluded pursuant to the terms of the contract. The interpretation of the Policy is in dispute. Prior to the filing of the instant action, defendants instituted a suit in state court. [FN1] The issues involved in that case required the state court to address the issue of whether the defendants' alleged involvement with the sewer and construction of the Bithell's home are redressable in tort.

> FN1. The Bithells, defendants in this suit, filed an action against the Oakland Hills Country Club, Bloomfield Township, and the Bloomfield Township Supervisor on May 30, 1991, in Oakland County Circuit Court (Case no. 91-412174).

Defendants assert that their loss occurred due to the incursion of a foreign substance into their home, caused by a deteriorated sewer line located beneath their home. The "foreign substance" referred to by defendants is raw sewage. Plaintiff contends that the actual cause of loss is "contamination," due to the raw sewage in the home, at such levels that the house has become uninhabitable, and may never be habitable. As such, plaintiff asserts that it is an excludable loss under the Policy.

Defendants first became aware of the sewer problem on March 3, 1991, when they found a large amount of "water" in the basement bedroom. The defendants subsequently learned that raw sewage from the Oakland Hills sewer line had discharged into defendants' property and caused the leak in the basement. Defendants re-experienced the flooding problem again in May and July of 1991 during periods of heavy rainfall.

Defendants submitted a claim for the damage to their home and personal property caused by the incursion of contamination in their home. They contend that because the "illegal" sewer line deteriorated over time, and because it was not constructed to withstand the increased burden that has been placed on it, raw sewage entered their home. Defendants assert that in order to remediate the damage, the soil underneath their home, and within 12 feet of their home, must be excavated and replaced with clean fill. Additionally, defendants claim that their home must be essentially gutted and rebuilt to remove the contamination.[FN2] There can be no serious dispute that the claimed loss is the result of contamination caused by the presence of raw sewage in defendants' home. Plaintiff denied defendants' claim, stating that the soil surrounding the home was not covered property pursuant to the language of the Policy, and further, that the cause of damage to the home and personal property was not covered under the Policy.

> FN2. The clean-up estimate they submitted indicates that among other things, all wall coverings and floor coverings must be replaced, new ceiling tiles installed, new furniture bought, as well as replacement of the water heater, furnace, and all drain pipes.

Plaintiff filed an action in this Court on July 22, 1992, requesting a declaratory judgment that neither the loss incurred nor the *880 cause of the loss was covered under the Policy. Plaintiff points to numerous exclusionary clauses within the Policy to support its contention.[FN3] Currently before this Court are the parties' cross motions for summary judgment pursuant to Fed.R.Civ.P. 56, pertaining to the issue of whether or not the Policy covers defendants' loss.

> FN3. Plaintiffs contend that the following exclusionary clauses apply to bar coverage in the instant action:
>
> **I. Under Coverage A-Dwelling,** the soil excavation is not covered property because the Policy explicitly states "this

coverage does not apply to land, including land on which the dwelling is located." (Policy at p. 5).

II. Under Section I-Perils insured against, excluded loss caused by

1. Loss caused by wear and tear, marring deterioration;

2. Loss caused by inherent vice, latent defect;

3. Loss caused by mold, wet or dry rot;

4. Loss caused by release, discharge, or dispersal of contaminants or pollutants;

(Policy at p. 10-11, # 4 (a-c, & e).

III. Under Section I-Exclusions:

1. Water damage, meaning water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, foundation, or other structure;

2. Weather condition that contribute to the water damage;

3. Acts or decisions, including the failure to act or decide, of any person, group, organization, or governmental body;

4. Faulty, inadequate or defective planning, zoning, development, surveying, siting, design or specifications of part or all of any property whether on or off the residence premises.

(Policy at p. 11, # 2 (a-c)).

DISCUSSION

To warrant summary judgment under Fed.R.Civ.P. 56, the moving party must show that "the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "Once the moving party has presented evidence sufficient to support a motion for summary judgment, the nonmoving party is not entitled to trial merely on the basis of allegations; *significant probative evidence must be presented to support the complaint." Goins v. Clorox Co.,* 926 F.2d 559, 561 (6th Cir.1991) (emphasis added). However, in determining whether there are issues of fact requiring a trial, "the inferences to be drawn from the underlying facts contained in the [affidavits, attached exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion." *Matsushita Electric Industries Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

[1][2][3][4] In order to resolve the present dispute, this Court must apply well-established rules of insurance contract construction. An insurance contract must be viewed as a whole in order to give meaning to its terms. *Allstate Ins. Co. v. Miller,* 175 Mich.App. 515, 519, 438 N.W.2d 638 (1989) (per curiam). Moreover, a court must look at the plain and ordinary meaning of the contract language; a court may not supply a forced or strained meaning to the words. *Edgar's Warehouse Ins. v. U.S. Fidelity & Guaranty Co.,* 375 Mich. 598, 602, 134 N.W.2d 746 (1965); *Allstate,* 175 Mich.App. at 519, 438 N.W.2d 638. It follows that a court cannot and will not make a new contract for the parties under the guise of contract interpretation. *Edgar's Warehouse,* 375 Mich. at 602, 134 N.W.2d 746. Therefore, where the contract language is clear and unambiguous, its terms will be enforced as written, unless the terms are in contravention of public policy. *Rakas v. Farm Bureau Mut. Ins. Co.,* 412 Mich. 355, 361-62, 314 N.W.2d 440 (1982), rehr'g

denied, 412 Mich. 1119 (1982). In this Court's opinion, the contract language in question is unambiguous as to whether or not coverage is excluded.

Defendants engage in a futile exercise of semantics to avoid the clear exclusionary language of the Policy. They argue that the damage was a result of "the incursion of a foreign substance into their home," and urge that this is not the same as a claim for damage caused by contamination or pollutants. This argument is meritless. The "foreign substance" that entered their home was raw sewage; in this Court's view, raw ***881** sewage is clearly a contaminant, and the raw sewage was unquestionably the cause of damage to defendant's home and personal property.

Essentially, defendants' claim of loss can be broken into three separate categories: 1) damage to the land itself; 2) damage to the dwelling structure; and 3) damage to the personal property within the dwelling. Under defendants' Policy, any property loss is insured unless excluded or excepted by the terms of the Policy. The introductory paragraph of "Part 3: Section I-Property Coverages" of defendants' Policy clearly indicates that "[f]or a property loss to be covered under Section 1, *both the property involved, and the cause of damage must be covered.* " (Policy at p. 5). Plaintiff argues that because both of these elements are not present for any of defendants' claimed losses, coverage does not exist. Defendants, on the other hand, argue that the Policy does provide coverage, and assert that because the exclusionary language is ambiguous, the ambiguity should be construed in favor of coverage. While this Court agrees that any ambiguities must be construed in favor of defendants, it is apparent that the provisions cited by plaintiff are unambiguous and clearly exclude coverage.

A. Damage to the Contaminated Soil

[5][6] It is undisputed that the Policy in question provides property coverage under Section 1. This provision provides insurance protection for the insured premises for damage arising out of specific causes which are not otherwise excluded in the insurance contract. The provision entitled "Coverage A-Dwelling" of defendants' Policy explicitly excludes coverage for defendants' claim of loss as it relates to the excavation of the contaminated soil surrounding and underneath defendants' home. The Policy clearly states that "this coverage does not apply to land, including land on which the dwelling is located." (Policy at p. 5). Accordingly, the damage to the soil alleged by defendants is not covered by the Policy, based on a plain reading of its terms. [FN4]

> FN4. Defendants assert that the excavation of the soil is covered under the section "Additional Property Coverages," because it constitutes removal of debris. The terms of this provision, however, indicate that defendants are incorrect. It states in pertinent part that:
>
> **1. Debris Removal.** We will pay your reasonable expenses for the removal of:
>
> a. Debris *of covered property* if a Peril Insured Against that applies to the damaged property causes the loss ...
>
> (emphasis added). Because the land itself is not covered property, the raw sewage contaminant within the soil, the "debris," as defendant terms it, is not covered under this provision.

B. Damage to the Dwelling and Personal Property

1. Applicable Policy Provisions

Any damage to the dwelling itself is covered under the Policy:

COVERAGE A-DWELLING

We cover: 1. The dwelling on the **residence**

> **premises** shown in the Declarations, including structures attached to the dwelling ...

(Policy at p. 5) (emphasis in the original).

Damage to personal property is also covered under the Policy. The applicable provision states in pertinent part:

> **COVERAGE C-PERSONAL PROPERTY**
>
> We cover personal property owned or used by **an insured**....

(Policy at p. 5) (emphasis in the original). In order for these losses to be covered, however, the cause of the damage must also be covered. In the present case, the cause of damage is explicitly excluded by the terms of the Policy.

2. Applicable Exclusionary Provision

[7] The Policy instructs that "[o]nce you have determined that the property involved in a loss is covered under this policy, you should determine whether the cause of damage is covered." (Policy at p. 10) On pages 10-12 of the Policy, the causes of damage that are covered are discussed, by delineating what types of causes are excluded. The preliminary paragraph explains that for "Coverages A, B, and C," the Policy does not insure losses that are either excluded under Section I-Exclusions (p. 11-12), or losses ***882** that are caused by the items listed on pages 10 and 11. The Policy specifically excludes loss caused by contaminants or pollutants. [FN5] The provision states in pertinent part:

> FN5. Although this Court does not need assistance in determining what "contamination" means, the definition provided by the Fifth Circuit is instructive. The Court asserted that contamination "occurs when a condition of impairment or impurity results from mixture or contact with a foreign substance." *Am. Cas. Co. v. Myrick,* 304 F.2d 179, 183 (5th Cir.1962). Clearly, the raw sewage that mixed with defendant's property fits within this definition.

> We insure against risks of direct loss to property described in Coverages A, B, and C only if that loss is a physical loss to the property; **however, we do not insure loss:**
>
> 1. Under Coverages A, B, and C: ...
>
> b. caused by: ...
>
> **4(e) release, discharge, or dispersal of contaminants or pollutants** ...

(Policy at 10-11) (Emphasis added). This Court finds that the above-quoted language constitutes a clear and unambiguous exclusion that applies in the instant action.[FN6] The damage to defendants' home was caused when raw sewage from the Oakland Hills Country Club sewer spilled into their home. Defendants argue that it was the incursion of the foreign substance, and not the foreign substance itself, that caused the loss, and therefore, the exclusionary language cited by plaintiff is inapplicable. In this Court's view, there is no question that the raw sewage that leaked into defendants' home is a "release, discharge, or dispersal of contaminants or pollutants." The clear language of the Policy excludes coverage for the losses claimed by defendants. [FN7] For this reason, plaintiff's motion for summary judgment must be granted.

> FN6. Accordingly, the Court declines to address the other exclusions cited by plaintiff in support of its contention that defendants do not have coverage under the policy for the loses they incurred.
>
> FN7. Defendant's argument that they are entitled to living expenses incurred when they had to move out of their home also fails. Although defendant is entitled generally to loss of use of their home under "Coverage D," the coverage only applies

> "if a loss covered under this Section makes that part of the residence premises where you reside not fit to live in." Plaintiff agrees with defendants that the house is uninhabitable due to the contamination. Plaintiff correctly argues, however, that because the loss of their premises was not a result of a cause included in the insurance contract, defendants cannot avail themselves of this provision, either.

CONCLUSION

For the reasons set forth above, plaintiff's motion for summary judgment shall be granted and defendants' motion for summary judgment shall be denied.

E.D.Mich.,1993.
Royal Ins. Co. v. Bithell
868 F.Supp. 878

END OF DOCUMENT

C

United States District Court,
E.D. Michigan,
Southern Division.
UNITED STATES FIRE INS. CO., Plaintiff,
v.
CITY OF WARREN, Defendant.
No. CIV. 00-40237.

Nov. 6, 2001.

Liability insurer sought reimbursement from insured city for payments made to homeowners to settle claims against insured arising from sewer backup that occurred after heavy rain. On insurer's motion for summary judgment, the District Court, Gadola, J., held that: (1) insured waived equitable estoppel defense by failing to raise it earlier, and (2) absolute pollution exclusion applied regardless of whether homeowners' alleged injuries were caused by "traditional environmental pollution."

Motion granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚿759

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(C) Answer
170AVII(C)2 Affirmative Defense or Avoidance
170Ak759 k. Waiver and Estoppel. Most Cited Cases
Defense of equitable estoppel was waived in insurer's action seeking reimbursement of settlement payments from insured, where insured waited almost six months before filing answer, which did not contain estoppel defense, and 13 months more, until its answer to insurer's summary judgment motion, before raising estoppel issue, even though facts underlying defense should have been well known at time of original answer. Fed.Rules Civ.Proc.Rule 8(c), 28 U.S.C.A.

[2] Federal Civil Procedure 170A ⚿751

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(C) Answer
170AVII(C)2 Affirmative Defense or Avoidance
170Ak751 k. In General. Most Cited Cases
Where failure to raise affirmative defense in answer does not cause surprise or unfair prejudice to plaintiff, district court may, in its discretion, allow issue to be raised on summary judgment motion. Fed.Rules Civ.Proc.Rules 8(c), 56, 28 U.S.C.A.

[3] Insurance 217 ⚿2278(17)

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases
Under Michigan law, raw sewage that backed up out of insured city's sewer system after heavy rains was "pollutant" within absolute pollution exclusion of liability insurance policy, and thus payments to homeowners for their alleged health problems and property damage resulting from backup were not covered regardless of whether alleged injuries were characterized as caused by "traditional environmental pollution."

[4] Insurance 217 ⚿2117

217 Insurance
217XV Coverage--in General
217k2114 Evidence
217k2117 k. Burden of Proof. Most Cited Cases
Under Michigan law, insurer bears burden of establishing that an exclusion applies.

[5] Insurance 217 ⚿1832(1)

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1830 Favoring Insureds or Beneficiaries; Disfavoring Insurers
217k1832 Ambiguity, Uncertainty or Conflict
217k1832(1) k. In General. Most Cited Cases

Insurance 217 ⚿1836

217 Insurance
217XIII Contracts and Policies
217XIII(G) Rules of Construction
217k1836 k. Favoring Coverage or Indemnity; Disfavoring Forfeiture. Most Cited Cases
Under Michigan law, court must construe any ambiguity in insurance policy in favor of insured and in favor of coverage.

*729 Christopher E. Le Vasseur,Michael H. Whiting, Stark, Reagan, Troy, MI, for Plaintiff.

Michael J. Watza, Richard M. Mitchell, Christina A. Ginter, Kitch, Drutchas, Detroit, MI, Albert B. Addis, Albert B. AddisAssoc., Mt. Clemens, MI, for Defendant.

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

GADOLA, District Judge.

Before the Court is Plaintiff's motion for summary judgment [docket entry 23]. Regarding this matter, the parties have provided the Court with extensive briefs and the Court has held a hearing in open court. For the reasons set forth below, the Court will grant Plaintiff's motion.

I BACKGROUND

Plaintiff is an insurance company with which Defendant municipality had primary and umbrella insurance policies that covered, *inter alia,* liability arising from bodily and property damage. Pollution exclusions applied to both policies.

Defendant experienced heavy rainfall on February 17 and 18, 1998. On February 23, 1998, a number of homeowners filed suit against Defendant, alleging that sewage had escaped from Defendant's sewers and entered the homeowners' properties, *730 causing extensive damage. These homeowners argued that Defendant was liable to them for bodily and property damage caused by a backup of effluent from Defendant's sewer system that had, *inter alia,* deposited "bacteria, viruses, spores and other disease organisms which caused health problems among certain Plaintiffs and which damaged the property of all Plaintiffs among other injuries and damages." (Pl.Ex. H at ¶ 27.5.)

Plaintiff paid $1,575,000.00 in settlement of the actions homeowners brought against Defendant. Those payments were subject, however, to Plaintiff's express reservation of its right to seek recovery from Defendant for those payments. In the case at bar, Plaintiff now seeks repayment from Defendant.

II LEGAL STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986);

Martin v. Ohio Turnpike Commission, 968 F.2d 606, 608 (6th Cir.1992).

In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences therefrom in a light most favorable to the nonmoving party. *60 Ivy Street Corp. v. Alexander,* 822 F.2d 1432, 1435 (6th Cir.1987). The Court is not required or permitted, however, to judge the evidence or make findings of fact. *Id.* at 1435-36. The moving party has the burden of showing conclusively that no genuine issue of material fact exists. *Id.* at 1435.

A fact is "material" for purposes of summary judgment where proof of that fact would have the effect of establishing or refuting an essential element of the cause of action or a defense advanced by the parties. *Kendall v. Hoover Co.,* 751 F.2d 171, 174 (6th Cir.1984). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Accordingly, where a reasonable jury could not find that the nonmoving party is entitled to a verdict, there is no genuine issue for trial and summary judgment is appropriate. *Id.; Feliciano v. City of Cleveland,* 988 F.2d 649, 654 (6th Cir.1993).

Once the moving party carries the initial burden of demonstrating that no genuine issues of material fact are in dispute, the burden shifts to the nonmoving party to present specific facts to prove that there is a genuine issue for trial. To create a genuine issue of material fact, the nonmoving party must present more than just some evidence of a disputed issue. As the United States Supreme Court has stated, "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249-50, 106 S.Ct. 2505 (citations omitted); *see Celotex,* 477 U.S. at 322-23, 106 S.Ct. 2548; **731Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Consequently, the nonmoving party must do more than raise some doubt as to the existence of a fact; the nonmoving party must produce evidence that would be sufficient to require submission of the issue to the jury. *Lucas v. Leaseway Multi Transportation Service, Inc.,* 738 F.Supp. 214, 217 (E.D.Mich.1990), *aff'd,* 929 F.2d 701 (6th Cir.1991). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505; *see Cox v. Kentucky Department of Transportation,* 53 F.3d 146, 150 (6th Cir.1995).

III ANALYSIS

Plaintiff argues that the pollution exclusions involved in this case militate toward entry of summary judgment in its favor. Defendant argues that Plaintiff's position is substantively incorrect and that Plaintiff is estopped from making such an argument. The Court will address the latter argument first.

A. Equitable Estoppel

[1] Defendant argues that the doctrine of equitable estoppel prevents Plaintiff from relying on the pollution exclusions. Plaintiff argues that Defendant's failure to assert this defense before its response to Plaintiff's motion for summary judgment effects a waiver of that defense.

[2] Federal Rule of Civil Procedure 8(c) requires litigants to set forth affirmative defenses in their answers. *Macurdy v. Sikov & Love, P.A.,* 894 F.2d 818, 824 (6th Cir.1990). "Generally, a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278 (1990 & Supp.2001). Where the failure to raise an affirmat-

ive defense before summary judgment does not cause surprise or unfair prejudice to the plaintiff, however, this Court, in its discretion, may allow the issue to be raised on summary judgment. *Smith v. Sushka,* 117 F.3d 965, 969 (6th Cir.1997).

In this case, Defendant waited almost six months after Plaintiff filed its complaint to file its answer and affirmative defenses. Neither of those documents included the defense of equitable estoppel, even though any facts underlying that defense should have been well known to Defendant when Plaintiff brought this action. Defendant instead waited more than thirteen months before raising the defense of equitable estoppel in its response to Plaintiff's motion for summary judgment.

In *Macurdy,* a case in which the defendants waited almost nineteen months after the filing of the complaint to plead an affirmative defense, the Sixth Circuit stated that "to allow the defendants to raise this affirmative defense initially at the summary judgment motion would violate Rule 8(c) and unfairly prejudice the plaintiff, which is why the rule requires that such a defense be asserted in the answer. We hold that this defense has been waived."

Given the similarities between this case and *Macurdy,* the Court holds that Defendant has waived the defense of equitable estoppel.

B. Pollution Exclusions

[3][4][5] The insurer bears the burden of establishing that an exclusion applies. *Heniser v. Frankenmuth Mut. Ins.,* 449 Mich. 155, 534 N.W.2d 502, 505 n. 6 (1995) (quoting *Arco Indus. Corp. v. American Motorists Ins. Co.,* 448 Mich. 395, 424-25, 531 N.W.2d 168 (1995) (Boyle, J. concurring)). The Court must construe any ambiguity in the policy in favor of the insured and in favor of coverage. ***732***Fire Ins. Exch. v. Diehl,* 450 Mich. 678, 545 N.W.2d 602, 606 (1996). Plaintiff argues that an unambiguous pollution exclusion in each of the policies it sold to Defendant precludes coverage for claims of pollution-related property and bodily damage.

The primary policy excluded from coverage, *inter alia,* " '[b]odily injury' or 'property damage' arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants." The umbrella policy excluded from coverage "bodily injury" and "property damage" "which would not have occurred in whole or in part but for the actual alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'Pollutants' at any time." Both policies contained the same definition of "pollutants": "Pollutants means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes material to be recycled, reconditioned, or reclaimed."

The most important case upon which Plaintiff relies is *McGuirk Sand & Gravel, Inc. v. Meridian Mut. Ins. Co.,* 220 Mich.App. 347, 559 N.W.2d 93 (1996). The pollution exclusion of the primary policy and the definition of "pollutants" in the case at bar are, verbatim, the same as the pollution exclusion and definition of pollutants at issue in *McGuirk. Id.* at 95. The pollution exclusion of the umbrella policy is not materially different from the pollution exclusion in *McGuirk.*

In *McGuirk,* the Michigan Court of Appeals concluded that the pollution exclusion at issue was an "absolute pollution exclusion" that was unambiguous and operated to exclude from coverage all claims alleging damage caused by pollution. *Id.* at 96-97. Accordingly, the *McGuirk* court held that an insurance company was entitled to summary disposition against the insured's claim that the insurer had a duty to defend and indemnify it against suits arising from the insured's alleged spilling of liquid pollutants.

Given the law as enunciated in *McGuirk,* this Court concludes that the pollution exclusions in this case are unambiguous and serve to establish that

Plaintiff was not obligated to indemnify the homeowners for claims that they suffered from Defendant's "pollution."

The question thus becomes whether, in light of the homeowners' claim that sewage intruded from Defendant's sewer into their homes and deposited "bacteria, viruses, spores and other disease organisms which caused health problems among certain Plaintiffs and which damaged the property of all Plaintiffs among other injuries and damages," there is an issue of material fact as to whether the homeowners' claims alleged damage caused by pollution. If so, *McGuirk* would lead to the conclusion that, as a matter of law, Plaintiff was not required to indemnify the homeowners.

Under the law of Michigan as enunciated in *Royal Ins. Co. v. Bithell,* 868 F.Supp. 878 (E.D.Mich.1993) (Duggan, J.), the Court concludes that the homeowners' claims alleged damages caused by pollution. Any backup of raw sewage into the homeowners' properties from Defendant's sewer would be a discharge of pollution. This is so because "raw sewage is clearly a contaminant" that would be covered by an exclusion from coverage of any "[l]oss caused by release, discharge, or dispersal of contaminants or pollutants." *Id.* at 881. Given the similarity between the pollution exclusion in *Bithell* and the pollution exclusions at bar, Defendant's discharge of sewage into the homeowners' properties would be a discharge covered by the pollution exclusion. Thus, summary judgment in Plaintiff's favor is appropriate.

*733 Defendant disagrees, pointing out that the Sixth Circuit, applying Michigan law, has reasoned that a pollution exclusion very similar to those at bar [FN1] "applies only to injuries caused by traditional environmental pollution." *Meridian Mut. Ins. Co. v. Kellman,* 197 F.3d 1178, 1181 (6th Cir.1999) . Because there would almost certainly be an issue of material fact as to whether the homeowners alleged harms that "traditional environmental pollution" caused, Defendant argues, the Court must not grant summary judgment to Plaintiff.

FN1. In *Kellman,* the exclusion covered " 'property damage' which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." *Kellman,* 197 F.3d at 1180.

The Court disagrees. To whatever extent *McGuirk* and *Kellman* might not coincide, this Court will follow *McGuirk* because Michigan state courts provide a more authoritative construction of state law than do federal courts. *See Litka v. University of Detroit Dental Sch.,* 610 F.Supp. 80, 83 (E.D.Mich.1985) (Pratt, J.). This Court also agrees with Judge Quist of the U.S. District Court for the Western District of Michigan that the *Kellman* panel's failure to discuss *McGuirk* was "inexplicable," and thus weakens the persuasiveness of *Kellman. Gulf Ins. Co. v. City of Holland,* No. 1:98-CV-774, 2000 U.S. Dist. Lexis 19602, at *16 (W.D. Mich. Apr. 3, 2000).

This Court holds that the absolute pollution exclusions involved in this case precluded coverage for the homeowners' claims against Defendant.

IV CONCLUSION

For the reasons set forth above,

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment [docket entry 23] is **GRANTED.**

IT IS FURTHER ORDERED that Defendant shall pay Plaintiff $1,575,000 within thirty (30) days of entry of this order.

SO ORDERED.

E.D.Mich.,2001.
U.S. Fire Ins. Co. v. City of Warren
176 F.Supp.2d 728

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720 F.Supp.2d 1377
(Cite as: 720 F.Supp.2d 1377)

H

United States District Court,
S.D. Florida.
WPC INDUSTRIAL CONTRACTORS, LTD., a Florida corporation, Plaintiff,
v.
AMERISURE MUTUAL INSURANCE CO., A foreign corporation, Defendant.

Case No. 08-10101-CIV.
Oct. 21, 2009.

Background: Builder of waste water treatment plant brought state court action against its insurer, seeking declaration that insurer had duty under commercial general liability (CGL) policy to defend builder in underlying state court action resulting from alleged sewage backups at home served by waste water treatment system, and that builder was entitled to coverage under CGL policy. Insurer removed action to federal court, and moved for summary judgment.

Holdings: The District Court, K. Michael Moore, J., held that:
(1) fecal contaminant was "pollutant" within meaning of limited pollution reimbursement "work sites" endorsement;
(2) fecal contaminant was not on or from "work site" of waste water treatment plant, within meaning of such endorsement; and
(3) pollution exclusion barred coverage with respect to suit filed by home owner.

Motion granted.

Opinion, 660 F.Supp.2d 1341, superseded.

West Headnotes

[1] Insurance 217 ⚿2914

217 Insurance
217XXIII Duty to Defend
217k2912 Determination of Duty
217k2914 k. Pleadings. Most Cited Cases

An insurer has a duty to defend the insured when some allegations in the underlying complaint arguably fall within the coverage of the policy, but there is no duty to defend where the complaint shows either that there is no coverage or that a policy exclusion applies.

[2] Insurance 217 ⚿2325

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2323 Environmental Liabilities; Pollution
217k2325 k. Scope of coverage. Most Cited Cases

Fecal contaminant, which allegedly entered home served by waste water treatment system, was "pollutant" within meaning of limited pollution reimbursement "work sites" endorsement contained in commercial general liability (CGL) policy issued to builder of waste water treatment plant, in that fecal contaminant was "solid irritant" and "contaminant" within policy provision defining "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

[3] Insurance 217 ⚿2325

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(B) Coverage for Particular Liabilities
217k2323 Environmental Liabilities; Pollution
217k2325 k. Scope of coverage. Most Cited Cases

Fecal contaminant, which allegedly entered home served by waste water treatment system, was not on or from "work site" of waste water treatment plant builder, and, thus, limited pollution reimbursement "work sites" endorsement, contained in com-

mercial general liability (CGL) policy issued to builder, did not apply, in that builder's work site included areas in which it performed its duties in course of carrying out its obligations as contractor for construction of facility and sewer collection system, and builder did not connect home to sewer collection system.

[4] **Insurance 217 ⚿2278(17)**

217 Insurance
217XVII Coverage--Liability Insurance
217XVII(A) In General
217k2273 Risks and Losses
217k2278 Common Exclusions
217k2278(17) k. Pollution. Most Cited Cases

Pollution exclusion contained in commercial general liability (CGL) policy issued to builder of waste water treatment plant, excluding coverage for "bodily injury" or "property damage" which would not have occurred in whole or part but for actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time, barred coverage with respect to suit filed by home owner, where home owner claimed that property damage to her house, and bodily injury to herself and her family, was caused by fecal contaminate from sewer backups.

***1378** Bryan W. Black, Derrevere & Associates, West Palm Beach, FL, for Plaintiff.

Frank Bradley Hassell, Ashleigh Jennifer Smith, Hassell Moorhead & Carroll, Daytona Beach, FL, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

K. MICHAEL MOORE, District Judge.

THIS CAUSE came before the Court upon Defendant's Motion for Summary Judgment (dkt. # 32).

UPON CONSIDERATION of the Motion, the Responses, the pertinent portions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

I. BACKGROUND

This case involves an insurance coverage dispute arising out of damage to a home and bodily injury allegedly caused by raw sewage backing up in the home. [FN1] Plaintiff WPC Industrial Contractors, Ltd. ("WPC") is an environmental construction management company that specializes in the construction of water treatment plants. In 1999, the Florida Legislature required that sewage systems in the Florida Keys be converted from septic tank systems to waste water treatment systems. *See* § 381.0065, Fla. Stat. Pursuant to the sewage conversion, the Village of Islamorada hired WPC to act as general contractor in the construction of a waste water treatment facility and sewer collection system, or sewer lines leading to the treatment facility. WPC completed its work in 2006, and the sewage system went into use in the summer of 2006. From January 1, 2006, to January 1, 2007, WPC was covered by a Commercial General Liability policy (the "CGL Policy") issued by Defendant Amerisure Mutual Insurance Company ("Amerisure"). *See* CGL Policy No. GL2017104020006 (dkt. # 1, at 12-85).

FN1. The facts here are taken from the pleadings and attached documents and appear to be largely undisputed. In resolving the duty to defend claim, however, this Court will rely only upon facts alleged in the Complaint.

***1379** Beginning in August of 2006, Christine Harris ("Harris"), a resident of Islamorada, alleges that she experienced sewage backups in her home. The sewage backups continued through November of 2006. In December of 2006, David Lanfrom ("Lanfrom"), a biologist, informed Harris that her house was contaminated with fecal contaminate and was unsafe to live in. The Harris family also became ill in December of 2006 and attributed their illness to exposure to fecal contaminate from the sewage backups. The Harris family subsequently vacated the house and took up residence in a motel.

In January of 2007, the "Health Department" visited Harris' home and concluded it was contaminated. Harris Compl. ¶ 20 (dkt. # 1, at 86-96). Shortly thereafter, WPC hired Advanced Cleaning Systems "to remove [the Harris'] personal items from the house and to tear down the walls to get rid of the contamination." *Id.*, ¶ 21. Lanfrom returned to the house in February of 2007. After conducting a random sam-

pling he concluded that the house was still contaminated. In March of 2007, the sewer backed up again. "As a result of the fecal contaminate, the [Harris family] has not been able to return to their home." *Id.*, ¶ 27.

In March of 2008, Harris filed a Complaint against WPC in the Circuit Court of the 16th Judicial Circuit in and for Monroe County, Florida. Harris brought claims on behalf of herself and her children for negligence, resulting in property damage and bodily injury, and for intentional infliction of emotional distress. In response to Harris' claim, WPC sought coverage from Amerisure under the CGL Policy. Amerisure denied WPC's claim. WPC then filed a Complaint (dkt. # 1, at 8-11) in the Circuit Court of the 16th Judicial District in and for Monroe County, Florida, seeking (1) a declaration that Amerisure has a duty to defend WPC in Harris' suit against WPC, and (2) a declaration that WPC is entitled to coverage under the CGL Policy. On November 20, 2008, Amerisure removed the action to this Court.

II. STANDARD OF REVIEW

The applicable standard for reviewing a summary judgment motion is unambiguously stated in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Summary judgment may be entered only where there is no genuine issue of material fact. *Twiss v. Kury*, 25 F.3d 1551, 1554 (11th Cir.1994). The moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir.1997). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Id.*

In applying this standard, the district court must view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Id.* However, the nonmoving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). "The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be *1380 evidence on which the jury could reasonably find for the [nonmovant]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III. ANALYSIS

WPC claims that Amerisure has a duty to defend it in Harris' action against WPC. WPC further claims it is covered by the CGL Policy and the Limited Pollution Reimbursement-"Work Sites" Endorsement and that none of the policy exclusions apply. Amerisure contends that is has no duty to defend WPC and that coverage is precluded by the Pollution Exclusion, the Fungi or Bacteria Exclusion, and that the Limited Pollution Reimbursement-"Work Sites" Endorsement does not apply.

A. *Duty to Defend*

[1] It is well settled that an insurer's duty to defend its insured against a legal action arises when the complaint alleges facts that fairly and potentially bring the suit within policy coverage. The duty to defend must be determined by allegations in the complaint. The duty to defend is of greater breadth than the insurer's duty to indemnify, and the insurer must defend even if the allegations in the complaint are factually incorrect or merit less. Indeed, when the actual facts are inconsistent with the allegations in the complaint, the allegations in the complaint control in determining the insurer's duty to defend. Any doubts regarding the duty to defend must be resolved in favor of the insured.

Hartford Acc. & Indem. Co. v. Beaver, 466 F.3d 1289, 1292 (11th Cir.2006) (quoting *Jones v. Fla. Ins. Guar. Ass'n*, 908 So.2d 435, 442-43 (Fla.2005)) (internal citations and quotation marks omitted); *see also Prudential Prop. & Cas. Ins. Co. v. Calvo*, 700 F.Supp. 1104, 1105 (S.D.Fla.1988) (stating that insurer's duty to defend is governed by allegations in the underlying complaint against the insured). Although an insurer has a duty to defend when some allegations in the complaint arguably fall within coverage of the policy, there is no duty

to defend where the complaint shows either that there is no coverage or that a policy exclusion applies. *Calvo*, 700 F.Supp. at 1105. "Thus, the central inquiry in a duty to defend case is whether the complaint 'alleges facts that fairly and potentially bring the suit within policy coverage.' " *Id.* (quoting *Jones*, 908 So.2d at 443).

1. Coverage Under the Limited Pollution Reimbursement-"Work Sites" Endorsement

Amerisure argues that the Limited Pollution Reimbursement-"Work Sites" Endorsement (the "LPR Endorsement") provides no coverage for Harris' claim against WPC. The LPR Endorsement provides, in relevant part:

b. This insurance applies to "bodily injury", "property damage", "environmental damage" and "defense expenses" only if:

(1) The "bodily injury", "property damage" or "environmental damage" is caused by a "pollution incident" on or from "your work site" in the "coverage territory":

(a) that results from "pollutants" brought on to such site by any insured or any contractor or subcontractor performing operations directly or indirectly on any insured's behalf;

(b) that is demonstrable as beginning and ending within 72 hours; and

(c) that is accidental.

CGL Policy, LPR Endorsement, Section I, (A)(1)(b)(1). " 'Your work site' means any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf were working on such premises, site or location." *Id.*, Section V " 'Pollution incident' means the actual or alleged emission, discharge, release, or escape of 'pollutants' from 'your *1381 work site' provided that such emission, discharge, release or escape results in 'environmental damage.' All 'bodily injury', 'property damage' and 'environmental damage' arising out of one emission, discharge, release or escape will be deemed to be one 'pollution incident'." *Id.* " 'Environmental damage' means the injurious presence of 'pollutants' in or upon land, the atmosphere, or any watercourse or body of water." *Id.*

[2][3] The first issue is whether the alleged "bodily injury" and "property damage" was caused by the discharge of a "pollutant" on or from "[WPC's] work site." Fecal contaminant is a "pollutant" within the meaning of the CGL Policy because it is a solid irritant and contaminant, which falls within the CGL Policy's definition of a "pollutant." *Philadelphia Indem. Ins. Co. v. Yachtman's Inn Condo Ass'n, Inc.*, 595 F.Supp.2d 1319, 1324 (S.D.Fla.2009) (finding that feces and raw sewage is waste that is a pollutant within the meaning of a CGL policy's definition of "pollutant"). WPC's work site includes the areas in which they performed their duties in the course of carrying out their obligations as contractor for the construction of Islamorada's waste water treatment facility and sewer collection system. WPC did not, however, connect the Harris' home to the sewer collection system. Harris Dep., at 15 (dkt. # 36-1). The Harris' home was connected to the sewer collection system by Freewheeler, a company unrelated to WPC and hired by the Harris family. *Id.*, at 15-16.

At some point, the sewage that was allegedly discharged into the Harris' home may have been in the sewage collection system that WPC built. The sewage would have then traveled through the connection that Freewheeler installed that linked the sewage collection system with the Harris' home and discharged into the home. Had the sewage discharged directly from the sewer collection system that WPC constructed, there is no doubt that the discharge would have occurred on or from [WPC's] work site. However, given that the discharge occurred at the opposite end of the connection between the sewage collection system and the Harris' home, a linkage that WPC did not build, the discharge did not occur on or from WPC's work site.

Although the sewage may have been inside of the sewage collection system at some point, and thus may have been within WPC's work site, at the time and place of the discharge in the Harris' home, the sewage had moved outside of WPC's work site. By way of analogy, if a gasoline truck delivers gasoline to a gas station, and the gas subsequently leaks from a defective storage tank at the gas station, the pollution discharge would not have been on or from the gasoline truck, just because the gasoline truck was the source of the gasoline delivery. Likewise, the fact

that the sewage originated in the sewage collection system does not mean that the discharge was on or from WPC's work site, where the discharge occurred at a location external to the work site. To suggest otherwise would require an interpretation of WPC's work site to include every household and business connected to every sewer line leading to the treatment facility. There is no basis for concluding that the language of the LPR Endorsement can be construed to give WPC's work site such an expansive interpretation. Therefore, the discharge was not on or from WPC's work site, merely because the sewage collection system may have been the source of the sewage. Accordingly, there is no coverage under the LPR Endorsement because there was no "pollution incident" on or from WPC's work site.

2. The Pollution Exclusion

[4] Amerisure contends that it has no duty to defend WPC because the pollution ***1382** exclusion definitively bars coverage.[FN2] The CGL Policy's Total Pollution Exclusion with a Building Heating Equipment Exception, Hostile Fire Exception and Contractor Job Site Exception Endorsement (the "Pollution Exclusion") states, in relevant part:

> FN2. Amerisure does not argue that the main coverage form of the CGL Policy does not provide coverage. Thus, aside from the analysis pertaining to the LPR Endorsement, this Court will proceed upon the assumption that claims for which WPC seeks coverage constitute bodily injury or property damage caused by an occurrence that took place in the coverage territory.

f. Pollution

(1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time ...

CGL Policy, Pollution Exclusion, ¶ 2(f) (dkt. # 1, at 50).[FN3] "Pollutant" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *Id.* at Section V, ¶ 15. Waste includes "materials to be recycled, reconditioned or reclaimed." *Id.*

> FN3. The Florida Supreme Court has held that the absolute pollution exclusion found in CGL policies is clear and unambiguous. *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1138 (Fla.1998) (holding that "[w]e, too, agree that the pollution exclusion clause is clear and unambiguous").

The CGL Policy's Pollution Exclusion requires that the "property damage" or "bodily injury" arise out of the "actual or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." CGL Policy, Pollution Exclusion, ¶ 2(f)(1). Fecal contaminant is a "pollutant" within the meaning of the CGL Policy because it is a solid irritant and contaminant, which falls within the CGL Policy's definition of a "pollutant." *Yachtman's Inn*, 595 F.Supp.2d at 1324. Harris claims that the property damage to her house, and bodily injury to herself and her family, was caused by fecal contaminate from sewer backups. Harris Compl. ¶¶ 14-15, 17-21, 23, 25, 27. Thus, the Pollution Exclusion applies because Harris alleges that the property damage and bodily injury was caused by the discharge or dispersal of a pollutant. Therefore, Amerisure has no duty to defend.

IV. CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (dkt. # 32) is GRANTED.

S.D.Fla.,2009.
WPC Indus. Contractors, Ltd. v. Amerisure Mut. Ins. Co.
720 F.Supp.2d 1377

END OF DOCUMENT

Indoor Air

Care for Your Air: A Guide to Indoor Air Quality

Understand indoor air in homes, schools, and offices

EPA 404/F-08/008, September 2008

Most of us spend much of our time indoors. The air that we breathe in our homes, in schools, and in offices can put us at risk for health problems. Some pollutants can be chemicals, gases, and living organisms like mold and pests.

Some pollutants in the air are especially harmful for children, elderly people, and those with health problems.

Several sources of air pollution are in homes, schools, and offices. Some pollutants cause health problems such as sore eyes, burning in the nose and throat, headaches, or fatigue. Other pollutants cause or worsen allergies, respiratory illnesses (such as asthma), heart disease, cancer, and other serious long-term conditions. Sometimes individual pollutants at high concentrations, such as carbon monoxide, cause death.

PDF Version (7 pp., 1.9 M, about PDF)

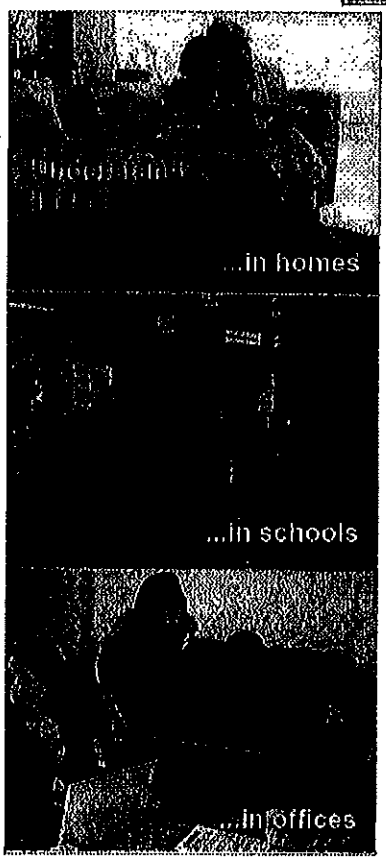
EPA 404/F-08/008, September 2008

Take a Tour of the IAQ House

Contents

Learn about pollutants

Understanding and controlling some of the common pollutants found in homes, schools, and offices may help improve your indoor air and reduce your family's risk of health concerns related to indoor air quality (IAQ).



Radon is a radioactive gas that is formed in the soil. It can enter indoors through cracks and openings in floors and walls that are in contact with the ground.

- Radon is the leading cause of lung cancer among nonsmokers, and the second leading cause of lung cancer overall.

Secondhand smoke comes from burning tobacco products. It can cause cancer and serious respiratory illnesses.

- Children are especially vulnerable to secondhand smoke. It can cause or worsen asthma symptoms and is linked to increased risks of ear infections and Sudden Infant Death Syndrome (SIDS).

Combustion Pollutants are gases or particles that come from burning materials. In homes, the major source of combustion pollutants are improperly vented or unvented fuel-burning appliances such as space heaters, woodstoves, gas stoves, water heaters, dryers, and fireplaces. The types and amounts of pollutants produced depends on the type of appliance, how well the appliance is installed, maintained, and vented, and the kind of fuel it uses. Common combustion pollutants include:

- Carbon monoxide (CO) which is a colorless, odorless gas that interferes with the delivery of oxygen throughout the body. Carbon monoxide causes headaches, dizziness, weakness, nausea, and even death.
- Nitrogen dioxide (NO_2) which is a colorless, odorless gas that causes eye, nose and throat irritation, shortness of breath, and an increased risk of respiratory infection.

Volatile organic compounds (VOCs) are chemicals found in paints and lacquers, paint strippers, cleaning supplies, varnishes and waxes, pesticides, building materials and furnishings, office equipment, moth repellents, air fresheners, and dry-cleaned clothing. VOCs evaporate into the air when these products are used or sometimes even when they are stored.

- Volatile organic compounds irritate the eyes, nose and throat, and cause headaches, nausea, and damage to the liver, kidneys, and central nervous system. Some of them can cause cancer.

Asthma triggers are commonly found in homes, schools, and offices and include mold, dust mites, secondhand smoke, and pet dander. A home may have *mold* growing on a shower curtain, *dust mites* in pillows, blankets or stuffed animals, *secondhand smoke* in the air, and *cat and dog hairs* on the carpet or floors. Other common asthma triggers include some foods and pollutants in the air.

- Asthma triggers cause symptoms including coughing, chest tightness, wheezing, and breathing problems. An asthma attack occurs when symptoms keep getting worse or are suddenly very severe. Asthma attacks can be life threatening. However, asthma is controllable with the right medicines and by reducing asthma triggers.

Molds are living things that produce spores. Molds produce spores that float in the air, land on damp surfaces, and grow.

- Inhaling or touching molds can cause hay fever-type symptoms such as sneezing, runny nose, red eyes, and skin rashes. Molds can also trigger asthma attacks.

Improving your indoor air

Take steps to help improve your air quality and reduce your IAQ-related health risks at little or no cost by:

Controlling the sources of pollution: Usually the most effective way to improve indoor air is to eliminate individual sources or reduce their emissions.

Ventilating: Increasing the amount of fresh air brought indoors helps reduce pollutants inside. When weather permits, open windows and doors, or run an air conditioner with the vent control open. Bathroom and kitchen fans that exhaust to the outdoors also increase ventilation and help remove pollutants.

Always ventilate and follow manufacturers' instructions when you use products or appliances that may release pollutants into the indoor air.

Changing filters regularly: Central heaters and air conditioners have filters to trap dust and other pollutants in the air. Make sure to change or clean the filters regularly, following the instructions on the package.

Adjusting humidity: The humidity inside can affect the concentrations of some indoor air pollutants. For example, high humidity keeps the air moist and increases the likelihood of mold.

Keep indoor humidity between 30 and 50 percent. Use a moisture or humidity gauge, available at most hardware stores, to see if the humidity in your home is at a good level. To increase humidity, use a vaporizer or humidifier. To decrease humidity, open the windows if it is not humid outdoors. If it is warm, turn on the air conditioner or adjust the humidity setting on the humidifier.

Take Action to Improve Air Quality in Every Room

Asthma is a serious, sometimes life-threatening respiratory disease that affects the quality of life for millions of Americans.

- Environmental asthma triggers: are found around the home and can be eliminated with simple steps.
- Don't allow smoking in your home or car.
- Dust and clean your home regularly.
- Clean up mold and fix water leaks.
- Wash sheets and blankets weekly in hot water.
- Use allergen-proof mattress and pillow covers.
- Keep pets out of the bedroom and off soft furniture.
- Control pests—close up cracks and crevices and seal leaks; don't leave food out.

Important tips that will help control indoor pollutants

- Test for radon and fix if there is a problem.
- Reduce asthma triggers such as mold and dust mites.
- Do not let people smoke indoors.
- Keep all areas clean and dry. Clean up any mold and get rid of excess water or moisture.
- Always ventilate when using products that can release pollutants into the air; if products must be stored following use, make sure to close tightly.
- Inspect fuel-burning appliances regularly for leaks, and make repairs when necessary.
- Consider installing a carbon monoxide alarm.

Children are especially sensitive to secondhand smoke, which can trigger asthma and other respiratory illnesses.

Secondhand smoke: smoke comes from burning tobacco products such as cigarettes, pipes, and cigars.

- To help protect children from secondhand smoke, do not smoke or allow others to smoke inside your home or car.

Radon is the second leading cause of lung cancer.

Radon gas: enters your home through cracks and openings in floors and walls in contact with the ground.

- Test your home with a do-it-yourself radon kit. If the test result indicates you should fix, call a qualified radon mitigation specialist.
- Ask your builder about including radon-reducing features in your new home at the time of construction.

Mold can lead to allergic reactions, asthma, and other respiratory ailments.

Mold: can grow anywhere there is moisture in a house.

- The key to mold control is moisture control.
- If mold is a problem in your home, you should clean up the mold promptly and fix the water problem.
- It is important to dry water-damaged areas and items within 24-48 hours to prevent mold growth.

VOCs cause eye, nose, and throat irritation, headaches, nausea, and can damage the liver, kidney, and central nervous system.

Volatile organic compounds (VOCs): are chemicals that evaporate at room temperature. VOCs are emitted by a wide array of products used in homes including paints and lacquers, paint strippers, varnishes, cleaning supplies, air fresheners, pesticides, building materials, and furnishings. VOCs are released from products into the home both during use and while stored.

- Read and follow all directions and warnings on common household products.
- Make sure there is plenty of fresh air and ventilation (e.g., opening windows and using extra fans) when painting, remodeling, or using other products that may release VOCs.
- Never mix products, such as household cleaners, unless directed to do so on the label.
- Store household products that contain chemicals according to manufacturers' instructions.
- Keep all products away from children!

Carbon monoxide causes headaches, dizziness, disorientation, nausea and fatigue, and high levels can be fatal.

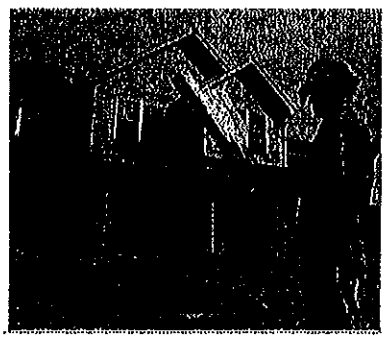
Nitrogen dioxide causes eyes, nose, and throat irritation, impairs lung function, and increases respiratory infections.

Sources include: indoor use of furnaces, gas stoves, unvented kerosene and gas space heaters, leaking chimneys, and tobacco products.

- Ventilate rooms where fuel-burning appliances are used.
- Use appliances that vent to the outside whenever possible.
- Ensure that all fuel-burning appliances are properly installed, used, adjusted, and maintained.

Remodeling old homes and building new homes

While remodeling or improving the energy efficiency of your home, steps should be taken to minimize pollution from sources inside the home, either from new materials or from disturbing materials already in the home. In addition, residents should be alert to signs of inadequate ventilation, such as stuffy air, moisture condensation on cold surfaces, or mold and mildew growth.



When building new homes, homebuyers today are increasingly concerned about the IAQ of their homes. Pollutants like mold, radon, carbon monoxide, and toxic chemicals have received greater attention than ever as poor IAQ has been linked to a host of health problems. To address these concerns, builders can employ a variety of construction practices and technologies to decrease the risk of poor IAQ in their new homes using the criteria from EPA's Indoor airPLUS as a guide.

To help ensure that you will have good IAQ in your new or remodeled home:

- Ask about including radon-reducing features.
- Provide proper drainage and seal foundations in new construction.
- Consider installing a mechanical ventilation system. Mechanical ventilation systems introduce fresh air using ducts and fans, instead of relying on holes or cracks in the walls and windows.

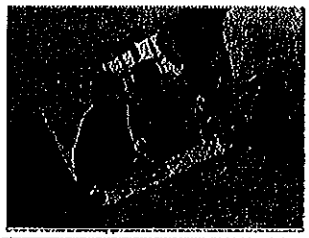
- When installing new appliances (like furnaces) make sure they are installed properly with a good vent or flue.

Schools

With nearly 56 million people, or 20 percent of the U.S. population, spending their days inside elementary and secondary schools, IAQ problems can be a significant concern. All types of schools—whether new or old, big or small, elementary or high school—can experience IAQ problems. School districts are increasingly experiencing budget shortfalls and many are in poor condition, leading to a host of IAQ problems.

- EPA's voluntary *Indoor Air Quality Tools for Schools Program* provides district-based guidance to schools about best practices, industry guidelines, and practical management actions to help school personnel identify, solve, and prevent IAQ problems.
- Children may be more sensitive to pollution, and children with asthma are especially sensitive. Asthma is responsible for millions of missed school days each year. Parents' and caregivers' involvement helps daycare facilities become aware of asthma triggers and the need to reduce them.

Office Buildings



Many office buildings have poor IAQ because of pollution sources and poorly designed, maintained, or operated ventilation systems.

- Office workers help to improve the indoor air in their buildings by paying attention to environmental conditions including ventilation, temperature, and the presence of odors. Report any problems to facility managers immediately.
- To improve IAQ, be careful not to block air vents or grilles, keep your space clean and dry, and do not bring in products that may pollute the indoor air.

Asthma	Indoor airPLUS Program	Partnership for Clean Indoor Air	Ice Arenas
Mold	IAQ Design Tools for Schools	Carbon Monoxide	Air Cleaners
Radon	Smoke-free Homes and Care	Floods	www.flu.gov
IAQ Tools for Schools	IAQ Tribal Partners Program	CIAQ	Indoor Air Quality

Last updated on Thursday, November 04, 2010

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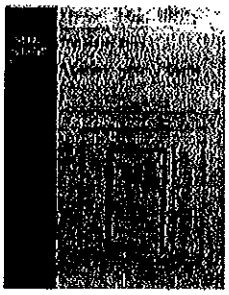

The Inside Story

A Guide to Indoor Air Quality

CPSC Document #450

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DISCLAIMER

Information provided in this booklet is based on current scientific and technical understanding of the issues presented and is reflective of the jurisdictional boundaries established by the statutes governing the co-authoring agencies. Following the advice given will not necessarily provide complete protection in all situations or against all health hazards that may be caused by indoor air pollution.

INTRODUCTION

Indoor Air Quality Concerns

All of us face a variety of risks to our health as we go about our day-to-day lives. Driving in cars, flying in planes, engaging in recreational activities, and being exposed to environmental pollutants all pose varying degrees of risk. Some risks are simply unavoidable. Some we choose to accept because to do otherwise would restrict our ability to lead our lives the way we want. And some are risks we might decide to avoid if we had the opportunity to make informed choices. Indoor air pollution is one risk that you can do something about.

In the last several years, a growing body of scientific evidence has indicated that the air within homes and other buildings can be more seriously polluted than the outdoor air in even the largest and most industrialized cities. Other research indicates that people spend approximately 90 percent of their time indoors. Thus, for many people, the risks to health may be greater due to exposure to air pollution indoors than outdoors.

In addition, people who may be exposed to indoor air pollutants for the longest periods of time are often those most susceptible to the effects of indoor air pollution. Such groups include the young, the elderly, and the chronically ill, especially those suffering from respiratory or cardiovascular disease.

Why a Booklet on Indoor Air?

While pollutant levels from individual sources may not pose a significant health risk by themselves, most homes have more than one source that contributes to indoor air pollution. There can be a serious risk from the cumulative effects of these sources. Fortunately, there are steps that most people can take both to reduce the risk from existing sources and to prevent new problems from occurring. This booklet was prepared by the U.S. Environmental Protection Agency (EPA) and the U.S. Consumer Product Safety Commission (CPSC) to help you decide whether to take actions that can reduce the level of indoor air pollution in your own home.

Because so many Americans spend a lot of time in offices with mechanical heating, cooling, and ventilation systems, there is also a short section on the causes of poor air quality in offices and what you can do if you suspect that your office may have a problem. A glossary and a list of organizations where you can get additional information are available in this document.

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INDOOR AIR QUALITY IN YOUR HOME

What Causes Indoor Air Problems?

Indoor pollution sources that release gases or particles into the air are the primary cause of indoor air quality problems in homes. Inadequate ventilation can increase indoor pollutant levels by not bringing in enough outdoor air to dilute emissions from indoor sources and by not carrying indoor air pollutants out of the home. High temperature and humidity levels can also increase concentrations of some pollutants.

Pollutant Sources

There are many sources of indoor air pollution in any home. These include combustion sources such as oil, gas, kerosene, coal, wood, and tobacco products; building materials and furnishings as diverse as deteriorated, asbestos-containing insulation, wet or damp carpet, and cabinetry or furniture made of certain pressed wood products; products for household cleaning and maintenance, personal care, or hobbies; central heating and cooling systems and humidification devices; and outdoor sources such as radon, pesticides, and outdoor air pollution.

The relative importance of any single source depends on how much of a given pollutant it emits and how hazardous those emissions are. In some cases, factors such as how old the source is and whether it is properly maintained are significant. For example, an improperly adjusted gas stove can emit significantly more carbon monoxide than one that is properly adjusted.

Some sources, such as building materials, furnishings, and household products like air fresheners, release pollutants more or less continuously. Other sources, related to activities carried out in the home, release pollutants intermittently. These include smoking, the use of unvented or malfunction-ing stoves, furnaces, or space heaters, the use of solvents in cleaning and hobby activities, the use of paint strippers in redecorating activities, and the use of cleaning products and pesticides in housekeeping. High pollutant concentrations can remain in the air for long periods after some of these activities.

Amount of Ventilation

If too little outdoor air enters a home, pollutants can accumulate to levels that can pose health and comfort problems. Unless they are built with special mechanical means of ventilation, homes that are designed and constructed to minimize the amount of outdoor air that can "leak" into and out of the home may have higher pollutant levels than other homes. However, because some weather conditions can drastically reduce the amount of outdoor air that enters a home, pollutants can build up even in homes that are normally considered "leaky."

How Does Outdoor Air Enter a House?

Outdoor air enters and leaves a house by: infiltration, natural ventilation, and mechanical ventilation. In a process known as infiltration, outdoor air flows into the house through openings, joints, and cracks in walls, floors, and ceilings, and around windows and doors. In natural ventilation, air moves through opened windows and doors. Air movement associated with infiltration and natural ventilation is caused by air temperature differences between indoors and outdoors and by wind. Finally, there are a number of mechanical ventilation devices, from outdoor-vented fans that intermittently remove air from a single room, such as bathrooms and kitchen, to air handling systems that use fans and duct work to continuously remove indoor air and distribute filtered and conditioned outdoor air to strategic points throughout the house. The rate at which outdoor air replaces indoor air is described as the air exchange rate. When there is little infiltration, natural ventilation, or mechanical ventilation, the air exchange rate is low and pollutant levels can increase.

What If You Live in an Apartment?

Apartments can have the same indoor air problems as single-family homes because many of the pollution sources, such as the interior building materials, furnishings, and household products, are similar. Indoor air problems similar to those in offices are caused by such sources as contaminated ventilation systems, improperly placed outdoor air intakes, or maintenance activities.

Solutions to air quality problems in apartments, as in homes and offices, involve such actions as: eliminating or controlling the sources of pollution, increasing ventilation, and installing air cleaning devices. Often a resident can take the appropriate action to improve the indoor air quality by removing a source, altering an activity, unblocking an air supply vent, or opening a window to temporarily increase the ventilation; in other cases, however, only the building owner or manager is in a position to remedy the problem. (See the section "What to Do If You Suspect a Problem") You can encourage building management to follow guidance in EPA and NIOSH's Building Air Quality: A Guide for Building Owners and Facility Managers. To obtain the looseleaf-fomat version of the Building Air Quality, complete with appendices, an index, and a full set of useful forms, and the newly released, Building Air Quality Action Plan, order GPO Stock # 055-000-00602-4, for $28, contact the: Superintendent of Documents, U.S. Government Printing Office (GPO), P.O. Box 371954, Pittsburgh, PA 15250-7954, or call (202) 512-1800, fax (202) 512-2250.

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IMPROVING THE AIR QUALITY IN YOUR HOME

Indoor Air and Your Health

Health effects from indoor air pollutants may be experienced soon after exposure or, possibly, years later.

Immediate effects may show up after a single exposure or repeated exposures. These include irritation of the eyes, nose, and throat, headaches, dizziness, and fatigue. Such immediate effects are usually short-term and treatable. Sometimes the treatment is simply eliminating the person's exposure to the source of the pollution, if it can be identified. Symptoms of some diseases, including asthma, hypersensitivity pneumonitis, and humidifier fever, may also show up soon after exposure to some indoor air pollutants.

The likelihood of immediate reactions to indoor air pollutants depends on several factors. Age and preexisting medical conditions are two important influences. In other cases, whether a person reacts to a pollutant depends on individual sensitivity, which varies tremendously from person to person. Some people can become sensitized to biological pollutants after repeated exposures, and it appears that some people can become sensitized to chemical pollutants as well.

Certain immediate effects are similar to those from colds or other viral diseases, so it is often difficult to determine if the symptoms are a result of exposure to indoor air pollution. For this reason, it is important to pay attention to the time and place the symptoms occur. If the symptoms fade or go away when a person is away from the home and return when the person returns, an effort should be made to identify indoor air sources that may be possible causes. Some effects may be made worse by an inadequate supply of outdoor air or from the heating, cooling, or humidity conditions prevalent in the home.

Other health effects may show up either years after exposure has occurred or only after long or repeated periods of exposure. These effects, which include some respiratory diseases, heart disease, and cancer, can be severely debilitating or fatal. It is prudent to try to improve the indoor air quality in your home even if symptoms are not noticeable. More information on potential health effects from particular indoor air pollutants is provided in the section, "A Look at Source-Specific Controls."

While pollutants commonly found in indoor air are responsible for many harmful effects, there is considerable uncertainty about what concentrations or periods of exposure are necessary to produce specific health problems. People also react very differently to exposure to indoor air pollutants. Further research is needed to better understand which health effects occur after exposure to the average pollutant concentrations found in homes and which occur from the higher concentrations that occur for short periods of time.

The health effects associated with some indoor air pollutants are summarized in the section "Reference Guide to Major Indoor Air Pollutants in the Home."

Identifying Air Quality Problems

Some health effects can be useful indicators of an indoor air quality problem, especially if they appear after a person moves to a new residence, remodels or refurnishes a home, or treats a home with pesticides. If you think that you have symptoms that may be related to your home environment, discuss them with your doctor or your local health department to see if they could be caused by indoor air pollution. You may also want to consult a board-certified allergist or an occupational medicine specialist for answers to your questions.

Another way to judge whether your home has or could develop indoor air problems is to identify potential sources of indoor air pollution. Although the presence of such sources does not necessarily mean that you have an indoor air quality problem, being aware of the type and number of potential sources is an important step toward assessing the air quality in your home.

A third way to decide whether your home may have poor indoor air quality is to look at your lifestyle and activities. Human activities can be significant sources of indoor air pollution. Finally, look for signs of problems with the ventilation in your home. Signs that can indicate your home may not have enough ventilation include moisture condensation on windows or walls, smelly or stuffy air, dirty central heating and air cooling equipment, and areas where books, shoes, or other items become moldy. To detect odors in your home, step outside for a few minutes, and then upon reentering your home, note whether odors are noticeable.

Measuring Pollutant Levels

The federal government recommends that you measure the level of radon in your home. Without measurements there is no way to tell whether radon is present because it is a colorless, odorless, radioactive gas. Inexpensive devices are available for measuring radon. EPA provides guidance as to risks associated with different levels of exposure and when the public should consider corrective action. There are specific mitigation techniques that have proven effective in reducing levels of radon in the home. (See "Radon" for additional information about testing and controlling radon in homes.)

For pollutants other than radon, measurements are most appropriate when there are either health symptoms or signs of poor ventilation and specific sources or pollutants have been identified as possible causes of indoor air quality problems. Testing for many pollutants can be expensive. Before monitoring your home for pollutants besides radon, consult your state or local health department or professionals who have experience in solving indoor air quality problems in nonindustrial buildings.

Weatherizing Your Home

The federal government recommends that homes be weatherized in order to reduce the amount of energy needed for heating and cooling. While weatherization is underway, however, steps should also be taken to minimize pollution from sources inside the home. (See "Improving the Air Quality in Your Home" for recommended actions.) In addition, residents should be alert to the emergence of signs of inadequate ventilation, such as stuffy air, moisture condensation on cold surfaces, or mold and mildew growth. Additional weatherization measures should not be undertaken until these problems have been corrected.

Weatherization generally does not cause indoor air problems by adding new pollutants to the air. (There are a few exceptions, such as caulking, that can sometimes emit pollutants.) However, measures such as installing storm windows, weather stripping, caulking, and blown-in wall insulation can reduce the amount of outdoor air infiltrating into a home. Consequently, after weatherization, concentrations of indoor air pollutants from sources inside the home can increase.

Three Basic Strategies

Source Control

Usually the most effective way to improve indoor air quality is to eliminate individual sources of pollution or to reduce their emissions. Some sources, like those that contain asbestos, can be sealed or enclosed; others, like gas stoves, can be adjusted to decrease the amount of emissions. In many cases, source control is also a more cost-efficient approach to protecting indoor air quality than increasing ventilation because increasing ventilation can increase energy costs. Specific sources of indoor air pollution in your home are listed later in this section.

Ventilation Improvements

Another approach to lowering the concentrations of indoor air pollutants in your home is to increase the amount of outdoor air coming indoors. Most home heating and cooling systems, including forced air heating systems, do not mechanically bring fresh air into the house. Opening windows and doors, operating window or attic fans, when the weather permits, or running a window air conditioner with the vent control open increases the outdoor ventilation rate. Local bathroom or kitchen fans that exhaust outdoors remove contaminants directly from the room where the fan is located and also increase the outdoor air ventilation rate.

It is particularly important to take as many of these steps as possible while you are involved in short-term activities that can generate high levels of pollutants--for example, painting, paint stripping, heating with kerosene heaters, cooking, or engaging in maintenance and hobby activities such as welding, soldering, or sanding. You might also choose to do some of these activities outdoors, if you can and if weather permits.

Advanced designs of new homes are starting to feature mechanical systems that bring outdoor air into the home. Some of these designs include energy-efficient heat recovery ventilators (also known as air-to-air heat exchangers). For more information about air-to-air heat exchangers, contact the Conservation and Renewable Energy Inquiry and Referral Service (CAREIRS), PO Box 3048, Merrifield, VA 22116; (800) 523-2929.

Air Cleaners

There are many types and sizes of air cleaners on the market, ranging from relatively inexpensive table-top models to sophisticated and expensive whole-house systems. Some air cleaners are highly effective at particle removal, while others, including most table-top models, are much less so. Air cleaners are generally not designed to remove gaseous pollutants.

The effectiveness of an air cleaner depends on how well it collects pollutants from indoor air (expressed as a percentage efficiency rate) and how much air it draws through the cleaning or filtering element (expressed in cubic feet per minute). A very efficient collector with a low air-circulation rate will not be effective, nor will a cleaner with a high air-circulation rate but a less efficient collector. The long-term performance of any air cleaner depends on maintaining it according to the manufacturer's directions.

Another important factor in determining the effectiveness of an air cleaner is the strength of the pollutant source. Table-top air cleaners, in particular, may not remove satisfactory amounts of pollutants from strong nearby sources. People with a sensitivity to particular sources may find that air cleaners are helpful only in conjunction with concerted efforts to remove the source.

Over the past few years, there has been some publicity suggesting that houseplants have been shown to reduce levels of some chemicals in laboratory experiments. There is currently no evidence, however, that a reasonable number of houseplants remove significant quantities of pollutants in homes and offices. Indoor houseplants should not be over-watered because overly damp soil may promote the growth of microorganisms which can affect allergic individuals.

At present, EPA does not recommend using air cleaners to reduce levels of radon and its decay products. The effectiveness of these devices is uncertain because they only partially remove the radon decay products and do not diminish the amount of radon entering the home. EPA plans to do additional research on whether air cleaners are, or could become, a reliable means of reducing the health risk from radon. EPA's booklet, Residential Air-Cleaning Devices, provides further information on air-cleaning devices to reduce indoor air pollutants.

For most indoor air quality problems in the home, source control is the most effective solution. This section takes a source-by-source look at the most common indoor air pollutants, their potential health effects, and ways to reduce levels in the home. (For a summary of the points made in this section, see the section entitled "Reference Guide to Major Indoor Air Pollutants in the Home.") EPA recently released Ozone Generators That Are Sold As Air Cleaners. The purpose of this document (which is only available via this web site) is to

provide accurate information regarding the use of ozone-generating devices in indoor occupied spaces. This information is based on the most credible scientific evidence currently available.

EPA has recently published, "Should You Have the Air Ducts in Your Home Cleaned?" EPA-402-K-97-002, October 1997. This document is intended to help consumers answer this often confusing question. The document explains what air duct cleaning is, provides guidance to help consumers decide whether to have the service performed in their home, and provides helpful information for choosing a duct cleaner, determining if duct cleaning was done properly, and how to prevent contamination of air ducts.

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A LOOK AT SOURCE-SPECIFIC CONTROLS

RADON (Rn)

The most common source of indoor radon is uranium in the soil or rock on which homes are built. As uranium naturally breaks down, it releases radon gas which is a colorless, odorless, radioactive gas. Radon gas enters homes through dirt floors, cracks in concrete walls and floors, floor drains, and sumps. When radon becomes trapped in buildings and concentrations build up indoors, exposure to radon becomes a concern.

Any home may have a radon problem. This means new and old homes, well-sealed and drafty homes, and homes with or without basements.

Sometimes radon enters the home through well water. In a small number of homes, the building materials can give off radon, too. However, building materials rarely cause radon problems by themselves.

Health Effects of Radon

The predominant health effect associated with exposure to elevated levels of radon is lung cancer. Research suggests that swallowing water with high radon levels may pose risks, too, although these are believed to be much lower than those from breathing air containing radon. Major health organizations (like the Centers for Disease Control and Prevention, the American Lung Association (ALA), and the American Medical Association) agree with estimates that radon causes thousands of preventable lung cancer deaths each year. EPA estimates that radon causes about 14,000 deaths per year in the United States--however, this number could range from 7,000 to 30,000 deaths per year. If you smoke and your home has high radon levels, your risk of lung cancer is especially high.

Reducing Exposure to Radon in Homes

Measure levels of radon in your home.

You can't see radon, but it's not hard to find out if you have a radon problem in your home. Testing is easy and should only take a little of your time.

There are many kinds of inexpensive, do-it-yourself radon test kits you can get through the mail and in hardware stores and other retail outlets. Make sure you buy a test kit that has passed EPA's testing program or is state-certified. These kits will usually display the phrase "Meets EPA Requirements." If you prefer, or if you are buying or selling a home, you can hire a trained contractor to do the testing for you. EPA's voluntary National Radon Proficiency Program (RPP) evaluated testing (measurement) contractors. A contractor who had met EPA's requirements carried an EPA-generated RPP identification card. EPA provided a list of companies and individual contractors on this web site which was also available to state radon offices. You should call your state radon office to obtain a list of qualified contractors in your area.You can also contact either the National Environmental Health Association (NEHA) - http://www.neha.org or the National Radon Safety Board (NRSB) - http://www.nrsb.org for a list of proficient radon measurement and/or mitigation contractors.

Refer to the EPA guidelines on how to test and interpret your test results.

You can learn more about radon through EPA's publications, *A Citizen's Guide to Radon: The Guide to Protecting Yourself and Your Family From Radon* and *Home Buyer's and Seller's Guide to Radon*; which are also available from your state radon office.

Learn about radon reduction methods.

Ways to reduce radon in your home are discussed in EPA's *Consumer's Guide to Radon Reduction*. You can get a copy from your state radon office. There are simple solutions to radon problems in homes. Thousands of homeowners have already fixed radon problems. Lowering high radon levels requires technical knowledge and special skills. You should use a contractor who is trained to fix radon problems.

Check with your state radon office for names of qualified or state-certified radon-reduction contractors in your area.

Stop smoking and discourage smoking in your home.

Scientific evidence indicates that smoking combined with radon is an especially serious health risk. Stop smoking and lower your radon level to reduce lung cancer risk.

Treat radon-contaminated well water.

While radon in water is not a problem in homes served by most public water supplies, it has been found in well water. If you've tested the air in your home and found a radon problem, and you have a well, contact a lab certified to measure radiation in water to have your water tested. Radon problems in water can be readily fixed. Call your state radon office or the EPA Drinking Water Hotline (800-426-4791) for more information.

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ENVIRONMENTAL TOBACCO SMOKE (ETS)

Environmental tobacco smoke (ETS) is the mixture of smoke that comes from the burning end of a cigarette, pipe, or cigar, and smoke exhaled by the smoker. It is a complex mixture of over 4,000 compounds, more than 40 of which are known to cause cancer in humans or animals and many of which are strong irritants. ETS is often referred to as "secondhand smoke" and exposure to ETS is often called "passive smoking."

Health Effects of Environmental Tobacco Smoke

In 1992, EPA completed a major assessment of the respiratory health risks of ETS (Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders EPA/600/6-90/006F). The report concludes that exposure to ETS is responsible for approximately 3,000 lung cancer deaths each year in nonsmoking adults and impairs the respiratory health of hundreds of thousands of children.

Infants and young children whose parents smoke in their presence are at increased risk of lower respiratory tract infections (pneumonia and bronchitis) and are more likely to have symptoms of respiratory irritation like cough, excess phlegm, and wheeze. EPA estimates that passive smoking annually causes between 150,000 and 300,000 lower respiratory tract infections in infants and children under 18 months of age, resulting in between 7,500 and 15,000 hospitalizations each year. These children may also have a build-up of fluid in the middle ear, which can lead to ear infections. Older children who have been exposed to secondhand smoke may have slightly reduced lung function.

Asthmatic children are especially at risk. EPA estimates that exposure to secondhand smoke increases the number of episodes and severity of symptoms in hundreds of thousands of asthmatic children, and may cause thousands of nonasth-matic children to develop the disease each year. EPA estimates that between 200,000 and 1,000,000 asthmatic children have their condition made worse by exposure to secondhand smoke each year. Exposure to secondhand smoke causes eye, nose, and throat irritation. It may affect the cardiovascular system and some studies have linked exposure to secondhand smoke with the onset of chest pain. For publications about ETS, go to the IAQ Publications page, or contact EPA's Indoor Air Quality Information Clearinghouse (IAQ INFO), 800-438-4318 or (703) 356-4020.

Reducing Exposure to Environmental Tobacco Smoke

Don't smoke at home or permit others to do so. Ask smokers to smoke outdoors.

The 1986 Surgeon General's report concluded that physical separation of smokers and nonsmokers in a common air space, such as different rooms within the same house, may reduce - but will not eliminate - non-smokers' exposure to environmental tobacco smoke.

If smoking indoors cannot be avoided, increase ventilation in the area where smoking takes place.

Open windows or use exhaust fans. Ventilation, a common method of reducing exposure to indoor air pollutants, also will reduce but not eliminate exposure to environmental tobacco smoke. Because smoking produces such large amounts of pollutants, natural or mechanical ventilation techniques do not remove them from the air in your home as quickly as they build up. In addition, the large increases in ventilation it takes to significantly reduce exposure to environmental tobacco smoke can also increase energy costs substantially. Consequently, the most effective way to reduce exposure to environmental tobacco smoke in the home is to eliminate smoking there.

Do not smoke if children are present, particularly infants and toddlers.

Children are particularly susceptible to the effects of passive smoking. Do not allow baby-sitters or others who work in your home to smoke indoors. Discourage others from smoking around children. Find out about the smoking policies of day care center providers, schools, and other care givers for your children. The policy should protect children from exposure to ETS.

BIOLOGICAL CONTAMINANTS

Biological contaminants include bacteria, molds, mildew, viruses, animal dander and cat saliva, house dust mites, cockroaches, and pollen. There are many sources of these pollutants. Pollens originate from plants; viruses are transmitted by people and animals; bacteria are carried by people, animals, and soil and plant debris; and household pets are sources of saliva and animal dander. The protein in urine from rats and mice is a potent allergen. When it dries, it can become airborne. Contaminated central air handling systems can become breeding grounds for mold, mildew, and other sources of biological contaminants and can then distribute these contaminants through the home.

By controlling the relative humidity level in a home, the growth of some sources of biologicals can be minimized. A relative humidity of 30-50 percent is generally recommended for homes. Standing water, water-damaged materials, or wet surfaces also serve as a breeding ground for molds, mildews, bacteria, and insects. House dust mites, the source of one of the most powerful biological allergens, grow in damp, warm environments.

Health Effects From Biological Contaminants

Some biological contaminants trigger allergic reactions, including hypersensitivity pneumonitis, allergic rhinitis, and some types of asthma. Infectious illnesses, such as influenza, measles, and chicken pox are transmitted through the air. Molds and mildews release disease-causing toxins. Symptoms of health problems caused by biological pollutants include sneezing, watery eyes, coughing, shortness of breath, dizziness, lethargy, fever, and digestive problems.

Allergic reactions occur only after repeated exposure to a specific biological allergen. However, that reaction may occur immediately upon re-exposure or after multiple exposures over time. As a result, people who have noticed only mild allergic reactions, or no reactions at all, may suddenly find themselves very sensitive to particular allergens.

Some diseases, like humidifier fever, are associated with exposure to toxins from microorganisms that can grow in large building ventilation systems. However, these diseases can also be traced to microorganisms that grow in home heating and cooling systems and humidifiers. Children, elderly people, and people with breathing problems, allergies, and lung diseases are particularly susceptible to disease-causing biological agents in the indoor air.

Reducing Exposure to Biological Contaminants

Install and use exhaust fans that are vented to the outdoors in kitchens and bathrooms and vent clothes dryers outdoors.

> These actions can eliminate much of the moisture that builds up from everyday activities. There are exhaust fans on the market that produce little noise, an important consideration for some people. Another benefit to using kitchen and bathroom exhaust fans is that they can reduce levels of organic pollutants that vaporize from hot water used in showers and dishwashers.

Ventilate the attic and crawl spaces to prevent moisture build-up.

> Keeping humidity levels in these areas below 50 percent can prevent water condensation on building materials.

If using cool mist or ultrasonic humidifiers, clean appliances according to manufacturer's instructions and refill with fresh water daily.

> Because these humidifiers can become breeding grounds for biological contaminants, they have the potential for causing diseases such as hypersensitivity pneumonitis and humidifier fever. Evaporation trays in air conditioners, dehumidifiers, and refrigerators should also be cleaned frequently.

Thoroughly clean and dry water-damaged carpets and building materials (within 24 hours if possible) or consider removal and replacement.

> Water-damaged carpets and building materials can harbor mold and bacteria. It is very difficult to completely rid such materials of biological contaminants.

Keep the house clean. House dust mites, pollens, animal dander, and other allergy-causing agents can be reduced, although not eliminated, through regular cleaning.

> People who are allergic to these pollutants should use allergen-proof mattress encasements, wash bedding in hot (130 degrees farenheit) water, and avoid room furnishings that accumulate dust, especially if they cannot be washed in hot water. Allergic individuals should also leave the house while it is being vacuumed because vacuuming can actually increase airborne levels of mite allergens and other biological contaminants. Using central vacuum systems that are vented to the outdoors or vacuums with high efficiency filters may also be of help.

Take steps to minimize biological pollutants in basements.

Clean and disinfect the basement floor drain regularly. Do not finish a basement below ground level unless all water leaks are patched and outdoor ventilation and adequate heat to prevent condensation are provided. Operate a dehumidifier in the basement if needed to keep relative humidity levels between 30-50 percent.

To learn more about biological pollutants, read Biological Pollutants in Your Home issued by the U.S. Consumer Product Safety Commission and the American Lung Association. For contact information, see the section, "Where to Go For Additional Information."

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STOVES, HEATERS, FIREPLACES, AND CHIMNEYS

In addition to environmental tobacco smoke, other sources of combustion products are unvented kerosene and gas space heaters, woodstoves, fireplaces, and gas stoves. The major pollutants released are carbon monoxide, nitrogen dioxide, and particles. Unvented kerosene heaters may also generate acid aerosols.

Combustion gases and particles also come from chimneys and flues that are improperly installed or maintained and cracked furnace heat exchangers. Pollutants from fireplaces and woodstoves with no dedicated outdoor air supply can be "back-drafted" from the chimney into the living space, particularly in weatherized homes.

Health Effects of Combustion Products

Carbon monoxide (CO) is a colorless, odorless gas that interferes with the delivery of oxygen throughout the body. At high concentrations it can cause unconsciousness and death. Lower concentrations can cause a range of symptoms from headaches, dizziness, weakness, nausea, confusion, and disorientation, to fatigue in healthy people and episodes of increased chest pain in people with chronic heart disease. The symptoms of carbon monoxide poisoning are sometimes confused with the flu or food poisoning. Fetuses, infants, elderly people, and people with anemia or with a history of heart or respiratory disease can be especially sensitive to carbon monoxide exposures.

Nitrogen dioxide (NO_2) is a colorless, odorless gas that irritates the mucous membranes in the eye, nose, and throat and causes shortness of breath after exposure to high concentrations. There is evidence that high concentrations or continued exposure to low levels of nitrogen dioxide increases the risk of respiratory infection; there is also evidence from animal studies that repeated exposures to elevated nitrogen dioxide levels may lead, or contribute, to the development of lung disease such as emphysema. People at particular risk from exposure to nitrogen dioxide include children and individuals with asthma and other respiratory diseases.

Particles, released when fuels are incompletely burned, can lodge in the lungs and irritate or damage lung tissue. A number of pollutants, including radon and benzo(a)pyrene, both of which can cause cancer, attach to small particles that are inhaled and then carried deep into the lung.

Reducing Exposure to Combustion Products in Homes

Take special precautions when operating fuel-burning unvented space heaters.

Consider potential effects of indoor air pollution if you use an unvented kerosene or gas space heater. Follow the manufacturer's directions, especially instructions on the proper fuel and keeping the heater properly adjusted. A persistent yellow-tipped flame is generally an indicator of maladjustment and increased pollutant emissions. While a space heater is in use, open a door from the room where the heater is located to the rest of the house and open a window slightly.

Install and use exhaust fans over gas cooking stoves and ranges and keep the burners properly adjusted.

Using a stove hood with a fan vented to the outdoors greatly reduces exposure to pollutants during cooking. Improper adjustment, often indicated by a persistent yellow-tipped flame, causes increased pollutant emissions. Ask your gas company to adjust the burner so that the flame tip is blue. If you purchase a new gas stove or range, consider buying one with pilotless ignition because it does not have a pilot light that burns continuously. Never use a gas stove to heat your home. Always make certain the flue in your gas fireplace is open when the fireplace is in use.

Keep woodstove emissions to a minimum. Choose properly sized new stoves that are certified as meeting EPA emission standards.

Make certain that doors in old woodstoves are tight-fitting. Use aged or cured (dried) wood only and follow the manufacturer's directions for starting, stoking, and putting out the fire in woodstoves. Chemicals are used to pressure-treat wood; such wood should never be burned indoors. (Because some old gaskets in woodstove doors contain asbestos, when replacing gaskets refer to the instructions in the CPSC, ALA, and EPA booklet, Asbestos in Your Home, to avoid creating an asbestos problem. New gaskets are made of fiberglass.)

Have central air handling systems, including furnaces, flues, and chimneys, inspected annually and promptly

repair cracks or damaged parts.

Blocked, leaking, or damaged chimneys or flues release harmful combustion gases and particles and even fatal concentrations of carbon monoxide. Strictly follow all service and maintenance procedures recommended by the manufacturer, including those that tell you how frequently to change the filter. If manufacturer's instructions are not readily available, change filters once every month or two during periods of use. Proper maintenance is important even for new furnaces because they can also corrode and leak combustion gases, including carbon monoxide.

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HOUSEHOLD PRODUCTS

Organic chemicals are widely used as ingredients in household products. Paints, varnishes, and wax all contain organic solvents, as do many cleaning, disinfecting, cosmetic, degreasing, and hobby products. Fuels are made up of organic chemicals. All of these products can release organic compounds while you are using them, and, to some degree, when they are stored.

EPA's Total Exposure Assessment Methodology (TEAM) studies found levels of about a dozen common organic pollutants to be 2 to 5 times higher inside homes than outside, regardless of whether the homes were located in rural or highly industrial areas. Additional TEAM studies indicate that while people are using products containing organic chemicals, they can expose themselves and others to very high pollutant levels, and elevated concentrations can persist in the air long after the activity is completed.

Health Effects of Household Chemicals

The ability of organic chemicals to cause health effects varies greatly, from those that are highly toxic, to those with no known health effect. As with other pollutants, the extent and nature of the health effect will depend on many factors including level of exposure and length of time exposed. Eye and respiratory tract irritation, headaches, dizziness, visual disorders, and memory impairment are among the immediate symptoms that some people have experienced soon after exposure to some organics. At present, not much is known about what health effects occur from the levels of organics usually found in homes. Many organic compounds are known to cause cancer in animals; some are suspected of causing, or are known to cause, cancer in humans.

Reducing Exposure to Household Chemicals

Follow label instructions carefully.

Potentially hazardous products often have warnings aimed at reducing exposure of the user. For example, if a label says to use the product in a well-ventilated area, go outdoors or in areas equipped with an exhaust fan to use it. Otherwise, open up windows to provide the maximum amount of outdoor air possible.

Throw away partially full containers of old or unneeded chemicals safely.

Because gases can leak even from closed containers, this single step could help lower concentrations of organic chemicals in your home. (Be sure that materials you decide to keep are stored not only in a well-ventilated area but are also safely out of reach of children.) Do not simply toss these unwanted products in the garbage can. Find out if your local government or any organization in your community sponsors special days for the collection of toxic household wastes. If such days are available, use them to dispose of the unwanted containers safely. If no such collection days are available, think about organizing one.

Buy limited quantities.

If you use products only occasionally or seasonally, such as paints, paint strippers, and kerosene for space heaters or gasoline for lawn mowers, buy only as much as you will use right away.

Keep exposure to emissions from products containing methylene chloride to a minimum.

Consumer products that contain **methylene chloride** include paint strippers, adhesive removers, and aerosol spray paints. Methylene chloride is known to cause cancer in animals. Also, methylene chloride is converted to carbon monoxide in the body and can cause symptoms associated with exposure to carbon monoxide. Carefully read the labels containing health hazard information and cautions on the proper use of these products. Use products that contain methylene chloride outdoors when possible; use indoors only if the area is well ventilated.

Keep exposure to benzene to a minimum.

Benzene is a known human carcinogen. The main indoor sources of this chemical are environmental tobacco smoke, stored fuels and paint supplies, and automobile emissions in attached garages. Actions that will reduce benzene

paint supplies and special fuels that will not be used immediately.

Keep exposure to perchloroethylene emissions from newly dry-cleaned materials to a minimum.

Perchloroethylene is the chemical most widely used in dry cleaning. In laboratory studies, it has been shown to cause cancer in animals. Recent studies indicate that people breathe low levels of this chemical both in homes where dry-cleaned goods are stored and as they wear dry-cleaned clothing. Dry cleaners recapture the perchloroethylene during the dry-cleaning process so they can save money by re-using it, and they remove more of the chemical during the pressing and finishing processes. Some dry cleaners, however, do not remove as much perchloroethylene as possible all of the time. Taking steps to minimize your exposure to this chemical is prudent. If dry-cleaned goods have a strong chemical odor when you pick them up, do not accept them until they have been properly dried. If goods with a chemical odor are returned to you on subsequent visits, try a different dry cleaner.

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FORMALDEHYDE

Formaldehyde is an important chemical used widely by industry to manufacture building materials and numerous household products. It is also a by-product of combustion and certain other natural processes. Thus, it may be present in substantial concentrations both indoors and outdoors.

Sources of formaldehyde in the home include building materials, smoking, household products, and the use of unvented, fuel-burning appliances, like gas stoves or kerosene space heaters. Formaldehyde, by itself or in combination with other chemicals, serves a number of purposes in manufactured products. For example, it is used to add permanent-press qualities to clothing and draperies, as a component of glues and adhesives, and as a preservative in some paints and coating products.

In homes, the most significant sources of formaldehyde are likely to be pressed wood products made using adhesives that contain urea-formaldehyde (UF) resins. Pressed wood products made for indoor use include: particleboard (used as subflooring and shelving and in cabinetry and furniture); hardwood plywood paneling (used for decorative wall covering and used in cabinets and furniture); and medium density fiberboard (used for drawer fronts, cabinets, and furniture tops). Medium density fiberboard contains a higher resin-to-wood ratio than any other UF pressed wood product and is generally recognized as being the highest formaldehyde-emitting pressed wood product.

Other pressed wood products, such as softwood plywood and flake or oriented strandboard, are produced for exterior construction use and contain the dark, or red/black-colored phenol-formaldehyde (PF) resin. Although formaldehyde is present in both types of resins, pressed woods that contain PF resin generally emit formaldehyde at considerably lower rates than those containing UF resin.

Since 1985, the Department of Housing and Urban Development (HUD) has permitted only the use of plywood and particleboard that conform to specified formaldehyde emission limits in the construction of prefabricated and mobile homes. In the past, some of these homes had elevated levels of formaldehyde because of the large amount of high-emitting pressed wood products used in their construction and because of their relatively small interior space.

The rate at which products like pressed wood or textiles release formaldehyde can change. Formaldehyde emissions will generally decrease as products age. When the products are new, high indoor temperatures or humidity can cause increased release of formaldehyde from these products.

During the 1970s, many homeowners had urea-formaldehyde foam insulation (UFFI) installed in the wall cavities of their homes as an energy conservation measure. However, many of these homes were found to have relatively high indoor concentrations of formaldehyde soon after the UFFI installation. Few homes are now being insulated with this product. Studies show that formaldehyde emissions from UFFI decline with time; therefore, homes in which UFFI was installed many years ago are unlikely to have high levels of formaldehyde now.

Health Effects of Formaldehyde

Formaldehyde, a colorless, pungent-smelling gas, can cause watery eyes, burning sensations in the eyes and throat, nausea, and difficulty in breathing in some humans exposed at elevated levels (above 0.1 parts per million). High concentrations may trigger attacks in people with asthma. There is evidence that some people can develop a sensitivity to formaldehyde. It has also been shown to cause cancer in animals and may cause cancer in humans.

Reducing Exposure to Formaldehyde in Homes

Ask about the formaldehyde content of pressed wood products,including building materials, cabinetry, and furniture before you purchase them.

If you experience adverse reactions to formaldehyde, you may want to avoid the use of pressed wood products and other formaldehyde-emitting goods. Even if you do not experience such reactions, you may wish to reduce your exposure as much as possible by purchasing exterior-grade products, which emit less formaldehyde. For further information on formaldehyde and consumer products, call the EPA Toxic Substance Control Act (TSCA) assistance line (202-554-1404).

Some studies suggest that coating pressed wood products with polyurethane may reduce formaldehyde emissions for some period of time. To be effective, any such coating must cover all surfaces and edges and remain intact. Increase the ventilation and carefully follow the manufacturernstructions while applying these coatings. (If you are sensitive to formaldehyde, check the label contents before purchasing coating products to avoid buying products that contain formaldehyde, as they will emit the chemical for a short time after application.) Maintain moderate temperature and humidity levels and provide adequate ventilation. The rate at which formaldehyde is released is accelerated by heat and may also depend somewhat on the humidity level. Therefore, the use of dehumidifiers and air conditioning to control humidity and to maintain a moderate temperature can help reduce formaldehyde emissions. (Drain and clean dehumidifier collection trays frequently so that they do not become a breeding ground for microorganisms.) Increasing the rate of ventilation in your home will also help in reducing formaldehyde levels.

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PESTICIDES

According to a recent survey, 75 percent of U.S. households used at least one pesticide product indoors during the past year. Products used most often are insecticides and disinfectants. Another study suggests that 80 percent of most people's exposure to pesticides occurs indoors and that measurable levels of up to a dozen pesticides have been found in the air inside homes. The amount of pesticides found in homes appears to be greater than can be explained by recent pesticide use in those households; other possible sources include contaminated soil or dust that floats or is tracked in from outside, stored pesticide containers, and household surfaces that collect and then release the pesticides. Pesticides used in and around the home include products to control insects (insecticides), termites (termiticides), rodents (rodenticides), fungi (fungicides), and microbes (disinfectants). They are sold as sprays, liquids, sticks, powders, crystals, balls, and foggers.

In 1990, the American Association of Poison Control Centers reported that some 79,000 children were involved in common household pesticide poisonings or exposures. In households with children under five years old, almost one-half stored at least one pesticide product within reach of children.

EPA registers pesticides for use and requires manufacturers to put information on the label about when and how to use the pesticide. It is important to remember that the "-cide" in pesticides means "to kill." *These products can be dangerous if not used properly.*

In addition to the active ingredient, pesticides are also made up of ingredients that are used to carry the active agent. These carrier agents are called "inerts" in pesticides because they are not toxic to the targeted pest; nevertheless, some inerts are capable of causing health problems.

Health Effects From Pesticides

Both the active and inert ingredients in pesticides can be organic compounds; therefore, both could add to the levels of airborne organics inside homes. Both types of ingredients can cause the effects discussed in this document under "Household Products," however, as with other household products, there is insufficient understanding at present about what pesticide concentrations are necessary to produce these effects.

Exposure to high levels of cyclodiene pesticides, commonly associated with misapplication, has produced various symptoms, including headaches, dizziness, muscle twitching, weakness, tingling sensations, and nausea. In addition, EPA is concerned that cyclodienes might cause long-term damage to the liver and the central nervous system, as well as an increased risk of cancer.

There is no further sale or commercial use permitted for the following cyclodiene or related pesticides: chlordane, aldrin, dieldrin, and heptachlor. The only exception is the use of heptachlor by utility companies to control fire ants in underground cable boxes.

Reducing Exposure to Pesticides in Homes

Read the label and follow the directions. It is illegal to use any pesticide in any manner inconsistent with the directions on its label.

Unless you have had special training and are certified, never use a pesticide that is restricted to use by state-certified pest control operators. Such pesticides are simply too dangerous for application by a noncertified person. Use only the pesticides approved for use by the general public and then only in recommended amounts; increasing the amount does not offer more protection against pests and can be harmful to you and your plants and pets.

Ventilate the area well after pesticide use.

Mix or dilute pesticides outdoors or in a well-ventilated area and only in the amounts that will be immediately needed. If possible, take plants and pets outside when applying pesticides to them.

Use nonchemical methods of pest control when possible.

Since pesticides can be found far from the site of their original application, it is prudent to reduce the use of chemical pesticides outdoors, as well as indoors. Depending on the site and pest to be controlled, one or more of the following steps

can be effective: use of biological pesticides, such as Bacillus thuringiensis, for the control of gypsy moths; selection of disease-resistant plants; and frequent washing of indoor plants and pets. Termite damage can be reduced or prevented by making certain that wooden building materials do not come into direct contact with the soil and by storing firewood away from the home. By appropriately fertilizing, watering, and aerating lawns, the need for chemical pesticide treatments of lawns can be dramatically reduced.

If you decide to use a pest control company, choose one carefully.

Ask for an inspection of your home and get a written control program for evaluation before you sign a contract. The control program should list specific names of pests to be controlled and chemicals to be used; it should also reflect any of your safety concerns. Insist on a proven record of competence and customer satisfaction.

Dispose of unwanted pesticides safely.

If you have unused or partially used pesticide containers you want to get rid of, dispose of them according to the directions on the label or on special household hazardous waste collection days. If there are no such collection days in your community, work with others to organize them.

Keep exposure to moth repellents to a minimum.

One pesticide often found in the home is paradichlorobenzene, a commonly used active ingredient in moth repellents. This chemical is known to cause cancer in animals, but substantial scientific uncertainty exists over the effects, if any, of long-term human exposure to paradichlorobenzene. EPA requires that products containing paradichlorobenzene bear warnings such as "avoid breathing vapors" to warn users of potential short-term toxic effects. Where possible, paradichlorobenzene, and items to be protected against moths, should be placed in trunks or other containers that can be stored in areas that are separately ventilated from the home, such as attics and detached garages. Paradichlorobenzene is also the key active ingredient in many air fresheners (in fact, some labels for moth repellents recommend that these same products be used as air fresheners or deodorants). Proper ventilation and basic household cleanliness will go a long way toward preventing unpleasant odors.

Call the National Pesticide Telecommunications Network (NPTN).

EPA sponsors the NPTN (800-858-PEST) to answer your questions about pesticides and to provide selected EPA publications on pesticides.

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ASBESTOS

Asbestos is a mineral fiber that has been used commonly in a variety of building construction materials for insulation and as a fire-retardant. EPA and CPSC have banned several asbestos products. Manufacturers have also voluntarily limited uses of asbestos. Today, asbestos is most commonly found in older homes, in pipe and furnace insulation materials, asbestos shingles, millboard, textured paints and other coating materials, and floor tiles.

Elevated concentrations of airborne asbestos can occur after asbestos-containing materials are disturbed by cutting, sanding or other remodeling activities. Improper attempts to remove these materials can release asbestos fibers into the air in homes, increasing asbestos levels and endangering people living in those homes.

Health Effects of Asbestos

The most dangerous asbestos fibers are too small to be visible. After they are inhaled, they can remain and accumulate in the lungs. Asbestos can cause lung cancer, meso-thelioma (a cancer of the chest and abdominal linings), and asbestosis (irreversible lung scarring that can be fatal). Symptoms of these diseases do not show up until many years after exposure began. Most people with asbestos-related diseases were exposed to elevated concentrations on the job; some developed disease from exposure to clothing and equipment brought home from job sites.

Reducing Exposure to Asbestos in Homes

Learn how asbestos problems are created in homes.

Read the booklet, Asbestos in Your Home, issued by CPSC, the ALA, and EPA. To contact these organizations, see the section, "Where to Go For More Information."

If you think your home may have asbestos, dont panic!

Usually it is best to leave asbestos material that is in good condition alone. Generally, material in good condition will not release asbestos fiber. There is no danger unless fibers are released and inhaled into the lungs.

Do not cut, rip, or sand asbestos-containing materials.

Leave undamaged materials alone and, to the extent possible, prevent them from being damaged, disturbed, or touched. Periodically inspect for damage or deterioration. Discard damaged or worn asbestos gloves, stove-top pads, or ironing board covers. Check with local health, environmental, or other appropriate officials to find out about proper handling and disposal procedures.

If asbestos material is more than slightly damaged, or if you are going to make changes in your home that might disturb it, repair or removal by a professional is needed. Before you have your house remodeled, find out whether asbestos materials are present.

When you need to remove or clean up asbestos, use a professionally trained contractor.

Select a contractor only after careful discussion of the problems in your home and the steps the contractor will take to clean up or remove them. Consider the option of sealing off the materials instead of removing them.

Call EPA's TSCA assistance line (202-554-1404) to find out whether your state has a training and certification program for asbestos removal contractors and for information on EPA's asbestos programs.

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LEAD

Lead has long been recognized as a harmful environmental pollutant. In late 1991, the Secretary of the Department of Health and Human Services called lead the ***"number one environmental threat to the health of children in the United States."*** There are many ways in which humans are exposed to lead: through air, drinking water, food, contaminated soil, deteriorating paint, and dust. Airborne lead enters the body when an individual breathes or swallows lead particles or dust once it has settled. Before it was known how harmful lead could be, it was used in paint, gasoline, water pipes, and many other products.

Old lead-based paint is the most significant source of lead exposure in the U.S. today. Harmful exposures to lead can be created when lead-based paint is improperly removed from surfaces by dry scraping, sanding, or open-flame burning. High concentrations of airborne lead particles in homes can also result from lead dust from outdoor sources, including contaminated soil tracked inside, and use of lead in certain indoor activities such as soldering and stained-glass making.

Health Effects of Exposure to Lead

Lead affects practically all systems within the body. At high levels it can cause convulsions, coma, and even death. Lower levels of lead can adversely affect the brain, central nervous system, blood cells, and kidneys.

The effects of lead exposure on fetuses and young children can be severe. They include delays in physical and mental development, lower IQ levels, shortened attention spans, and increased behavioral problems. Fetuses , infants, and children are more vulnerable to lead exposure than adults since lead is more easily absorbed into growing bodies, and the tissues of small children are more sensitive to the damaging effects of lead. Children may have higher exposures since they are more likely to get lead dust on their hands and then put their fingers or other lead-contaminated objects into their mouths.

Get your child tested for lead exposure. To find out where to do this, call your doctor or local health clinic. For more information on health effects, get a copy of the Centers for Disease Control's, Preventing Lead Poisoning in Young Children (October 1991).

Ways to Reduce Exposure to Lead

Keep areas where children play as dust-free and clean as possible.

Mop floors and wipe window ledges and chewable surfaces such as cribs with a solution of powdered automatic dishwasher detergent in warm water. (Dishwasher detergents are recommended because of their high content of phosphate.) Most multi-purpose cleaners will not remove lead in ordinary dust. Wash toys and stuffed animals regularly. Make sure that children wash their hands before meals, nap time, and bedtime.

Reduce the risk from lead-based paint.

Most homes built before 1960 contain heavily leaded paint. Some homes built as recently as 1978 may also contain lead paint. This paint could be on window frames, walls, the outside of homes, or other surfaces. Do not burn painted wood since it may contain lead.

Leave lead-based paint undisturbed if it is in good condition - do not sand or burn off paint that may contain lead.

Lead paint in good condition is usually not a problem except in places where painted surfaces rub against each other and

create dust (for example, opening a window).

Do not remove lead paint yourself.

Individuals have been poisoned by scraping or sanding lead paint because these activities generate large amounts of lead dust. Consult your state health or housing department for suggestions on which private laboratories or public agencies may be able to help test your home for lead in paint. Home test kits cannot detect small amounts of lead under some conditions. Hire a person with special training for correcting lead paint problems to remove lead-based paint. Occupants, especially children and pregnant women, should leave the building until all work is finished and clean-up is done.

For additional information dealing with lead-based paint abatement contact the Department of Housing and Urban Development for the following two documents: Comprehensive and Workable Plan for the Abatement of Lead-Based Paint in Privately Owned Housing: Report to Congress (December 7, 1990) and Lead-Based Paint: Interim Guidelines for Hazard Identification and Abatement in Public and Indian Housing (September 1990).

Do not bring lead dust into the home.

If you work in construction, demolition, painting, with batteries, in a radiator repair shop or lead factory, or your hobby involves lead, you may unknowingly bring lead into your home on your hands or clothes. You may also be tracking in lead from soil around your home. Soil very close to homes may be contaminated from lead paint on the outside of the building. Soil by roads and highways may be contaminated from years of exhaust fumes from cars and trucks that used leaded gas. Use door mats to wipe your feet before entering the home. If you work with lead in your job or a hobby, change your clothes before you go home and wash these clothes separately. Encourage your children to play in sand and grassy areas instead of dirt which sticks to fingers and toys. Try to keep your children from eating dirt, and make sure they wash their hands when they come inside.

Find out about lead in drinking water.

Most well and city water does not usually contain lead. Water usually picks up lead inside the home from household plumbing that is made with lead materials. The only way to know if there is lead in drinking water is to have it tested. Contact the local health department or the water supplier to find out how to get the water tested. Send for the EPA pamphlet, Lead and Your Drinking Water, for more information about what you can do if you have lead in your drinking water. Call EPA's Safe Drinking Water Hotline (800-426-4791) for more information.

Eat right.

A child who gets enough iron and calcium will absorb less lead. Foods rich in iron include eggs, red meats, and beans. Dairy products are high in calcium. Do not store food or liquid in lead crystal glassware or imported or old pottery. If you reuse old plastic bags to store or carry food, keep the printing on the outside of the bag.

You can get a brochure, Lead Poisoning and Your Children, and more information by calling the National Lead Information Center, 800-LEAD-FYI.

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WHAT ABOUT CARPET?

In recent years, a number of consumers have associated a variety of symptoms with the installation of new carpet. Scientists have not been able to determine whether the chemicals emitted by new carpets are responsible. If you are installing new carpet, you may wish to take the following steps:

- Talk to your carpet retailer. Ask for information on emissions from carpet.
- Ask the retailer to unroll and air out the carpet in a well-ventilated area before installation.
- Ask for low-emitting adhesives if adhesives are needed.
- Consider leaving the premises during and immediately after carpet installation. You may wish to schedule the installation when most family members or office workers are out.
- Be sure the retailer requires the installer to follow the Carpet and Rug Institute's installation guidelines.
- Open doors and windows. Increasing the amount of fresh air in the home will reduce exposure to most chemicals released from

carpet. During and after installation, use window fans, room air conditioners, or other mechanical ventilation equipment you may have installed in your house, to exhaust fumes to the outdoors. Keep them running for 48 to 72 hours after the new carpet is installed.

- Contact your carpet retailer if objectionable odors persist.
- Follow the manufacturer's instructions for proper carpet maintenance.

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WHEN BUILDING A NEW HOME

Building a new home provides the opportunity for preventing indoor air problems. However, it can result in exposure to higher levels of indoor air contaminants if careful attention is not given to potential pollution sources and the air exchange rate.

Express your concerns about indoor air quality to your architect or builder and enlist his or her cooperation in taking measures to provide good indoor air quality. Talk both about purchasing building materials and furnishings that are low-emitting and about providing an adequate amount of ventilation.

The American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) recommends a ventilation rate of 0.35 ach (air changes per hour) for new homes, and some new homes are built to even tighter specifications. Particular care should be given in such homes to preventing the build-up of indoor air pollutants to high levels.

Here are a few important actions that can make a difference:

Use radon-resistant construction techniques.

Obtain a copy of the EPA booklet, Model Standards and Techniques for Control of Radon in New Residential Buildings, from your state radon office or health agency, your state homebuilders' association, or your EPA regional office.

Choose building materials and furnishings that will keep indoor air pollution to a minimum.

There are many actions a homeowner can take to select products that will prevent indoor air problems from occurring - a couple of them are mentioned here. First, use exterior-grade pressed wood products made with phenol-formaldehyde resin in floors, cabinetry, and wall surfaces. Or, as an alternative, consider using solid wood products. Secondly, if you plan to install wall-to-wall carpet on concrete in contact with the ground, especially concrete in basements, make sure that an effective moisture barrier is installed prior to installing the carpet. Do not permanently adhere carpet to concrete with adhesives so that the carpet can be removed if it becomes wet.

Provide proper drainage and seal foundations in new construction.

Air that enters the home through the foundation can contain more moisture than is generated from all occupant activities.

Become familiar with mechanical ventilation systems and consider installing one.

Advanced designs of new homes are starting to feature mechanical systems that bring outdoor air into the home. Some of these designs include energy-efficient heat recovery ventilators (also known as air-to-air heat exchangers).

Ensure that combustion appliances, including furnaces, fireplaces, woodstoves, and heaters, are properly vented and receive enough supply air.

Combustion gases, including carbon monoxide, and particles can be back-drafted from the chimney or flue into the living space if the combustion appliance is not properly vented or does not receive enough supply air. Back-drafting can be a particular problem in weatherized or tightly constructed homes. Installing a dedicated outdoor air supply for the combustion appliance can help prevent backdrafting.

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DO YOU SUSPECT YOUR OFFICE HAS AN INDOOR AIR PROBLEM?

Indoor air quality problems are not limited to homes. In fact, many office buildings have significant air pollution sources. Some of these buildings may be inadequately ventilated. For example, mechanical ventilation systems may not be designed or operated to provide

their homes. As a result, there has been an increase in the incidence of reported health problems.

Health Effects

A number of well-identified illnesses, such as Legionnaires' disease, asthma, hypersensitivity pneumonitis, and humidifier fever, have been directly traced to specific building problems. These are called building-related illnesses. Most of these diseases can be treated, nevertheless, some pose serious risks.

Sometimes, however, building occupants experience symptoms that do not fit the pattern of any particular illness and are difficult to trace to any specific source. This phenomenon has been labeled sick building syndrome. People may complain of one or more of the following symptoms: dry or burning mucous membranes in the nose, eyes, and throat; sneezing; stuffy or runny nose; fatigue or lethargy; headache; dizziness; nausea; irritability and forgetfulness. Poor lighting, noise, vibration, thermal discomfort, and psychological stress may also cause, or contribute to, these symptoms.

There is no single manner in which these health problems appear. In some cases, problems begin as workers enter their offices and diminish as workers leave; other times, symptoms continue until the illness is treated. Sometimes there are outbreaks of illness among many workers in a single building; in other cases, health symptoms show up only in individual workers.

In the opinion of some World Health Organization experts, up to 30 percent of new or remodeled commercial buildings may have unusually high rates of health and comfort complaints from occupants that may potentially be related to indoor air quality.

What Causes Problems?

Three major reasons for poor indoor air quality in office buildings are the presence of indoor air pollution sources; poorly designed, maintained, or operated ventilation systems; and uses of the building that were unanticipated or poorly planned for when the building was designed or renovated.

Sources of Office Air Pollution

As with homes, the most important factor influencing indoor air quality is the presence of pollutant sources. Commonly found office pollutants and their sources include environmental tobacco smoke; asbestos from insulating and fire-retardant building supplies; formaldehyde from pressed wood products; other organics from building materials, carpet, and other office furnishings, cleaning materials and activities, restroom air fresheners, paints, adhesives, copying machines, and photography and print shops; biological contaminants from dirty ventilation systems or water-damaged walls, ceilings, and carpets; and pesticides from pest management practices.

Ventilation Systems

Mechanical ventilation systems in large buildings are designed and operated not only to heat and cool the air, but also to draw in and circulate outdoor air. If they are poorly designed, operated, or maintained, however, ventilation systems can contribute to indoor air problems in several ways.

For example, problems arise when, in an effort to save energy, ventilation systems are not used to bring in adequate amounts of outdoor air. Inadequate ventilation also occurs if the air supply and return vents within each room are blocked or placed in such a way that outdoor air does not actually reach the breathing zone of building occupants. Improperly located outdoor air intake vents can also bring in air contaminated with automobile and truck exhaust, boiler emissions, fumes from dumpsters, or air vented from restrooms. Finally, ventilation systems can be a source of in door pollution themselves by spreading biological contaminants that have multiplied in cooling towers, humidifiers, dehumidifiers, air conditioners, or the inside surfaces of ventilation duct work.

Use of the Building

Indoor air pollutants can be circulated from portions of the building used for specialized purposes, such as restaurants, print shops, and dry-cleaning stores, into offices in the same building. Carbon monoxide and other components of automobile exhaust can be drawn from underground parking garages through stairwells and elevator shafts into office spaces.

In addition, buildings originally designed for one purpose may end up being converted to use as office space. If not properly modified during building renovations, the room partitions and ventilation system can contribute to indoor air quality problems by restricting air recirculation or by providing an inadequate supply of outdoor air.

What to Do if You Suspect a Problem

If you or others at your office are experiencing health or comfort problems that you suspect may be caused by indoor air pollution, you can do the following:

- Talk with other workers, your supervisor, and union representatives to see if the problems are being experienced by others and urge that a record of reported health complaints be kept by management, if one has not already been established.
- Talk with your own physician and report your problems to the company physician, nurse, or health and safety officer. Call your state or local health department or air pollution control program to talk over the symptoms and possible causes.

- Encourage building management to obtain a copy of Building Air Quality: A Guide for Building Owners and Facility Managers from the EPA. Building Air Quality (BAQ) is simply written, yet provides comprehensive information for identifying, correcting, and preventing indoor air quality problems. BAQ also provides supporting information such as when and how to select outside technical assistance, how to communicate with others regarding indoor air issues, and where to find additional sources of information. To obtain the looseleaf-fomat version of the Building Air Quality, complete with appendices, an index, and a full set of useful forms, and the newly released, Building Air Quality Action Plan, order GPO Stock # 055-000-00602-4, for $28, contact the: Superintendent of Documents, U.S. Government Printing Office (GPO), P.O. Box 371954, Pittsburgh, PA 15250-7954, or call (202) 512-1800, fax (202) 512-2250.
- Obtain a copy of "An Office Building Occupant's Guide to Indoor Air Quality," EPA-402-K-97-003, October 1997 from IAQ INFO at 1-800-438-4318.
- Frequently, indoor air quality problems in large commercial buildings cannot be effectively identified or remedied without a comprehensive building investigation. These investigations may start with written questionnaires and telephone consultations in which building investigators assess the history of occupant symptoms and building operation procedures. In some cases, these inquiries may quickly uncover the problem and on-site visits are unnecessary.
- More often, however, investigators will need to come to the building to conduct personal interviews with occupants, to look for possible sources of the problems, and to inspect the design and operation of the ventilation system and other building features. Because taking measurements of pollutants at the very low levels often found in office buildings is expensive and may not yield information readily useful in identifying problem sources, investigators may not take many measurements. The process of solving indoor air quality problems that result in health and comfort complaints can be a slow one, involving several trial solutions before successful remedial actions are identified.
- If a professional company is hired to conduct a building investigation, select a company on the basis of its experience in identifying and solving indoor air quality problems in nonindustrial buildings.
- Work with others to establish a smoking policy that eliminates involuntary nonsmoker exposure to environmental tobacco smoke.
- Call the National Institute for Occupational Safety and Health (NIOSH) for information on obtaining a health hazard evaluation of your office (800-35NIOSH), or contact the Occupational Safety and Health Administration, (202) 219-8151.

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REFERENCE GUIDE TO MAJOR INDOOR AIR POLLUTANTS IN THE HOME

The pollutants listed in this guide have been shown to cause the health effects mentioned. However, it is not necessarily true that the effects noted occur at the pollutant concentration levels typically found in the home. In many cases, our understanding of the pollutants and their health effects is too limited to determine the levels at which the listed effects could occur.

RADON (Rn)

Sources: Earth and rock beneath home; well water; building materials.

Health Effects: No immediate symptoms. Estimated to contribute to between 7,000 and 30,000 lung cancer deaths each year. Smokers are at higher risk of developing radon-induced lung cancer.

Levels in Homes: Based on a national residential radon survey completed in 1991, the average indoor radon level is 1.3 picocuries per liter (pCi/L). The average outdoor level is about 0.4 pCi/L.

Steps to Reduce Exposure:

- Test your home for radon_it's easy and inexpensive.
- Fix your home if your radon level is 4 picocuries per liter (pCi/L) or higher.
- Radon levels less than 4 pCi/L still pose a risk, and in many cases may be reduced.
- If you want more information on radon, contact your state radon office, or call 800-SOS-RADON.

ENVIRONMENTAL TOBACCO SMOKE (ETS)

Source: Cigarette, pipe, and cigar smoking.

Health Effects: Eye, nose, and throat irritation; headaches; lung cancer; may contribute to heart disease. Specifically for children, increased risk of lower respiratory tract infections, such as bronchitis and pneumonia, and ear infections; build-up of fluid in the middle ear; increased severity and frequency of asthma episodes; decreased lung function.

Levels in Homes: Particle levels in homes without smokers or other strong particle sources are the same as, or lower than, those outdoors. Homes with one or more smokers may have particle levels several times higher than outdoor levels.

Steps to Reduce Exposure:

- Do not smoke in your home or permit others to do so.
- Do not smoke if children are present, particularly infants and toddlers.
- If smoking indoors cannot be avoided, increase ventilation in the area where smoking takes place. Open windows or use exhaust fans.

BIOLOGICALS

Sources: Wet or moist walls, ceilings, carpets, and furniture; poorly maintained humidifiers, dehumidifiers, and air conditioners; bedding; household pets.

Health Effects: Eye, nose, and throat irritation; shortness of breath; dizziness; lethargy; fever; digestive problems. Can cause asthma; humidifier fever; influenza and other infectious diseases.

Levels in Homes: Indoor levels of pollen and fungi are lower than outdoor levels (except where indoor sources of fungi are present). Indoor levels of dust mites are higher than outdoor levels.

Steps to Reduce Exposure:

- Install and use fans vented to outdoors in kitchens and bathrooms.
- Vent clothes dryers to outdoors.
- Clean cool mist and ultrasonic humidifiers in accordance with manufacturer's instructions and refill with clean water daily.
- Empty water trays in air conditioners, dehumidifiers, and refrigerators frequently.
- Clean and dry or remove water-damaged carpets.
- Use basements as living areas only if they are leakproof and have adequate ventilation. Use dehumidifiers, if necessary, to maintain humidity between 30-50 percent.

CARBON MONOXIDE (CO)

Sources: Unvented kerosene and gas space heaters; leaking chimneys and furnaces; back-drafting from furnaces, gas water heaters, woodstoves, and fireplaces; gas stoves. Automobile exhaust from attached garages. Environmental Tobacco Smoke.

Health Effects: At low concentrations, fatigue in healthy people and chest pain in people with heart disease. At higher concentrations, impaired vision and coordination; headaches; dizziness; confusion; nausea. Can cause flu-like symptoms that clear up after leaving home. Fatal at very high concentrations.

Levels in Homes: Average levels in homes without gas stoves vary from 0.5 to 5 parts per million (ppm). Levels near properly adjusted gas stoves are often 5 to 15 ppm and those near poorly adjusted stoves may be 30 ppm or higher.

Steps to Reduce Exposure:

- Keep gas appliances properly adjusted.
- Consider purchasing a vented space heater when replacing an unvented one.
- Use proper fuel in kerosene space heaters.
- Install and use an exhaust fan vented to outdoors over gas stoves.
- Open flues when fireplaces are in use.
- Choose properly sized woodstoves that are certified to meet EPA emission standards. Make certain that doors on all woodstoves fit tightly.
- Have a trained professional inspect, clean, and tune-up central heating system (furnaces, flues, and chimneys) annually. Repair any leaks promptly.
- Do not idle the car inside garage.

NITROGEN DIOXIDE (NO_2)

Sources: Kerosene heaters, unvented gas stoves and heaters. Environmental tobacco smoke. Health Effects: Eye, nose, and throat irritation. May cause impaired lung function and increased respiratory infections in young children.

Levels in Homes: Average level in homes without combustion appliances is about half that of outdoors. In homes with gas stoves, kerosene heaters, or unvented gas space heaters, indoor levels often exceed outdoor levels.

Steps to Reduce Exposure: See steps under carbon monoxide.

ORGANIC GASES

Sources: Household products including: paints, paint strippers, and other solvents; wood preservatives; aerosol sprays; cleansers and

disinfectants; moth repellents and air fresheners; stored fuels and automotive products; hobby supplies; dry-cleaned clothing..

Health Effects: Eye, nose, and throat irritation; headaches, loss of coordination, nausea; damage to liver, kidney, and central nervous system. Some organics can cause cancer in animals; some are suspected or known to cause cancer in humans.

Levels in Homes: Studies have found that levels of several organics average 2 to 5 times higher indoors than outdoors. During and for several hours immediately after certain activities, such as paint stripping, levels may be 1,000 times background outdoor levels.

Steps to Reduce Exposure:

- Use household products according to manufac-turer's directions.
- Make sure you provide plenty of fresh air when using these products.
- Throw away unused or little-used containers safely; buy in quantities that you will use soon.
- Keep out of reach of children and pets.
- Never mix household care products unless directed on the label.

RESPIRABLE PARTICLES

Sources: Fireplaces, woodstoves, and kerosene heaters. Environmental tobacco smoke.

Health Effects: Eye, nose, and throat irritation; respiratory infections and bronchitis; lung cancer. (Effects attributable to environmental tobacco smoke are listed elsewhere.)

Levels in Homes: Particle levels in homes without smoking or other strong particle sources are the same as, or lower than, outdoor levels.

Steps to Reduce Exposure:

- Vent all furnaces to outdoors; keep doors to rest of house open when using unvented space heaters.
- Choose properly sized woodstoves, certified to meet EPA emission standards; make certain that doors on all woodstoves fit tightly.
- Have a trained professional inspect, clean, and tune-up central heating system (furnace, flues, and chimneys) annually. Repair any leaks promptly.
- Change filters on central heating and cooling systems and air cleaners according to manufacturer's directions.

FORMALDEHYDE

Sources: Pressed wood products (hardwood plywood wall paneling, particleboard, fiberboard) and furniture made with these pressed wood products. Urea-formaldehyde foam insulation (UFFI). Combustion sources and environmental tobacco smoke. Durable press drapes, other textiles, and glues.

Health Effects: Eye, nose, and throat irritation; wheezing and coughing; fatigue; skin rash; severe allergic reactions. May cause cancer. May also cause other effects listed under "organic gases."

Levels in Homes: Average concentrations in older homes without UFFI are generally well below 0.1 (ppm). In homes with significant amounts of new pressed wood products, levels can be greater than 0.3 ppm.

Steps to Reduce Exposure:

- Use "exterior-grade" pressed wood products (lower-emitting because they contain phenol resins, not urea resins).
- Use air conditioning and dehumidifiers to maintain moderate temperature and reduce humidity levels.
- Increase ventilation, particularly after bringing new sources of formaldehyde into the home.

PESTICIDES

Sources: Products used to kill household pests (insecticides, termiticides, and disinfectants). Also, products used on lawns and gardens that drift or are tracked inside the house.

Health Effects: Irritation to eye, nose, and throat; damage to central nervous system and kidney; increased risk of cancer.

Levels in Homes: Preliminary research shows widespread presence of pesticide residues in homes.

Steps to Reduce Exposure:

- Use strictly according to manufacturer's directions.
- Mix or dilute outdoors.
- Apply only in recommended quantities.
- Increase ventilation when using indoors. Take plants or pets outdoors when applying pesticides to them.
- Use nonchemical methods of pest control where possible.
- If you use a pest control company, select it carefully.
- Do not store unneeded pesticides inside home; dispose of unwanted containers safely.
- Store clothes with moth repellents in separately ventilated areas, if possible.
- Keep indoor spaces clean, dry, and well ventilated to avoid pest and odor problems.

ASBESTOS

Sources: Deteriorating, damaged, or disturbed insulation, fireproofing, acoustical materials, and floor tiles.

Health Effects: No immediate symptoms, but long-term risk of chest and abdominal cancers and lung diseases. Smokers are at higher risk of developing asbestos-induced lung cancer.

Levels in Homes: Elevated levels can occur in homes where asbestos-containing materials are damaged or disturbed.

Steps to Reduce Exposure:

- It is best to leave undamaged asbestos material alone if it is not likely to be disturbed.
- Use trained and qualified contractors for control measures that may disturb asbestos and for cleanup.
- Follow proper procedures in replacing woodstove door gaskets that may contain asbestos.

LEAD

Sources: Lead-based paint, contaminated soil, dust, and drinking water.

Health Effects: Lead affects practically all systems within the body. Lead at high levels (lead levels at or above 80 micrograms per deciliter (80 ug/dl) of blood) can cause convulsions, coma, and even death. Lower levels of lead can cause adverse health effects on the central nervous system, kidney, and blood cells. Blood lead levels as low as 10 ug/dl can impair mental and physical development.

Steps to Reduce Exposure:

- Keep areas where children play as dust-free and clean as possible.
- Leave lead-based paint undisturbed if it is in good condition; do not sand or burn off paint that may contain lead.
- Do not remove lead paint yourself.
- Do not bring lead dust into the home.
- If your work or hobby involves lead, change clothes and use doormats before entering your home.
- Eat a balanced diet, rich in calcium and iron.

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WHERE TO GO FOR ADDITIONAL INFORMATION ON INDOOR AIR QUALITY

DISCLAIMER: Links to other Federal Agencies on this page are pointers to other hosts and locations in the Internet. The information on this is provided here as a service.

Federal Information Sources for Indoor Air Quality

Federal agencies with indoor air quality information may be contacted as follows:

U. S. Environmental Protection Agency (U.S. EPA)

INDOOR AIR QUALITY - Information Clearinghouse (IAQ INFO)
P.O. Box 37133
Washington, DC 20013-7133
(800) 438-4318; (703) 356-4020

Operates Monday to Friday from 9a.m. to 5p.m. Eastern Standard Time (EST). Distributes EPA publications, answers questions on the phone, and makes referrals to other nonprofit and governmental organizations.

NATIONAL RADON HOTLINES
(800) SOS-RADON
[(800) 767-7236]
Information recording operates 24 hours a day.

NATIONAL LEAD INFORMATION CENTER
(800) LEAD-FYI
[(800) 532-3394]
Operates 24 hours a day, seven days a week. Callers may order an information package. To speak to an information specialist, call (800) 424-5323. Operates Monday to Friday from 8:30a.m. to 5p.m. EST.

NATIONAL PESTICIDES TELECOMMUNICATIONS NETWORK
National toll-free number: **(800) 858-PEST**
[In Oregon - (800) 858-7378]
Operates Monday to Friday from 6:30a.m. to 4:30p.m. Pacific Time. Provides information about pesticides to the general public and the medical, veterinary, and professional communities. Medical and government personnel may call 800-858-7377.

RCRA/SUPERFUND HOTLINE
National toll-free number: **(800) 424-9346**
In Washington, DC area: (703) 412-9810
Operates Monday to Friday from 8:30a.m. to 7:30p.m. EST. Provides information on regulations under both the Resources Conservation and Recovery Act (including solid and hazardous waste issues) and the Superfund law.

SAFE DRINKING WATER HOTLINE
(800) 426-4791
Operates Monday to Friday from 8:30a.m. to 5p.m. EST. Provides information on regulations under the Safe Drinking Water Act, lead and radon in drinking water, filter information, and a list of state drinking water offices.

TSCA ASSISTANCE INFORMATION SERVICE
(202) 554-1404
Operates Monday to Friday from 8:30a.m. to 5p.m. EST. Provides information on regulations under the Toxic Substances Control Act and on EPA's asbestos program.

U.S. Consumer Product Safety Commission (CPSC) [http://www.cpsc.gov/]

Washington, DC 20207-0001
Product Safety Hotline: (800) 638-CPSC
Teletypewriter for the hearing impaired (outside Maryland): (301) 595-7054;
Maryland only: (800) 492-8104.
Recorded information is available 24 hours a day when calling from a touch-tone phone. Operators are on duty Monday to Friday from 10:30 to 4 EST to take complaints about unsafe consumer products.

CPSC Regional Offices

Eastern Regional Center
201 Varick Street, Room 903
New York, NY 10014-4811
(212) 620-4120

States in Eastern Region: Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Virgin Islands, West Virginia

Central Regional Center
230 South Dearborn Street, Room 2944
Chicago, IL 60604-1601
(312) 353-8260

States in Central Region: Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Wisconsin

Western Regional Center
1301 Clay Street, Suite 610-N
Oakland, CA 94612-5217
(510) 637-4050

States in Western Region: Alaska, Arizona, California, Colorado, Guam, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah

Washington, Wyoming

U.S. Department of Housing and Urban Development [http://www.hud.gov/]

Office of Energy and the Environment, Washington, DC 20410
HUD USER National toll-free number: (800) 245-2691
In Washington, DC area: (301) 251-5154

U.S. Department of Energy [http://www.doe.gov/]

Office of Conservation and Renewable Energy
1000 Independence Ave., SW, Washington, DC 20585

Conservation and Renewable Energy Inquiry and Referral Service (CAREIRS)
PO Box 3048, Merrifield, VA 22116; (800) 523-2929.
Operates Monday to Friday from 9 to 5 EST. Provides consumer information on conservation and renewable energy in residences.

U.S. Public Health Service

Division of Federal Occupational Health
Office of Environmental Hygiene, Region III, Room 1310
3535 Market St., Philadelphia, PA 19104
(215) 596-1888; fax: 215-596-5024
Provides indoor air quality consultative services to federal agency managers.

Centers for Disease Control and Prevention [http://www.cdc.gov]

Lead Poisoning Prevention Branch
Centers for Disease Control and Prevention
4770 Buford Highway, NE (F-42)
Atlanta, GA 30341-3724
(800) 488-7330

Office on Smoking and Health
Centers for Disease Control and Prevention
4770 Buford Highway, NE (K-50)
Atlanta, GA 30341-3724
(404) 488-5701

Occupational Safety and Health Administration (OSHA)[http://www.osha.gov/]

Office of Information and Consumer Affairs
Room N-3647, 200 Constitution Avenue, NW
Washington, DC 20210
(202) 219-8151

Bonneville Power Administration

Portland, OR 97208

General Services Administration

18th and F Streets, NW
Washington, DC 20405

Tennesee Valley Authority

Industrial Hygiene Branch
Multipurpose Building (1-B)
Muscle Shoals, AL 35660

State and Local Organizations

Your questions or concerns about indoor air problems can frequently be answered by the government agencies in your state or local government. Responsibilities for indoor air quality issues are usually divided among many different agencies. Calling or writing the

agencies responsible for health or air quality control is the best way to start getting information from your state or local government. To obtain state agency contacts, write or call EPA's IAQ Information Clearinghouse, (800) 438-4318, (703) 356-4020 in the Washington, D.C. area.

Other Organizations

The following organizations have information specifically discussed in this booklet. Call the IAQ Information Clearinghouse at (800) 438-4318 for the names of a variety of organizations that have more information on specific and general indoor air quality issues.

American Association of Poison Control Centers (AAPCC)
3800 Reservoir Road, NW
Washington, DC 20007
Webiste: www.aapcc.org

Association of Home Appliance Manufacturers (AHAM)
20 North Wacker Drive
Chicago, IL 60606
(312) 984-5800, ext. 308
Website: www.aham.org

American Society of Heating, Refrigerating, and Air-Conditioning (ASHRAE)
1791 Tullie Circle NE
Atlanta, GA 30329
Website: www.ashrae.org

World Health Organization (WHO)
Publications Center
49 Sheridan Avenue
Albany, NY 12210
Website: www.who.org

Your Local American Lung Association (ALA)
National ALA Headquarters
1740 Broadway
New York, NY 10019
(800) LUNG-USA
Website: www.lungusa.org

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GLOSSARY OF TERMS

ACID AEROSOL: Acidic liquid or solid particles that are small enough to become airborne. High concentrations of acid aerosols can be irritating to the lungs and have been associated with some respiratory diseases, such as asthma.

ANIMAL DANDER: Tiny scales of animal skin.

ALLERGEN: A substance capable of causing an allergic reaction because of an individual's sensitivity to that substance.

ALLERGIC RHINITIS: Inflammation of the mucous membranes in the nose that is caused by an allergic reaction.

BUILDING-RELATED ILLNESS: A discrete, identifiable disease or illness that can be traced to a specific pollutant or source within a building. (Contrast with "Sick building syndrome").

CHEMICAL SENSITIZATION: Evidence suggests that some people may develop health problems characterized by effects such as dizziness, eye and throat irritation, chest tightness, and nasal congestion that appear whenever they are exposed to certain chemicals. People may react to even trace amounts of chemicals to which they have become "sensitized."

ENVIRONMENTAL TOBACCO SMOKE (ETS): Mixture of smoke from the burning end of a cigarette, pipe, or cigar and smoke exhaled by the smoker (also secondhand smoke or passive smoking).

FUNGI: Any of a group of parasitic lower plants that lack chlorophyll, including molds and mildews.

HUMIDIFIER FEVER: A respiratory illness caused by exposure to toxins from microorganisms found in wet or moist areas in humidifiers and air conditioners. Also called air conditioner or ventilation fever.

HYPERSENSITIVITY PNEUMONITIS: A group of respiratory diseases that cause inflammation of the lung (specifically granulomatous

cells). Most forms of hypersensitivity pneumon-itis are caused by the inhalation of organic dusts, including molds.

ORGANIC COMPOUNDS: Chemicals that contain carbon. Volatile organic compounds vaporize at room temperature and pressure. They are found in many indoor sources, including many common household products and building materials.

PICOCURIE (pCi): A unit for measuring radioactivity, often expressed as picocuries per liter (pCi/L) of air.

PRESSED WOOD PRODUCTS: A group of materials used in building and furniture construction that are made from wood veneers, particles, or fibers bonded together with an adhesive under heat and pressure.

RADON (Rn) AND RADON DECAY PRODUCTS: Radon is a radioactive gas formed in the decay of uranium. The radon decay products (also called radon daughters or progeny) can be breathed into the lung where they continue to release radiation as they further decay.

SICK BUILDING SYNDROME: Term that refers to a set of symptoms that affect some number of building occupants during the time they spend in the building and diminish or go away during periods when they leave the building. Cannot be traced to specific pollutants or sources within the building. (Contrast with "Building related illness").

VENTILATION RATE: The rate at which indoor air enters and leaves a building. Expressed in one of two ways: the number of changes of outdoor air per unit of time (air changes per hour, or "ach") or the rate at which a volume of outdoor air enters per unit of time (cubic feet per minute, or "cfm").

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The CPSC and the EPA have not reviewed or approved all the information and documents on indoor air quality that may be provided by other groups or organizations.

Consumers can obtain this publication and additional publication information from the Publications section of CPSC's web site or by sending your publication request to info@cpsc.gov.

The U.S. Consumer Product Safety Commission is charged with protecting the public from unreasonable risks of serious injury or death from thousands of types of consumer products under the agency's jurisdiction. The CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard. The CPSC's work to ensure the safety of consumer products - such as toys, cribs, power tools, cigarette lighters, and household chemicals - contributed significantly to the decline in the rate of deaths and injuries associated with consumer products over the past 30 years.

To report a dangerous product or a product-related injury, call CPSC's hotline at (800) 638-2772 or CPSC's teletypewriter at (301) 595-7054, or visit CPSC's web site at www.cpsc.gov/talk.html. To join a CPSC email subscription list, please go to https://www.cpsc.gov/cpsclist.aspx. Consumers can obtain this release and recall information at CPSC's Web site at www.cpsc.gov.

ELECTRONIC FILING OF APPENDIX CERTIFICATION

I certify that this appendix has been filed electronically in conformance with Wis. Stat. § 809.19(13) and that pursuant to Wis. Stat. § 809.19(13)(f), the electronic form of this appendix is identical to the paper copy of the appendix.

Dated: April 13th, 2011.

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STATE OF WISCONSIN
SUPREME COURT

JOEL HIRSCHHORN AND EVELYN F. HIRSCHHORN,
Plaintiffs-Appellants,

Appeal No: 2009AP002768

v.

Cir. Ct. Case No. 2008CV000202

AUTO-OWNERS INSURANCE COMPANY,
Defendant-Respondent-Petitioner.

RESPONSE BY PLAINTIFFS-APPELLANTS JOEL HIRSCHHORN AND EVELYN F. HIRSCHHORN TO BRIEF-IN-CHIEF OF DEFENDANT-RESPONDENT-PETITIONER AUTO-OWNERS INSURANCE COMPANY

REVIEW OF A FINAL JUDGMENT OF THE CIRCUIT COURT FOR ONEIDA COUNTY, JUDGE MARK MANGERSON, DISMISSING PLAINTIFFS'-APPELLANTS' COMPLAINT

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ISSUES

I. WOULD A REASONABLE INSURED CONCLUDE THAT THE ACCUMULATION OF BAT GUANO WAS COVERED BY THEIR HOMEOWNER'S POLICY?

The Circuit Court answered: No.
The Court of Appeals answered: Yes.

II. DOES THE ACUMMULATION OF BAT GUANO FALL UNDER A STANDARD POLLUTION EXCLUSION PROVISION IN A HOMEOWNER'S POLICY AS A POLLUTANT?

The Circuit Court answered: Yes.
The Court of Appeals answered: No.

STATEMENT OF THE CASE

A. Introduction

Plaintiff-Appellants agree this is a coverage dispute under a homeowner's insurance policy in which the Court of Appeals found coverage because of ambiguity in the policy. The Court of Appeals was correct. This Court should affirm the Court of Appeals decision and provide that the AOI[1] policy provides coverage for the HIRSCHHORNS' loss in order to give effect to the homeowner's reasonable expectations and language in the subject policy.

B. Factual Summary

On May 21, 2004, AOI issued an insurance policy to HIRSCHHORNS insuring their vacation home in Oneida County, Wisconsin (hereinafter referred to as the "insured premises"). (R.11: 1). The policy covered the dwelling, outbuildings and personal property at the insured premises against risk of accidental, direct and physical loss. (R.1: 7-19). This policy was in force in 2007 (the year of the loss at issue). Hirschhorn v. Auto-Owners Insurance Company, 330 Wis. 2d 232, ¶2.

Regular inspections and maintenance had been performed on the house since 1981. (R.18: 5-10). Once or twice a month, since 1981, a next-door

[1] Plaintiffs-Appellants, Joel Hirschhorn and Evelyn F. Hirschhorn, will be referred to as "HIRSCHHORNS." Defendant-Respondent-Petitioner, Auto-Owners Insurance Company, will be referred to as "AOI." References to the record will be (R.Doc#:P#). References to AOI's Initial Brief will be (AOI.B., p.___).

neighbor or house cleaner would access the house to inspect, clean as necessary, and assure the HIRSCHHORNS no damage had been done to the home during their absence. If necessary, the individual would make any and all repairs, improvements and conduct any maintenance to the house. (R.18: 5-17). During this time, no bat guano was ever found in the house.

In early May, 2007, Joel Hirschhorn ("JOEL HIRSCHHORN"), met with a real estate broker for the purpose of listing the insured premises for sale, (R.12: 2), they found no signs of bats during the inspection. (R.18: 24). However, in mid-to-late July of 2007, the real estate broker, while inspecting the house, detected the presence of bats and, with JOEL HIRSCHHORN'S knowledge and consent, undertook an effort to remove same and clean the premises. (R.12: 3-4). Hirschhorn, 330 Wis. 2d 232, ¶2.

The HIRSCHHORNS and family stayed at the insured premises between August 9 and 14, 2007. During their vacation they noticed a penetrating and offensive odor emanating from the home. (R.18: 26-28). Upon leaving on August 14, 2007, HIRSCHHORNS arranged for a contractor to complete a more thorough inspection of the home. (R.18: 85-95). The contractor determined that the cause of the offensive odor was the accumulation of bat guano between the siding and the walls of the home, resulting in damage to the insured premises. (R.18: 85-95). The contractor gave JOEL HIRSCHHORN an estimate to remediate the bat guano problem,

but could not guarantee that the removal of the accumulated bat guano and clean up would rid the home of the odor. (R.18: 90-91, 95-97).

On October 23, 2007, HIRSCHHORNS filed a property loss notice with AOI. The property loss notice was only partial; HIRSCHHORNS never claimed total loss. **AOI, without making any attempt to investigate the claim, or inspect the condition of the home, immediately denied the claim three (3) days later**. (R.18: 116-117, 122). In its letter to HIRSCHHORNS, AOI acknowledged that the "policy does cover bats," but denied the claim because an accumulation of bat guano "[was] not sudden and accidental." (R.18: 116-117). AOI concluded that the loss was a maintenance issue and not covered by the policy due to the policy's exclusion for faulty, inadequate or defective maintenance. (R.18: 116-117). Hirschhorn, 330 Wis. 2d 232, ¶3.

After the denial of the claim by AOI, on November 4, 2007, HIRSCHHORNS entered into a contract with Cornerstone Builders to demolish the existing home and construct a new one. (R.17: 1). HIRSCHHORNS believed that, under the circumstances, economically it was more practical to demolish the existing house and rebuild because the home had become uninhabitable for them and now had significantly less market value due to the penetrating and offensive odor. (R.11: 3).

On February 22, 2009, AOI issued its Revised Position Letter,[2] (R.18: 120-121), asserting the pollution exclusion provision of the policy as the reason for denying coverage. This was the first time AOI had raised that as a basis for denying coverage, which was over four (4) months after the house had been demolished[3] and construction of a new house on the same lot had commenced. Hirschhorn, 330 Wis. 2d 232, ¶3.

C. Procedural Posture

On May 15, 2008, HIRSCHHORNS filed their Complaint in the Circuit Court for Oneida County, Wisconsin. (R.1: 1-6). The Complaint set forth two claims against AOI: 1) breach of contract, and 2) bad faith. (P – Appx. 28-32, R.1: 2-6). After issue was joined, both parties filed Motions for Summary Judgment and supporting papers, affidavits and briefs. (R.6: 1-3, R. 7: 1-16, R.14: 1-2, R.11: 1-4, R.12: 1-28, R.13: 1-19, R.15: 1-45, R.17: 1-24, R.18: 1-133, R.23: 1-27).

In an oral ruling, on April 6, 2009, the Honorable Mark A. Mangerson found that there was coverage under the terms of the policy and that none of the exclusions (including the pollution exclusion) applied to bar coverage by AOI. (R.24: 24-28, P-Appx 19, 21-22). The Circuit Court stated:

> When we talk about pollution, it's usually a leakage or seeping from a polluted area into some other area causing damage. And we don't have that same situation here. We have the damage actually being caused by things coming into

[2] Interestingly, AOI's Brief fails to inform this Court about the various reasons given by AOI for denial of the claim.

[3] At no time did AOI ask or attempt to inspect the subject premises.

> the structure and the deposit being actually made in the structure, which isn't the same as the traditional pollution cases. (R. 24: 27, P-Appx 22).

AOI subsequently moved for reconsideration, (R.27: 1-13), addressing only the pollution exclusion issue, claiming to have "missed the mark" in its handling of the pollution exclusion issue previously. (R.27: 6). The HIRSCHHORNS timely filed their Brief in Opposition to AOI's Motion for Reconsideration. (R.25: 1-3).

On September 18, 2009, without any oral argument or further evidentiary hearing, the Circuit Court issued its Decision and Order on Respondent's Motion for Reconsideration. (R.26: 1-4, P-Appx. 11-14). The Circuit Court "affirmed its ruling on the initial issue of coverage under the policy," (R.26: 1, P-Appx. 11), but, contrary to the previous decision announced from the bench, then ruled that the pollution exclusion provision of the policy applied to bar coverage for the damages caused by the accumulation of bat guano and urine in the HIRSCHHORNS' residence. (R.26: 3-4, P-Appx. 13-14). In other words, the Court agreed that there was coverage for "bats," as the Court found: "[a]ssuming an additional cause of the entry is by the bats a structural defect or faulty maintenance, the ensuing loss exception applies . . . This court declines Auto-Owners' invitation to reverse itself on these findings." (P-Appx 12). However, the Court decided the pollution exclusion applied, and dismissed HIRSCHHORNS' lawsuit. The HIRSCHHORNS appealed.

On October 19, 2010, the Court of Appeals reversed the Circuit Court's Decision and Order granting AOI's Motion for Reconsideration and dismissing the case. Hirschhorn, 2010 WI App 154, ¶ 15, 330 Wis. 2d 232, 792 N.W.2d 639. **The Court of Appeals held that a reasonable insured would not view the accumulation of bat guano as within the pollution exclusion and analogized the bat guano to exhaled carbon dioxide, which was found not to be a pollutant within the pollution exclusion in Donaldson v. Urban Land Interests, Inc., 211 Wis. 2d 224, 230, 564 N.W.2d 728 (1997). Hirschhorn, 330 Wis. 2d 232, ¶ 10.**

STANDARD OF REVIEW

"Interpretation of a policy presents a question of law, which [this Court] review[s] independently of the determinations rendered by the circuit court and the court of appeals." Zarder v. Humana Ins. Co., 2010 WI 35, ¶22, 324 Wis. 2d 325, 782 N.W.2d 682; *citing* Liebovich v. Minn. Ins. Co., 2008 WI 75, ¶17, 310 Wis. 2d 751.

ARGUMENT

A. UNDER THE PLAIN MEANING OF AOI'S POLLUTION EXCLUSION, THERE IS COVERAGE FOR LOSSES RESULTING FROM AN ACCUMULATION OF BAT GUANO OR FROM THE ODORS EMANATING THEREFROM

The Courts "must first determine whether any policy language relating to the disputed coverage is ambiguous." Wadzinski v. Auto-Owners Ins. Co., 2011 Wisc. App. LEXIS 155, ¶8; *citing* Folkman v. Quamme, 2003 WI 116, ¶13, 264 Wis. 2d 617, 665 N.W.2d 857. "If words or phrases in a policy are susceptible to more than one reasonable construction, they are ambiguous." Zarder, 2010 WI 35, ¶26; *citing* Lisowski v. Hastings Mut. Ins. Co., 2009 WI 11, ¶9, 315 Wis. 2d 388, 759 N.W.2d 754. Undefined words and phrases in an insurance policy are given their common and ordinary meaning, and are construed as they would be understood by a reasonable insured. Id., ¶26; *citing* Acuity v. Bagadia, 2008 WI 62, ¶13, 310 Wis. 2d 197, 750 N.W.2d 817.

"A word or phrase may be unambiguous in one situation, and yet be ambiguous in another . . . Permitting the facts of a case to gauge ambiguity simply acknowledges that reasonable minds can differ about a statute's application [here, an insurance policy] when the text is a constant but the circumstances to which the text may apply are kaleidoscopic." Zarder, 2010 WI 35, ¶42; *citing* Seider v. O'Connell, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659. "'Of primary importance is that the language of an insurance

policy should be interpreted to mean what a **reasonable person in the position of the insured** would have understood the words to mean.'" Wadzinski, 2011 Wisc. App. LEXIS at ¶8; *quoting* General Cas. Co. v. Hills, 209 Wis. 2d 167, 175, 561 N.W.2d 718. [Emphasis added].

"Ambiguous terms in an insurance contract are construed in favor of coverage for the insured." Zarder, 2010 WI 35, ¶48; *citing* Bagadia, 310 Wis. 2d 197, ¶42. "'[B]ecause the insurer is in a position to write its insurance contracts with the exact language it chooses – so long as the language conforms to statutory and administrative law – ambiguity in that language is construed in favor of an insured seeking coverage.'" Id., ¶27; *quoting* Froedtert Mem'l Lutheran Hosp. v. Nat'l States Ins., 2009 WI 33, ¶43, 317 Wis. 2d 54, 765 N.W.2d 251. The courts have said many times, many ways that an insurer's intended meaning is irrelevant, for the touchstone is what the ordinary person in the position of the insured understands the words in the policy to mean. Folkman, 2003 WI 116, ¶ 17.

This Court has held that the policy is construed "neither through the magnifying eye of a technical lawyer," nor from the vantage point of those sophisticated in the ways of the insurance field, but as the ordinary insured reads it. Handal v. American Farmers Mutual Casualty Co., 79 Wis. 2d 67, 77, 255 N.W. 2d 903 (1977). It is clear that ambiguous policies always create coverage, as they should, because courts construe ambiguities against the insurer. Kaun v. Industrial Fire and Cas. Ins. Co., 148 Wis. 2d 662, 669, 436

N.W. 2d 321 (1989). As the drafter of the policy, AOI is solely able to avoid creating confusion by including the appropriate language. Insurers are "married" to the language they have chosen. An insurance company which authors ambiguous language in its insurance policy should expect a judicial construction contrary to what it claims it intended. McPhee v. American Motorist Ins. Co., 57 Wis. 2d 669, 682, 205 N.W. 2d 152 (1973).

The damages suffered by the HIRSCHHORNS are covered by AOI's homeowner's policy. The accumulation of bat guano and urine within the walls and attic of their residence, which resulted in a "penetrating and offensive odor" rendering the vacation home uninhabitable and significantly less marketable, does not fall under the plain meaning of the pollution exclusion provision of the policy.

The pollution exclusion provision in AOI's homeowner's insurance policy excludes coverage of "loss resulting directly or indirectly from … discharge, release, escape, seepage, migration or dispersal of pollutants…" (R.1: 27). Two elements must be present in order for the pollution exclusion to apply and bar coverage: 1) the damage must result from the "discharge, release, escape, seepage, migration or dispersal" of the damaging substance, and 2) the substance that caused the damage must be a "pollutant" within the meaning of the policy. Although AOI contends both of these elements are met, neither is present in this case.

AOI repeatedly contends that the damages suffered by the HIRSCHHORNS are excluded from coverage under the pollution exclusion clause of AOI's homeowner's insurance policy. It should be noted that AOI, the Circuit Court and Court of Appeals all agree that bats themselves are actually covered under the policy. Specifically, AOI argues that both the bat guano and the odors emanating therefrom were "discharged, released, and dispersed" throughout the HIRSCHHORN'S home. AOI further argues that the "penetrating and offensive odor" from the accumulation of bat guano is a "gaseous" "irritant" and "contaminant." (AOI.B., p. 21-23). AOI also argues that bat guano is a "solid," "liquid" "contaminant" and "irritant" which constitutes "waste." (AOI.B., p. 23-26). However, AOI's contentions are contradicted by the facts of this case and Wisconsin case law.

AOI's homeowner's insurance policy defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gasses and waste. Waste includes materials to be recycled, reconditioned or reclaimed." (P-Appx. 26, 27 R.1: 18). These terms, which AOI contends excludes coverage, are overly broad and susceptible to more than one reasonable interpretation, and are thus ambiguous. Noticeably neither the words "odors" nor "smells" are included in the definition.

1. *The Bat Guano and Odor Emanating Therefrom Were Not Discharged, Released, and Dispersed Throughout the Hirschhorns' Home*

The damage at issue in this case was not caused by the "discharge, release, escape, seepage, migration or dispersal" of bat guano or the odor emanating therefrom throughout the HIRSCHHORN'S home, but rather by the "accumulation" of bat guano in specific locations in the home. There is no question that bat guano was discharged or released into the attic and walls of the HIRSCHHORN residence, however this "discharge or release" of the guano and the odor was not the cause of the damage – the accumulation was.

This situation is analogous to an infestation of mold within an insured's home. When mold infests a reasonable insured's home, it is not the smell of the individual mold spores that causes the damage, but the accumulation of mold spores. If only one or two mold spores existed, the damage would not occur. Sub judice, had only one bat housed itself in the siding of the residence and discharged small amounts of guano, the damage would not have occurred, as the discharge of only a few guano droppings would not result in a smell so offensive as to render the residence "uninhabitable and unsalable." By analogy, if this Court were to accept AOI's argument, it would be the same as finding that an insured who had "fire" coverage being told s/he did not have coverage for the concomitant smoke and/or soot which traveled throughout the rest of the house as a result of the fire, though the latter was confined to just one room. That is like saying HIRSCHHORNS house is

covered for damage by bats, but not for damage caused by their guano. This is an unreasonable interpretation of the language in this AOI policy.

The damage at issue in this case resulted from the "accumulation" of bat guano within the confined, unventilated space of the walls. It was the unmeasured accumulation of guano that resulted in the offensive odor, not the "discharge, release, escape, seepage, migration or dispersal" of the guano. Thus, the first requirement for excluding coverage under AOI's pollution exclusion has not been met and therefore, the pollution exclusion does not apply barring coverage.

2. *The Odor Emanating From the Accumulation of Bat Guano is not a "Gaseous" "Irritant" or "Contaminant" That Was "Released" and "Dispersed" Throughout the HIRSCHHORNS' Home*

AOI contends that the "penetrating and offensive odor" was a "gaseous" "irritant" or "contaminant" which was "released" and "dispersed" throughout the HIRSCHHORNS' home. However, this contention contradicts the facts of this case and Wisconsin case law and therefore fails to meet the second element necessary to bar coverage.

AOI's contention, that the "penetrating and offensive odor" falls under this exclusion provision as a "pollutant," belies the policy itself. "Odor" is not listed in the definition of pollutant. (R.1: 18). **Had AOI intended to exclude coverage for "penetrating and offensive odor[s]," it could and would have written that simple, unequivocal phrase into the pollution exclusion provision of the homeowner's policy.** Wisconsin case law could not be more

clear on this point. Zarder, 2010 WI 35, ¶27; *citing* Froedtert Mem'l Lutheran Hosp., 2009 WI 33, ¶43.

Moreover, a reasonable insured would not think the common and ordinary meanings of "gas[]" or "fume" would include "odor" or "smell" from bat guano. The policy does not make clear, on its face, that a "penetrating and offensive odor" is included under the definition of "pollutant." A reasonable insured should not have to go to a dictionary and search the multiple definitions of any term contained in their homeowner's policy to have an understanding of same. The policy should be clear on its face so that a reasonable insured is on notice of what is or is not being covered, and what is or is not excluded from coverage. AOI, as the author of said policy, should have included "odor" in the definition of "pollutant" if it wanted to exclude coverage for such. "[B]ecause the insurer is in a position to write its insurance contracts with the exact language it chooses – so long as the language conforms to statutory and administrative law – ambiguity in that language is construed in favor of an insured seeking coverage." Zarder, 2010 WI 35, ¶27. (citations omitted).

AOI further contends that the "penetrating and offensive odor" is an "irritant" and "contaminant." In support of this position, AOI relies on Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co., 201 Wis. 2d 161, 169-170, 548 N.W.2d 127 (Ct. App. 1996). However, AOI's reliance on this case is misplaced.

In support of this argument, AOI contends that the odor from the bat guano "penetrated" – i.e. "contaminated" – HIRSCHHORNS house and personal belongings. (AOI.B., p. 22). AOI further contends that the Court of Appeals' definition of "contamination" in Richland Valley Products ("an 'impairment' or 'impurity' 'resulting from mixture of contact with a foreign substance'") (citations omitted), includes the odor emanating from the accumulation of bat guano. (AOI.B., p. 22). However, the definition provided by the Court of Appeals in Richland Valley Products and relied upon by AOI is overbroad and demonstrates the inherent ambiguity of the term "contamination." An odor is hardly a foreign substance.

Under Richland Valley Products and AOI's definition of "contamination," the pollution exclusion is virtually limitless. That is not what Wisconsin case law provides. In Donaldson, 211 Wis. 2d 224, 564 N.W.2d 728 (1997), this Court, in examining a pollution exclusion clause identical to AOI's, held that "[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." 211 Wis. 2d at 232 (citations omitted). This Court went on to explain that,

> without some limiting 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.** Donaldson, 211 Wis. 2d at 232. [Emphasis added](citations omitted).

The limiting principle applied in Donaldson is the reasonable expectation of the insured. The Court in Donaldson held that the policy's definition of "pollutant" (the same definition found in AOI's pollution exclusion provision) was ambiguous.[4] Id. at 234. The Court explained that a reasonable insured would expect coverage for damages caused by the inadequate ventilation of exhaled carbon dioxide. Id. at 235. This holding was based, in part, on the rationale that while "[e]xhaled carbon dioxide can achieve an injurious concentration in a poorly ventilated area … it would not necessarily be understood by a reasonable insured to meet the policy definition of a pollutant." Id. at 231.

The Donaldson Court also noted that exhaled carbon dioxide is "a universally present and generally harmless in all but the most unusual instances." Id. at 234. Directly applying the limiting principle, the Court found that because the "respiration process which produces exhaled carbon dioxide is a necessary and natural part of life" a reasonable insured would not "necessarily view exhaled carbon dioxide as in the same class as 'smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.'" Id. at 234.

[4] That AOI would ignore the lesson learned in Donaldson and NOT clarify its pollution exclusion for the mutual benefit of both the insurer and its insured's is itself puzzling.

As in Donaldson, sub judice, a reasonable insured would not view a "penetrating and offensive odor" emanating from the accumulation of bat guano as "gasses," "fumes" or "**pollution.**" Donaldson, 211 Wis. 2d at 234. A reasonable insured would view an "odor" as a "smell," which is something that is generally harmless, except in highly unique unusual circumstances. Id. Finally, odors from bat guano are akin to a respiration process and are certainly a natural part of life to a reasonable insured in the Wisconsin Northwoods. Id.

Thus, applying the "limiting principle" - the reasonable expectation of the insured - in Donaldson to the limitless definition found in Richland Valley Products, precludes the pollution exclusion provision of AOI's homeowner policy from "extend[ing] far beyond its intended scope, and lead[ing] to [an] absurd result[.]" Donaldson, 211 Wis. 2d. at 232.

Due to the facially insufficient nature of the pollution exclusion, as well as the limitless nature of the terms "irritant" and "contaminant," AOI's argument that the "penetrating and offensive odor" was a "gas[]" or "fume[]" "irritant" and "contaminant," and thus a "pollutant," clearly fails. Consequently, the pollution exclusion fails and coverage is not barred.

3. *Bat Guano is Not a "Solid," "Liquid" "Contaminant" and "Irritant" That Was "Released" and "Dispersed" Throughout the Home and Does Not Also Constitute "Waste"*

AOI contends that the bat guano itself is a "solid," "liquid" "contaminant" and "irritant," also constituting "waste," that was "released"

and "dispersed" throughout the HIRSCHHORNS' home. However, as stated by the Court of Appeals and consistent with controlling, Wisconsin Supreme Court case law, bat guano is not a "solid" "liquid" "contaminant," "irritant," or "waste" that was "released" and "dispersed" throughout the HIRSCHHORNS' home. The Court of Appeals stated it best when it said "in the context it is presented here, when a person reading the definition arrives at the term "waste," poop does not pop into one's mind." Hirschhorn, 330 Wis. 2d 232, ¶12. Although AOI believes this phrase "misses the point," **that is the exact, and controlling, point**. The rules of construction prohibit AOI from narrowly tailoring the definition of these words to meet its immediate needs.

While it is undisputed that bat guano is either a "solid" or a "liquid," those words themselves are not sufficient to fit the definition of "contaminant," "irritant," or most importantly, "waste." AOI contends (again) that bat guano "undoubtedly satisfies the definition of 'contaminant'" in Richland Valley Products. However, as discussed supra, pp. 13-17, the definition of "contaminant" and "irritant" is overbroad and limitless, and applying the limiting principle from Donaldson (as in the case with the "odor") precludes AOI from systematically including bat guano within the pollution exclusion to meet its needs sub judice.

In Hirschhorn, the Court of Appeals, following the controlling Wisconsin Supreme Court opinion in Donaldson, applied a similar analysis to bat guano in concluding it was improperly characterized as "waste:"

> Here, we conclude excreted bat guano is akin to exhaled carbon dioxide [in Donaldson], both biologically and as a reasonable insured homeowner would view it regarding the pollution exclusion. One could review the pollution exclusion as a whole and reasonably interpret "pollutant" as not including bat guano excreted inside a house. Therefore, strictly construing the exclusion and resolving ambiguities in favor of coverage, we conclude the pollution exclusion does not eliminate coverage in this case. Hirschhorn, 330 Wis. 2d 232, ¶ 10.

The Court went on to state that, "[w]hile Donaldson recognized the terms irritant and contaminant are extremely broad, waste is even more so. Review of any comprehensive dictionary reveals numerous definitions of waste, even when used, as here, as a noun." Id. at ¶13. The Court further explained that "waste, in its context here listed as an example of a pollutant, would not unavoidably be interpreted as excrement. Substituting terms makes this evident: 'smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gasses and [excrement].' As the saying goes, 'one of these things is not like the others.'" Id. at ¶14. (footnote omitted).

AOI, selecting and citing two dictionaries,[5] provides definitions of "waste" that make reference to excrement or a similar substance. However, as noted by the Court of Appeals in Hirschhorn, any "comprehensive dictionary" is going to provide multiple definitions of an ambiguous term such as waste. Id. at ¶13. By providing two random definitions which benefit its position, AOI actually affirms the Court of Appeals conclusion that where the words at

[5] It is clear AOI has arbitrarily chosen two dictionaries that provide definitions of "waste" which bolsters its argument, just as AOI accused the Court of Appeals of having improperly done so. This crystallizes the fact that there are simply too many interpretations of the word "waste" to render same **unambiguous**.

issue are susceptible to more than one interpretation, there is an ambiguity to a reasonable insured. And, as it is well settled, ambiguities in insurance policies are rendered versus the insurer and in favor of the insured. Zarder, 2010 WI 35, ¶48.

AOI fails, however, to address the Court of Appeals rather telling and cogent observation that "one of these things is not like the others." Id. at ¶14. It is clear that AOI did not intend to include bat guano (much less the smell of its accumulation) in the definition of pollution as the list of words or phrases defining pollution are quite specific. Bat guano, or even more generally, excrement, does not fit the pollution exclusion definitions in the policy. AOI offers no valid legal rationale for such.

AOI further contends "the fact that a word has multiple definitions does not render it ambiguous under Wisconsin law." (AOI.B., p. 25); *citing* United States Fire Ins. Co. v. Ace Baking Co., 164 Wis. 2d 499, 503, 476 N.W.2d 280 (Ct. App. 1991). While that statement is accurate in context, "a pollution clause **is** ambiguous where the insured could **reasonably expect coverage under the facts of the case**." Langone v. Am. Family Mutual Ins. Co., 2007 WI App. 121, ¶21. [Emphasis added]. Sub judice, nothing in the definition of "pollution" puts a reasonable insured on notice that bat guano or the odor emanating from it would **not** be covered by the policy. In fact, the term "waste," under which AOI contends bat guano falls, is further explained by the policy as "including materials to be recycled, reconditioned or reclaimed."

(P-Appx. 26). Nothing about those three words relates in any way to excrement. Thus, it is clear that under the facts of this case, an insured could reasonably expect coverage for damage resulting from the accumulation of bat guano and the smell emanating therefrom in a Wisconsin Northwoods home.

The Court of Appeals, following the Wisconsin Supreme Court in Donaldson, held that the definition of "pollutant," as it appears in AOI's homeowner's insurance policy is ambiguous. *See* Hirschhorn, 330 Wis. 2d 232, ¶ 10, and Donaldson, 211 Wis. 2d at 231, respectively. The Court of Appeals was, simply, correct.

One must look to the reasonable expectations of the insured in interpreting the definition as it applies to various substances. A reasonable insured, owning a home in the Wisconsin Northwoods, would not expect bat guano to "qualify" as a "pollutant" within the policy's pollution exclusion clause. Reasonableness is to be interpreted in the "shoes" of a similarly situated insured. It is clear that both the Wisconsin Supreme Court's decision in Donaldson and the Court of Appeals' decision in Hirschhorn support this conclusion. Therefore, according to the well established and time honored principle of law that "ambiguities are to be resolved in favor of coverage, while coverage exclusion clauses are narrowly construed against the insurer," Zarder, 2010 WI 35, ¶48, bat guano should not be considered a "irritant," "contaminant," or "waste," and any damage resulting from the accumulation

of bat guano and the resulting smell within a residence should not be excluded from coverage under AOI's pollution exclusion clause.

B. The Pollution Exclusion is Ambiguous and a Reasonable Insured Would Not Conclude That A "Penetrating and Offensive Odor" Emanating From Bat Guano Falls Under An Exclusion Covering "Gases," "Irritants," and "Waste"[6]

AOI contends that the pollution exclusion is not ambiguous merely because the terms "pollutants" and "waste" are broadly defined. (AOI.B., p. 26). AOI argues that "the fact that 'waste' and 'pollutants' may include industrial refuse does not mean they can be read reasonably as being limited to industrial refuse." (AOI.B., p. 27). Well, that may, or may not, be so, which is exactly why the policy language at issue is ambiguous. A reasonable insured, living in a rural area such as the Wisconsin Northwoods, is whose perspective matters. Handal, 79 Wis.2d at 77. AOI never seems to acknowledge that person, and continually and narrowly defines its own terms to suit its own purpose.

AOI boldly states that "bat guano is encompassed in the ordinary definition of 'waste.'" There is no "ordinary" definition of "waste." Within the briefs submitted to the Court of Appeals, the Court of Appeals opinion and AOI's Initial Brief before this Court, we have already seen **nine (9) different definitions of "waste."** Clearly there is no "ordinary" definition of same as

[6] Unfortunately it appears that AOI's Brief has multiple sections which essentially argue the same point. Therefore, to avoid redundancy, but still address each argument, Hirschhorns respond briefly to same.

AOI has alleged. Moreover, the Court of Appeals decided that there are numerous definitions of "waste," but in the context here, "waste" is "damaged, defective, or superfluous material produced during or left over from a manufacturing process or industrial operation" . . . or "garbage, rubbish." Hirschhorn, 330 Wis. 2d 232, ¶ 13; *citing* Webster's Third New International Dictionary 2580 (unbar. Merriam Webster 1993). The Court of Appeals is not limiting its policy to industrial waste as AOI has repeatedly stated, but is merely pointing out the fact that there are several interpretations of the language available, therefore same is ambiguous. That ambiguity is construed in the insured's favor. Zarder, 2010 WI 35, ¶48. The Court of Appeals decision was correct.

C. No Reasonable Insured Would Read Auto-Owners' Pollution Exclusion and Conclude that it Applies Only to Industrial Waste, But Could Understand the Exclusion Does Not Include Pollution Resulting from Biological Processes

1. The Court of Appeals Did Not Impose any Artificial Restrictions on the Definitions of "Pollutants" and "Waste"

Hirschhorn agrees with AOI that no reasonable person would read the pollution exclusion and conclude that it applies **ONLY** to industrial waste. However, a reasonable insured could reasonably believe that the pollution exclusion does not bar a claim for bat guano. AOI clearly misconstrues what the Court of Appeals held in Hirschhorn, which stands for the simple – and legally correct - principle that because an insured "**might** reasonably interpret

the pollution exclusion as not contemplating bat guano, coverage is not excluded." Hirschhorn, 330 Wis. 2d 232, ¶ 15. [Emphasis added].

Nowhere in Hirschhorn does it state that the language "**only**" includes industrial waste. It is unfortunate that AOI dedicates so much of its brief to this unfounded argument. In fact, the Court of Appeals in Hirschhorn observed, in reference to "discharge, release, escape, seepage, migration or dispersal of pollutants," "[] the bodily processes by which wastes such as carbon dioxide, urine or feces move out of an organism would more commonly be described as respiration, elimination, excretion, or some other term suggesting a biological process. Thus, **at best,** the clause's action words **do not suggest** to the reader a biological process, and **they may even suggest** that biological processes are not part of the exclusion." Id. [Emphasis added].

What Hirschhorn concluded is that the way the AOI policy language reads, it is easy for a reasonable insured to construe the pollution exclusion in a number of ways – hence it is ambiguous. By no means does the Court of Appeals decision "alter the terms of Auto-Owners' policy," (AOI.B., p. 32), rather, it finds the language used in same to be ambiguous.

"'[T]he test is not what the insurer intended its words to mean but what a reasonable person in the position of an insured would have understood the words to mean.'" Barber, Timothy, Brief of Amicus Curiae for Wisconsin Association for Justice, p. 4; Zarder v. Acuity, a Mutual Insurance Company, Wisconsin Supreme Court, 2008AP919; *citing* McPhee v. Motorists Ins. Co.

57 Wis. 2d 669, 676, 205 N.W.2d 152 (1973). Mr. Barber went on to state "[i]f there are two competing reasonable interpretations of a word or phrase, the policy is ambiguous. 'Whatever ambiguity exists in a contract of insurance is resolved in favor of the insured.'" Id.; *quoting* Caporali v. Washington National Insurance Co., 102 Wis. 2d 669, 675, 307 N.W.2d 218, 221 (1981). Sub judice, AOI has identified for this Court at least two competing interpretations: biological processes and industrial pollution. After this Court rules, AOI may very well have to amend the language of its policy consistent with this Court's decision.

The Court of Appeals decision did not impose "artificial restrictions" on the definitions of "pollutants" and "waste." Rather, it made clear to AOI that its policy language is ambiguous, and such ambiguity must be resolved in favor of the insured.

2. The Court of Appeals Interpretation of the Policy is Reasonable Because it Does Not Conflict with the Purpose and Nature of the Risks Insured Under a Homeowner's Policy

AOI argues that the Court of Appeals' restrictive interpretation of the pollution exclusion conflicts with the nature and purpose of the homeowner's policy and is patently unreasonable when considering the types of losses commonly suffered by homeowners. (AOI.B., p. 35). First, the Court of Appeals' decision is not "restrictive," but rather makes clear the policy is ambiguous. Second, if it were AOI's intent for bats, bat guano, and the smell from bat guano to fall within the scope of the pollution exclusion, **AOI easily**

could have written that simple language into the policy. As the drafter of the policy, the insurance company alone is able to avoid creating ambiguity by including the specific language it wants. McPhee, 57 Wis. 2d at 682. AOI failed to do so here. The ambiguity is construed in favor of the HIRSCHHORNS.

Again, AOI contends that the Court of Appeals decision interprets the pollution exclusion to apply to ONLY industrial "garbage [or] rubbish" that is not the result of "biological processes." To the extent that this argument is redundant, HIRSCHHORNS have previously addressed this issue. See supra, pp. 23-25. AOI makes clear that "the presence of latent chemical industrial waste homes are subject to a variety of different types of pollutants, both chemical and biological, that have nothing to do with toxic industrial waste." (AOI.B., p 36). This supports HIRSCHHORNS position, as again it is clear there are simply too many reasonable interpretations of the terms used in the policy.

AOI misses the point and reaffirms the holding in Hirschhorn. The fact that AOI now believes that the "biological" pollutants of "mold, fungi, sewage, dustmites, spores and other non-chemical, non-industrial pollutants" are written out of the contract demonstrates the language is ambiguous. If AOI is really concerned about this, it should rewrite its policy to make clear what is, and is not, covered. The Court of Appeals opinion establishes that the policy, as written, is ambiguous as to whether bat guano and the smell

emanating therefrom falls within the scope of the pollution exclusion clause in the policy. Since the policy is ambiguous, the Court of Appeals correctly found in favor of the HIRSCHHORNS.

Next, AOI references a Consumer Products Safety Commission, which includes "urine from rats and mice" as a "biological contaminant." AOI asks this Court to rule that the Court of Appeals decision decided that this, as well as other "biological contaminants" such as bacteria, molds, mildew, viruses, animal dander and cat saliva, house dust mites, cockroaches, and pollen, have all been written out of the exclusion. (AOI.B., p. 37). Not true. First, the article makes no reference to bats (or guano and the odors emanating therefrom) and the materials are considered "contaminants," not "waste," which is the focus of the opinion and what AOI has continually argued bat guano is. The Court of Appeals decision is simply stating that some biological processes could fall outside of the pollution exclusion clause as written. That is the point of the decision, that the policy provision as written is ambiguous. No matter how many times AOI states it is not, their arguments are contrary to this position.

Lastly, AOI states "under the Court of Appeals 'construction' of Auto-Owners policy, the pollution exclusion applies only to risks that are not related to the type of property insured. This was never the intent of the pollution exclusion; nor does such a reading comport with the broad language utilized in the exclusion." (AOI.B., p. 38). We are simply at a loss to understand why

AOI believes the Court of Appeals decision does this, nor does AOI cite specific language demonstrating same. Moreover, under AOI's interpretation, the "broad" language would essentially be limitless.

The Court of Appeals decision did not restrict the pollution exclusion to industrial waste, nor did it eliminate all biological processes from same. The Court of Appeals decision interprets the language in the pollution exclusion to be ambiguous when applied to the facts sub judice. This Court should do likewise.

D. The Court of Appeals Did Not Create a "Biological Processes" Exception to the Pollution Exclusion

AOI contends that the Court of Appeals incorrectly relies on Donaldson to support its holding "that odor emanating from bat guano is not a pollutant" and to create a "biological processes" exception to the pollution exclusion. (AOI.B., p. 41). That is not accurate. Donaldson supports the Court of Appeals holding that bat guano is not a pollutant within the terms of AOI's policy. Likewise, the Court of Appeals did not rely on Donaldson to create a "biological processes" exception to the pollution exclusion. Although AOI continues to attempt to "create" this mystery exception, simply put - it just is not so.

AOI argues "Donaldson recognized that carbon dioxide is generally not harmful or a pollutant and it was only because the building in that case was poorly ventilated that accumulations of carbon dioxide became a problem."

(AOI.B., p. 40). AOI further states that the "foul and rancorous odors emanating from animal feces and urine are NOT expected to be present in a home." (AOI.B., p. 40). Finally, AOI believes "[t]here are no circumstances under which a reasonable homeowner would want or expect the presence of bat guano in his or her home." (AOI.B., p. 40). HIRSCHHORNS agree with AOI's position, and that proves the point. Surely no reasonable insured homeowner (HIRSCHHORNS) would want or expect bats or bat guano and the odors emanating therefrom, in their home, but the accumulation of same (much like the accumulation of carbon dioxide in Donaldson) was sudden and unexpected, interfered with the use, occupancy and marketability of the house, and thus a reasonable insured would believe same to be covered under the policy s/he purchased and paid for.

The Court of Appeals was correct in its reliance on Donaldson to support its holding that bat guano and the odors emanating therefrom are not pollutants within in the definitions of the policy.[7] The Court in Donaldson found that because the "respiration process which produces exhaled carbon dioxide is a necessary and natural part of life" a reasonable insured would not "necessarily view exhaled carbon dioxide as in the same class as 'smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.'" Id. at 234. This Court further reasoned that while "[e]xhaled carbon dioxide can achieve an injurious concentration in a poorly ventilated area [the bat guano and odors

[7] See Argument A.1, infra, pp. 12-13.

emanating therefrom, sub judice] … it would not necessarily be understood by a reasonable insured to meet the policy definition of a pollutant [HIRSCHHORNS, sub judice]." Id. at 231. In Donaldson, this Court found the pollution exclusion ambiguous and extended coverage. Id. at 234. This Court should do likewise sub judice.

Need we repeat what we argued earlier? See Argument A.3 and Argument C.1, pp. 17-22 and 23-25, respectively. The District Court of Appeals got it right in Hirschhorn, and so should this Court here.

E. Peace and Ace Baking are Distinguishable

1. *Peace Supports The Ambiguous Nature of The Pollution Exclusion and Thus Does Not Reject the Notion That the Term "Pollutants" is Limited to Traditional Industrial Pollution.*

AOI argues that the Court of Appeals decision is in conflict with Peace v. Northwestern National Insurance, 228 Wis. 2d 106, 596 N.W.2d 429 (1999). AOI contends that Peace adopts a "'plain meaning' when applying the pollution exclusion and refused to follow a line of cases that narrowly interpreted the exclusion by using a 'term-of-art' approach that focused on the 'traditional' meaning of the term 'pollution' in industry." (AOI.B., p. 42); *citing* Peace, 228 Wis. 2d at 135-36. AOI contends that Peace stands for the proposition that "the Court of Appeals' statement that 'poop does not pop into one's mind' when reading the pollution exclusion in Auto-Owners' policy in the abstract misses the point." (AOI.B., p. 42); *citing* Hirschhorn, 330 Wis. 2d 232, ¶12.

AOI's interpretation of Peace does not conflict with the Court of Appeals decision sub judice, which was based on this Court's decision in Donaldson. This Court, in Peace, states just that. Peace, 228 Wis. 2d at 136. This Court, in its decision of Peace, specifically distinguished Donaldson, addressing the nature of the substances at hand in each case. Id. at 137-38. The Peace Court stated "exhaled carbon dioxide [referring to Donaldson] is universally present and generally harmless in all but the most unusual circumstances. The same cannot be said for lead paint chips, flakes, and dust [referring to Peace]. They are widely, if not universally, understood to be dangerous and capable of producing lead poisoning. The toxic effects of lead have been recognized for centuries." Id.

Sub judice, the Hirschhorn Court of Appeals likened bat guano to the carbon dioxide in Donaldson. Bat guano, like Donaldson's carbon dioxide and unlike Peace's lead paint chips, flakes or dust, is generally harmless in all but the most unusual circumstances, as we have here. Peace specifically recognized the different factual nature of Donaldson, which the Hirschhorn Court of Appeals correctly decided is the most "akin" to the factual situation sub judice. Clearly Peace's express differentiation of Donaldson established no conflict between Peace and the Hirschhorn decision.

Further, AOI's "plain meaning" and "missing the point" arguments simply fail. Applying the "plain meaning" to any of the terms, sub judice, even if they are construed against the "traditional" meaning of the term

"pollution," bat guano is simply not covered by the pollution exclusion. Peace makes this clear by the manner in which it factually distinguished Donaldson. Thus, bat guano, due to its generally harmless nature, like Donaldson's carbon dioxide, does not fall within the pollution exclusion based on the "plain meaning" of the terms in same.

Likewise, AOI's argument that the Court of Appeals' statement, "poop does not pop into one's mind," misses the point, couldn't be further from the truth: **it is exactly the point.** The Court of Appeals here is essentially applying AOI's "plain meaning" interpretation from Peace. The Court of Appeals is saying, when considering the "plain meaning" of "waste," the term "poop" does not come to mind. Therefore, no reasonable insured would think bat guano is covered under the "waste" provision of the pollution exclusion. AOI's reliance on Peace to distinguish and claim conflict with the Court of Appeals' decision is misplaced.

2. *Sub Judice, Ace-Baking is Not Controlling Wisconsin Supreme Court Precedent and is Distinguishable From the Facts in Hirschhorn*

The Court of Appeals decision is entirely consistent with binding, Wisconsin Supreme Court precedent. Ace Baking Co., 164 Wis. 2d 499, 476 N.W.2d 280 (Ct. App. 1991) is not controlling. Donaldson, 211 Wis. 2d 224, 564 N.W. 2d 728 (1997), upon which the Hirschhorn Court of Appeals based its decision, is the controlling case. Zarder, 324 Wis. 2d 325, 782 N.W.2d 682, decided by the Wisconsin Supreme Court just last year, reaffirms many of

the insurance policy interpretation rules which are found in Donaldson. Oddly enough, Zarder is totally ignored by AOI sub judice.

Ace Baking is also easily distinguishable from the situation sub judice. AOI contends that the linalool's contamination and fouling of the baking products is "akin" to bat guano, and the odor emanating therefrom. (AOI.B., p. 45-47). However, that is not so. Ace Baking is a "contamination" case. Ace Baking, 164 Wis. 2d at 505. The linalool leaked into the baking products, causing the ice cream cones to smell and taste like soap. Id. at 501. However, the baking products and linalool were intentionally and voluntarily stored in the same facility by Ace Baking, and linalool, although harmless when properly used, is a fragrance additive (i.e. chemical substance).[8] Id.

Here, the bats entered HIRSCHHORNS' home unexpectedly and uninvited. The bats and guano were not placed into the environment by the HIRSCHHORNS. Moreover, the guano produced by the bats cannot be equated to a chemical substance such as linalool, which is added to fabric softener to produce a pleasant smell. The factual circumstances here are clearly distinguishable from Ace Baking.

AOI further argues that the Court of Appeals should have "interpreted the terms of the policy before it by providing the words with their common and ordinary meanings and asking whether the loss at issue was 'reasonably

[8] See EPA Doc. # EPA-HQ-EPA-2006-0356, Linalool Summary Document Registration Review: Initial Docket, April 2007 at http://www.epa.gov/pesticides/ppdc/regisreview/implemen/july07/linalool-summary.pdf.

and fairly encompassed' within the scope of those terms." (AOI.B., p. 45); *citing* Ace Baking, 164 Wis. 2d at 505. AOI has conveniently overlooked this Court's recent decision in Zarder, which again laid out the proper framework for interpreting insurance policy coverage. Based on that analysis, bat guano and the odor emanating therefrom DO NOT properly fall within the pollution exclusion.

Ace Baking does not control. The Hirschhorn Court of Appeals decision was correct, finding the pollution exclusion ambiguous and to extend coverage.

F. AOI Has Failed to Provide Any Decisions From Foreign Jurisdictions Which Concluded That Bat Guano Or The Odor Emanating Therefrom Is A "Pollutant" Under A Standard Pollution Exclusion

AOI has identified the following cases from foreign jurisdictions which it believes supports its position sub judice: WPC Industrial Contractors, Ltd. V. Amerisure Mutual Insurance Corp., 720 F.Supp. 2d 1377 (S.D. Fla. 2009); Grosse Point Park v. Michigan Municipal Liability and Property Pool, 702 N.W.2d 106, 113-14 (Mich. 2005); Royal Insurance Company v. Bithell, 868 F.Supp. 878, 882 (E.D. Mich. 1993); Philadelphia Indemnity Insurance Company v. Yachtsman's Inn Condominium Association, 595 F.Supp. 2d 1319 (S.D. Fla. 2009); Deni Assocs. v. State Farm Fire & Cas. Co., 711 So.2d 1135 (Fla. 1998); CBL & Assocs. Mgmt., Inc. v. Lumbermens Mut. Cas. Co., 2006 WL 2087625 (E.D. Tenn. July 25, 2006). (AOI.B, p. 47-52).

It is clear, based on AOI's own analysis, and our review, that none of these cases specifically deal with bats, bat guano or the odor emanating therefrom. Each of these cases involved human excrement and sewage, or foul odors from chemicals. Human excrement from a sewer system is completely distinguishable from bat guano. A reasonable insured may understand the pollution exclusion to include human excrement. However, not one of the cases cited helps AOI from escaping the ambiguity of the language in the policy. Zarder and Donaldson are the law in Wisconsin and should be followed here.

CONCLUSION

The Court of Appeals "got it right" and the decision below should be affirmed. This cause should be remanded to the Circuit Court for further proceedings.

Respectfully submitted,
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STATEMENT ON ORAL ARGUMENT

Plaintiffs-Appellants, Joel Hirschhorn and Evelyn F. Hirschhorn ("HIRSCHHORNS"), request oral argument. Oral argument will enable this Court to better focus on, and counsel to properly explain, the facts deemed most important and relevant. Oral argument will assist this Court in efficiently considering all the salient facts and applying the governing law and principles of insurance policy interpretation to fairly resolve the issues presented.

STATEMENT ON PUBLICATION

Publication is appropriate in this case because this Court's decision will clarify the interpretation of the pollution exclusion clause, found in nearly all homeowner's insurance policies, in regards to coverage for damages caused by bats and/or bat guano. Insurance coverage for damage by bats and bat guano is an important issue in Wisconsin.

FORM AND LENGTH CERTIFICATION

Pursuant to Wis. Stat. § 809.19(3), I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) & (c) for a response brief with proportional serif font (Century 13 pt for body text and 11 pt for quotes and footnotes). The length of this entire brief is 8,241 words.

_____
JOEL HIRSCHHORN

CERTIFICATION OF MAILING

I certify that 22 copies of this brief were deposited in Federal Express for delivery to the Clerk of the Wisconsin Supreme Court and 3 copies were sent via Federal Express to: Arthur E. Kurtz, Esq., and Timothy M. Barber, Esq., Axley Byrnelson, LLP, 2 East Mifflin Street, Suite 200, Post Office Box 1767, Madison, Wisconsin 53701-1767 on May ____ , 2011. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: _____

_____
JOEL HIRSCHHORN

CERTIFICATION OF ELECTRONIC FILING

Pursuant to section 809.19(12)(f), Stats., I certify that the text of the electronic copy of Plaintiffs'-Appellants' Response is identical to the text of the paper copy of Plaintiffs'-Appellants' Response.

Date: _____

_____
JOEL HIRSCHHORN

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STATE OF WISCONSIN
SUPREME COURT

JOEL HIRSCHHORN AND EVELYN F. HIRSCHHORN,
Plaintiffs-Appellants,

Appeal No. 2009AP002768

v.

Cir. Ct. Case No. 2008CV000202

AUTO-OWNERS INSURANCE COMPANY,
Defendant-Respondent-Petitioner.

DEFENDANT-RESPONDENT-PETITIONER AUTO-OWNERS INSURANCE COMPANY'S REPLY BRIEF

REVIEW OF A FINAL JUDGMENT OF THE CIRCUIT COURT FOR ONEIDA COUNTY, JUDGE MARK MANGERSON, DISMISSING PLAINTIFFS-APPELLANTS' COMPLAINT

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INTRODUCTION

The Hirschhorns allege their vacation home was damaged due to a "penetrating and offensive odor" emanating from bat guano that was deposited between the walls in the home and absorbed into the furniture and structure of the building. They claim the smell was so bad that it rendered the home uninhabitable and they had no choice but to demolish the house. This alleged loss is unambiguously excluded under the plain meaning of the terms in Auto-Owners Insurance Company's pollution exclusion for three separate reasons: 1) The "penetrating and offensive odor" emanating from the bat guano unambiguously constitutes a "gaseous" "irritant" and "contaminant" that was "released," "dispersed" and "discharged" throughout the Hirschhorns' home; 2) the accumulation of bat guano from which the fumes emanated unambiguously constitutes a "solid" and "liquid" "contaminant" and "irritant" that was "released," "dispersed" and "discharged"; and 3) animal excrement unambiguously constitutes "waste."

UNDISPUTED FACTS

There are only two facts necessary for resolution of this case. First, paragraph 9 of the Hirschhorns' Complaint alleges:

> Between August 9 and 14, 2007, the Hirschhorn family stayed in the insured premises, during which time they noticed a penetrating and offensive odor emanating from the home. . . . . [T]he cause of the penetrating and offensive odor was damage to the insured premises, resulting from the accumulation of bat guano between the siding and the walls of the home. Consequentially, the home became uninhabitable and unsalable due to the penetrating and offensive odor . . . . In addition, the drapes, carpets, fabrics and fabric furnishings in the home where rendered unusable as a result of the absorption of the bat guano odor.

(A-Appx 30; R.1:3.) Second, the pollution exclusion in the policy of homeowners insurance issued to the Hirschhorns provides, in pertinent part:

> 10. **Pollutants** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
>
> . . . .
>
> b. **Coverage A Dwelling and Coverage B-Other Structures**
>
> Except as to ensuing loss not otherwise excluded, we do not cover loss resulting directly or indirectly from:
>
> . . . .
>
> (h) discharge, release, escape, seepage, migration or dispersal of pollutants . . . .

(P-Appx. 26-27; R.8, Ex. 2:2-3.)

ARGUMENT

I. The Hirschhorns Incorrectly Apply the Ambiguity Standard

The Hirschhorns argue that Auto-Owners' pollution exclusion is ambiguous because it can be understood to apply to substances other than bat guano. They maintain that because the definition of "pollutant" in Auto-Owners' policy is the same as the policy that was found ambiguous in *Donaldson v. Urban Land Interests, Inc.*, 211 Wis. 2d 224, 564 N.W.2d 728 (1997), Auto-Owners' policy must therefore be ambiguous. (Resp. Br. at 16, 30.) These arguments are fallacious on several levels.

First, while it is correct that ambiguous insurance policies are construed in favor of the insured, in order to be ambiguous, a policy term must have more than one *reasonable* interpretation; and an interpretation that conflicts with the actual terms of the policy is by definition, unreasonable. *Limpert v. Smith*, 56 Wis. 2d 632, 640-641, 203 N.W.2d 29 (1973). "An insured cannot have a reasonable expectation of coverage where an unambiguous

policy excludes coverage." *State Farm Fire & Cas. Co. v. Acuity*, 2005 WI App 77, ¶18, 280 Wis. 2d 624, 695 N.W.2d 883.

Second, the ambiguity inquiry is not to be conducted in the abstract; courts analyze whether an insured "could reasonably expect coverage on the facts of [each] case." *Donaldson*, 211 Wis. 2d at 233. *Donaldson* did not announce a *per se* rule that the definition of the term "pollutant" in the policy before it is always ambiguous; it simply held that the term "pollutant" was ambiguous as applied to the facts of that case—human-exhaled carbon dioxide. *Id.* at 230-31, 235.

Third, when interpreting insurance policies, courts first determine the common, ordinary meaning of the policy terms and then analyze whether the facts of the particular case fall within that meaning. *Landshire Fast Foods of Milwaukee, Inc. v. Employers Mut. Cas. Co.*, 2004 WI App 29, ¶¶16-19, 269 Wis. 2d 775, 676 N.W.2d 528 (analyzing whether the common, unambiguous definition of "contaminant" applied to certain bacteria). Therefore, the question before the court is not whether

Auto-Owners' pollution exclusion can reasonably be read to apply to substances other than bat guano or whether a property owner in northern Wisconsin would subjectively expect insurance coverage for bat guano damage. Rather, the proper analysis is whether the text of the pollution exclusion can reasonably be read as not applying to bat guano and/or bat guano odor. *See id.* (ruling that it was unreasonable for insured to read the term "contaminant" as limited to inorganic materials).

Given the policy definition of the term "pollutant" and the common and ordinary meaning of the words in that definition, it is unreasonable to read the pollution exclusion as not applying to bat guano and bat guano odor that render a house uninhabitable. In other words, the pollution exclusion in Auto-Owners' policy unambiguously excludes the Hirschhorns' alleged loss.

II. The Bat Guano and The Penetrating and Offensive Odor Emanating Therefrom Were "Discharged", "Released" and "Dispersed" Throughout The Hirschhorns' Home.

The parties agree that two conditions must be met in order for the pollution exclusion to apply: 1) The damage alleged must

have been caused, "directly or indirectly," by the "discharge, release, escape, seepage, migration or dispersal" of a substance; and 2) The substance must constitute a "pollutant." The Hirschhorns claim the first condition is not satisfied, arguing: "The damage at issue in this case was not caused by the 'discharge, release, escape, seepage, migration, or dispersal' of bat guano or the odor emanating therefrom through the HIRSCHHORN'S home, but rather by the 'accumulation' of bat guano at specific locations in the home." (Resp. Br. at 12.)

This argument is meritless, as it completely contradicts the Hirschhorns' Complaint, which alleged: "the home became uninhabitable and unsalable *due to the penetrating and offensive odor* . . . . In addition, the drapes, carpets, fabrics and fabric furnishings in the home where rendered unusable *as a result of the absorption of the bat guano odor*." (A-Appx 30; R:1:3.) (emphasis added). The Complaint clearly alleges that the home was rendered uninhabitable and that the Hirschhorns' property

was damaged due to the "*odor emanating from"* the bat guano. (*Id.*) (emphasis added.)

An ordinary reasonable insured would understand that an "odor emanating" from bat guano deposited between the walls of a home is a substance that was "discharge[]d, release[d]," that escape[d], seep[ed], migrat[ed]," and that was "dispers[ed] throughout the house. The common meaning of "emanate" is "to come or send forth, . . . to flow out." American Heritage College Dictionary 457 (4th ed. 2004). The ordinary meaning of the word "emanate" is synonymous with all the verbs in Auto-Owners' pollution exclusion.[1]

Also, before it could "accumulate" the bat guano itself needed to be "discharged" and "released" by the bats and "dispersed" throughout the inside of the walls of the Hirschhorns'

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[1] "Release" means to "let go" American Heritage College Dictionary 1174 (4th ed. 2004). "Disperse" means to "distribute . . . throughout a medium" *Id.* at 408. "Discharge" means "to let go" "flowing out or pouring forth; emission; secretion" *Id.* at 403. "Seep" means "to pass slowly through small openings; ooze . . . to enter, depart, or become diffused gradually." *Id.* at 1256. "Escape" means "a gradual effusion from an enclosure, a leakage." *Id.* 476. "Migrate means" "to move from one . . . region and settle in another." *Id.* at 881.

home—i.e., the guano needed to "escape" and "seep" out of the bats. "Accumulation" describes the *amount* of a substance—not the manner in which it arrived at a particular location. But-for the discharge, release, seepage, escape, and dispersal of the bat guano, no accumulation could occur.

Therefore, the first condition of the pollution exclusion is unambiguously satisfied in this case, as the bat guano was "discharged" and "released" by the bats; it "escaped" and "seeped" from the bats; and it was "dispersed" between the walls of the Hirschhorns' home. Likewise, the bat guano odor was "released" and "discharged" from the guano; it "escaped", "seeped", and "migrated" from the guano; and it was "dispersed" throughout the Hirschhorns' home.

III. Bat Guano and Odor Emanating Therefrom That Render a Home Uninhabitable Are Unambiguously "Solid," "Liquid," and "Gaseous" "Irritants" and "Contaminants"

The term "pollutants" is defined in Auto-Owners' policy as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals,

liquids, gases and waste." (P-Appx. 26; R.8, Ex. 2:2.) Three types of "pollutants" are present in this case. First, the bat guano constitutes a "solid [and] liquid" "irritant or contaminant." Second, the bat guano odor constitutes a "gaseous" "irritant or contaminant" and falls under the category of "fumes" and "gases." Third, the bat guano itself constitutes "waste."

A *The Hirschhorns' Argument That a "Penetrating and Offensive Odor" Emanating From Bat Guano Does Not Fall Within the Ordinary Meaning of the Terms "Gas" and "Fumes" is Patently Unreasonable.*

While admitting that bat guano is a solid and liquid (Resp. Br. at 18), the Hirschhorns claim that a "penetrating and offensive odor" or "smell" emanating from bat guano does not fall within the ordinary meaning of the terms "gas" and "fumes." (Resp. Br. at 13-14.) Quite frankly, Auto-Owners is flabbergasted as to how an insured who alleges that his house was rendered uninhabitable due to the odor from bat guano can argue with a straight face that such a rancid smell is not a "gas" or a "fume." The ordinary definition of "fume" is "[a] strong or acrid odor." American Heritage College Dictionary at 561. The Hirschhorns

likewise fail to explain why bat guano odor is not in the "gaseous" state of matter.

A "penetrating and offensive odor" is unambiguously a "fume" and present in the "gaseous" state of matter and therefore qualifies as a "pollutant" under the policy. The Hirschhorns' arguments to the contrary are meritless.

B A Homeowner Alleging That His Home Was Rendered Uninhabitable Due to a Penetrating and Offensive Odor Emanating From Animal Excrement Cannot Reasonably Believe That His Home Was Not Damaged by "Contaminants" or "Irritants."

The Hirschhorns argue that the terms "irritants" and "contaminants" are "overbroad and limitless" (Resp. Br. at 18) and do not include bat guano and bat guano odor because Auto-Owners pollution exclusion does not specifically list "penetrating and offensive odors" from bat guano as "pollutants." These same arguments were specifically rejected by the Court of Appeals in *Landshire Fast Foods of Milwaukee,* 269 Wis. 2d 775, ¶17. There, the court of appeals ruled that "the meaning of the term 'contaminant' in an insurance contract pollution exclusion is well

interpretations." *Id.,* ¶19 (emphasis added). Thus, it held that the term "contaminants" unambiguously covered a bacteria outbreak at the insured's food processing center, reasoning:

> "*[a]lthough various forms of matter can constitute contamination, the term is not itself reasonably susceptible to multiple meanings*." The presence of Listeria monocytogenes in Landshire's food products plainly rendered the food unfit for consumption, and as such meets the ordinary, unambiguous definition of "contamination."
> . . . .
> . . . Bacteria, such as Listeria monocytogenes, when it renders a product impaired or impure, falls squarely within the plain and ordinary meaning of "contaminant."

Id., ¶¶16, 19 (internal citation omitted) (emphasis added). In so ruling, the court rejected the insured's argument that the term "contaminant" was ambiguous and could reasonably be understood as applying only to "inorganic matter." *Id.*, ¶16.

Although various forms of matter can constitute "contaminants" and "irritants" under Auto-Owners' policy, those terms are not ambiguous as applied to a "penetrating and offensive odor" emanating from bat guano that rendered a home uninhabitable. Bat guano and odor emanating therefrom that render a home impure and unfit for habitation, fall squarely

within the plain and ordinary meaning of the words "contaminant" and "irritant." The Hirschhorns allege their vacation home became uninhabitable due to a "penetrating and offensive odor" emanating from bat guano that was deposited between the walls in the home and absorbed into the furniture and structure of the building. They cannot reasonably believe that those same substances do not constitute "contaminants" or "irritants."

Likewise, the Hirschhorns cannot reasonably contend that "foul odors from bat guano are akin to [the human] respiration process" at issue in *Donaldson*. (Resp. Br. at 17.) Carbon dioxide exhaled by humans is generally benign and does not damage or contaminate a building. Carbon dioxide emitted by humans is normally expected to be found in inhabited buildings. In contrast, animal excrement discharged between the walls of a home and the odors that are discharged and seep out will always contaminate and damage a home. As conceded by the Hirschhorns, "[s]urely no reasonable insured homeowner . . .

would want or expect bats or bat guano or the odors emanating therefrom, in their home . . . ." (Resp. Br. at 29.)

Landshire Fast Food, 269 Wis. 2d 775, ¶15, applied the definition of "contaminant" set forth in *Richland Valley Prods., Inc. v. St. Paul Fire & Cas. Co.,* 201 Wis. 2d 161, 169-170, 548 N.W.2d 127 (Ct. App. 1996): "[A] condition of impurity resulting from mixture or contact with a foreign substance." This is consistent with the court of appeals' decision in *United States Fire Insurance Co. v. Ace Baking Co.*, 164 Wis. 2d 499, 476 N.W.2d 280 (Ct. App. 1991), which held that fabric softener was a "contaminant" because it fouled the insured's food products. All of these cases involve insured property that is fouled and rendered unusable by the presence of a foreign substance. "[T]he essence of a pollution exclusion is that there is no coverage for the contamination of [the insured's property] by any substance foreign to [that property]." *Landshire Fast Foods*, 269 Wis. 2d 775, ¶15.

Here, the Hirschhorns' property was rendered impure and unusable by foreign substances that they concede no reasonable insured would expect or want in their home—bat guano and fumes emanating therefrom. A homeowner who alleges that his home was ruined and made uninhabitable due to the presence of these substances cannot reasonably believe they do not constitute "contaminants" or "irritants."

IV. Bat Guano is Waste

Auto-Owners has established that bat guano and bat guano odor unambiguously meet the definition of "pollutant." Thus, this Court need not even reach the issue of whether the term "waste" unambiguously applies to animal excrement. "Waste" is but one of the many contaminants and irritants included in the definition of "pollutant" in Auto-Owners' policy. However, if the Court reaches this issue, it should conclude that "waste" unambiguously includes animal excrement.

The Hirschhorns concede that a reasonable insured would understand the term "waste" to include *human* excrement, yet

they contend the term waste does not unambiguously include *animal* excrement. (Resp. Br. at 35.) They provide no justification for this dichotomy. Instead, they argue that applying the principle of construction *ejusdem generis*, the definition of "waste" should be limited to those items delineated in Auto-Owners' Policy—"materials to be recycled, reconditioned or reclaimed." (P-Appx. 26; R.8, Ex. 2:2.)

However, rules of construction, such as *ejusdem generis*, apply only where a party establishes that a policy term is ambiguous; the rules of construction cannot be used to create ambiguity. *See Landshire Fast Foods*, 269 Wis. 2d 775, ¶14 ("However, rules of construction are not used when a contract is unambiguous, but only when ambiguous.") (citing *Jones v. Sears Roebuck Co.*, 80 Wis. 2d 321, 329-30, 259 N.W.2d 70 (1977)).

The Hirschhorns have not even attempted to explain how it is that a reasonable insured could conclude that "waste" includes human, but not animal, excrement. They have not produced any authority to contradict the many cases cited in Auto-Owners

initial brief, demonstrating that the term "waste" in a pollution exclusion is unambiguous as applied to excrement. And again, their arguments mirror those expressly rejected by the court of appeals in *Landshire Fast Foods*, 269 Wis. 2d 775, ¶17, where the court specifically refused to apply the *ejusdem generis* rule to limit the meaning of the term "contaminants" to "inorganic substances" because the bacteria at issue "me[t] the ordinary, unambiguous definition of "contamination.'"

V. The Court of Appeals Decision Incorrectly Limits The Scope of The Pollution Exclusion to "Non-biological Processes"

The Hirschhorns attempt to downplay the impact of the Court of Appeals decision below by arguing that the Court of Appeals did not limit the term "pollutant" to non-biological processes" and instead merely provided and alternative reasonable reading of the policy. This is incorrect. Under the rules of insurance contract construction, the legal effect of concluding that a reasonable insured *could* read the pollution exclusion as not applying to "non-biological processes" is that the

policy doesn't apply to biological processes, because ambiguities are construed in the insured's favor.

The Court of Appeals' conclusion that the term "pollutant" can reasonably be read as applying to only non-biological processes or industrial waste has no basis in the language of Auto-Owners' pollution exclusion. It also completely contradicts its earlier decision in *Landshire Fast Foods*, 269 Wis. 2d 775, ¶16, where it held that a reasonable insured could not read the word "contaminant" as applying only to "inorganic matter." "Landshire's proposition—that the term 'contaminant' in the policy definition of 'pollutant' included only 'inorganic matter,'—is therefore unreasonable and does not render the language ambiguous."

The loss alleged by the Hirschhorns meets the ordinary, unambiguous definition of "contaminants." There is no basis to limit the meaning of that term to particular substances.

CONCLUSION

For these reasons, this Court should reverse the Court of Appeals' decision and hold that damage to a home caused by a "penetrating and offensive odor" emanating from bat guano that rendered the home uninhabitable unambiguously falls within the scope of the pollution exclusion in Auto-Owners' policy.

Respectfully submitted this 12th day of May, 2011.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) & (c) as to form and certification for a reply brief and appendix produced with a proportional serif font (Century 13 pt for body text and 11 pt for quotes and footnotes).

The length of this brief is 2999 words.

Dated: May 12th, 2011.

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ELECTRONIC FILING CERTIFICATION

I further certify, pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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STATE OF WISCONSIN
SUPREME COURT

JOEL HIRSCHHORN and
EVELYN F. HIRSCHHORN,

Plaintiffs-Appellants-Respondents,

vs.

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Respondent-Petitioner.

Appeal No. 2009-AP-2768

Circuit Court Case No. 08-CV-202

ON APPEAL FROM THE CIRCUIT COURT OF
ONEIDA COUNTY, CIRCUIT COURT, CASE NO. 08-CV-000202
THE HONORABLE MARK MANGERSON, PRESIDING

NON-PARTY BRIEF OF WISCONSIN DEFENSE COUNSEL IN SUPPORT OF DEFENDANT-RESPONDENT-PETITIONER AND IN SUPPORT OF REVERSAL

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June 17, 2011

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INTRODUCTION

Wisconsin Defense Counsel (the "WDC") submits this non-party brief in support of defendant-respondent-petitioner Auto-Owners Insurance Company ("Auto Owners") and to urge this Court to reverse the Court of Appeals' decision. WDC is a statewide organization of lawyers dedicated to the defense of Wisconsin citizens and businesses, the maintenance of an equitable justice system, and the education of its members.

There are three reasons why the Court of Appeals' conclusion that the pollution exclusion is ambiguous as applied to excreted and accumulated bat guano should be reversed. First, the Court of Appeals' analysis disregards the plain and ordinary meaning of the term "waste" and inappropriately relies on a canon of judicial interpretation to constrict the scope of that term to the byproducts of manufacturing or industrial processes. The resulting exclusion of materials resulting from biological processes is not a reasonable limitation of the term "waste."

Second, the Court of Appeals' conclusion is inconsistent with the reasonable expectations of Wisconsin homeowners given the prevalence and close proximity of animals in and around residential areas.

Third, the Court of Appeals' conclusion that insurance coverage is available to pay for damage caused by the presence of animal waste serves as a disincentive to Wisconsin homeowners, particularly those who own vacation or seasonal homes, to diligently monitor the condition of their property. For these reasons, WDC respectfully requests that the Court reverse the Court of Appeals' decision.

ARGUMENT

I. THE COURT OF APPEALS' LIMITING CONSTRUCTION OF THE TERM "WASTE" IS AT ODDS WITH THE PLAIN MEANING OF THAT TERM.

The primary objective of judicial examination of the terms of insurance policies and other contracts is to ascertain and enforce the intent of the parties. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 18, 326 Wis. 2d 729, 786 N.W.2d 78. To determine and give effect to this intent, Wisconsin courts begin with the terms of the policy itself, according terms not specifically defined in the policy a plain and ordinary meaning and interpreting them as they would be understood by a reasonable person in the insured's position. *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 86, ¶ 18, 311 Wis. 2d 492, 753 N.W.2d 448; *State Farm Mut. Auto. Ins. Co. v. Langridge*, 2004 WI 113, ¶ 14, 275 Wis. 2d 35, 683 N.W.2d 75.

As this Court has recognized in two cases examining the same pollution exclusion at issue in the present case, the terms of the exclusion are undeniably broad. *Peace ex rel. Lerner v. Northwestern Nat'l Ins. Co.*, 228 Wis. 2d 106, 139, 596 N.W.2d 429 (1999); *Donaldson v. Urban*, 211 Wis. 2d 224, 231, 564 N.W.2d 728 (1997). That breadth is evident from the first words of the definition – "pollutants means *any* solid, liquid, gaseous or thermal irritant or contaminant…." (emphasis added). Use of the word "any" as a modifier of the terms "irritant" and "contaminant" compels a broad reading of those terms. *See Marotz v. Hallman*, 2007 WI 89, ¶ 25, 302 Wis. 2d 428, 734 N.W.2d 411 (use of word "any" to modify "person or organization" in provision of insurance statute "indicates

broad application when it comes to the persons and organizations that fall within the scope of the provision"). Despite acknowledging that the term "waste" is even broader than the terms "irritant" and "contaminant," the Court of Appeals held that a limited construction of "waste" was appropriate in light of the other terms included as examples of "irritants" and "contaminants." *Hirschhorn v. Auto-Owners Ins. Co.*, 2010 WI App 154, ¶¶ 12-13, 330 Wis. 2d 232, 792 N.W.2d 639.

This analysis is flawed in two respects. First, it disregards the common and ordinary meaning of the term "waste," which, as the Court of Appeals acknowledged, includes excrement. *Id.* at ¶ 14. This Court has looked to dictionaries for assistance in ascertaining the common, ordinary meaning of undefined terms in a pollution exclusion, *Peace*, 228 Wis. 2d at 122-23, and in this case the dictionary definitions of "waste" support a broader interpretation of the term than suggested by the Court of Appeals. Webster's Ninth Collegiate Dictionary defines "waste" as including "refuse from places of human or animal habitation: as (1) : GARBAGE, RUBBISH (2) *pl.* : EXCREMENT (3) : SEWAGE." Webster's Ninth New Collegiate Dictionary 1331 (1987). Courts in other jurisdictions have cited this definition in construing pollution exclusions that are similar or identical to the exclusion at issue in this case. *See, e.g., Boulevard Inv. Co. v. Capitol Indem. Corp.*, 27 S.W.3d 856, 858 (Mo. Ct. App. 2000). This Court should interpret the standard pollution exclusion in the Auto-Owners policy consistently with these non-Wisconsin authorities. *Tri-City Nat'l Bank v. Federal Ins. Co.*, 2004 WI App 12, ¶ 33, 268 Wis. 2d 785, 674

N.W.2d 617 ("it is better public policy to strive for uniform interpretation of insurance policies, particularly of those policies issued nationwide").

Second, the Court of Appeals' limiting construction of the term "waste" improperly relies on the *ejusdem generis* canon of construction. Courts often resort to canons of construction to resolve ambiguities in statutory or contract language. Where the meaning of a term in an insurance policy is plain and unambiguous, however, courts must apply that plain meaning and cannot invoke interpretive canons to alter or limit that meaning. *Peace*, 228 Wis. 2d at 121; *Hull v. State Farm Mut. Auto Ins. Co.*, 222 Wis. 2d 627, 637, 586 N.W.2d 863 (1998) ("When the meaning of a term in an insurance policy is plain, the court should apply the term in accordance with the 'everyday meaning' which a lay person would ascribe to it, and should not turn to rules of construction or case law."). In this case, the common and ordinary meaning of "waste" includes excrement. *See, e.g., United States Fire Ins. Co. v. City of Warren*, 87 Fed. Appx. 485, 489, 2003 WL 23172047 (6th Cir. 2003) (unpublished) (rejecting argument that "waste" in pollution exclusion solely refers to leftovers from industrial processes, and recognizing sewage to be composed of "solid, liquid [or] gaseous … irritants or contaminants, including … waste."). The term as used in the instant policy plainly and unambiguously includes bat guano within its scope.

Even if the term "waste" was ambiguous, application of the *ejusdem generis* canon of construction still would be improper. The meaning of a general term is not circumscribed by the meaning of more specific

preceding terms where there is a clear manifestation of contrary intent. *LaBarge v. State*, 74 Wis. 2d 327, 332, 246 N.W.2d 794 (1976). The introductory clause of the definition of "pollutant" – "***any*** solid, liquid, gaseous or thermal ***irritant*** or contaminant" – manifests an intent not to constrict the term waste only to materials left over from manufacturing or industrial processes. (Emphasis added).

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE REASONABLE EXPECTATIONS OF THE PARTIES AND SERVES AS A DISINCENTIVE TO OWNERS OF VACATION HOMES TO MONITOR THEIR PROPERTY.

In addition to its lack of textual support, the Court of Appeals' cramped interpretation of the pollution exclusion should be rejected because it (1) is inconsistent with the reasonable expectations of insurers and homeowners concerning the types of risks which are covered and excluded from coverage under a homeowner's insurance policy and (2) discourages Wisconsin homeowners, in particular those who are not physically present in their homes throughout the calendar year, from taking preventative measures to guard against similar occurrences.

Where, as here, the terms of an exclusion are broad on their face, judicial interpretation and application of those terms should be consistent with the reasonable expectations of the parties. *Zarnstorff v. Neenah Creek Custom Trucking*, 2010 WI App 147, ¶ 30, 330 Wis. 2d 174, 792 N.W.2d 594. The Court of Appeals' conclusion that the term "waste" in the pollution exclusion in a homeowner's insurance policy encompasses the byproducts of industrial and manufacturing operations, but could

reasonably be read not to apply to "biological" forms of waste, is not consistent with the reasonable expectations of Wisconsin homeowners. Many homes in Wisconsin are located in rural or urban residential areas far from factories, plants and other facilities where manufacturing or industrial activities occur. In contrast, bats and other animals live above, below and around residential areas. The close proximity between animals and human dwellings informs the expectations of a homeowner concerning the scope of the term "waste." No reasonable homeowner would expect that accumulated animal excrement, and the "penetrating and offensive odor" emanating therefrom, would not be included within the broad terms of a pollution exclusion that includes the term waste.

Moreover, the Court of Appeals decision exacerbates the problem of moral hazard by creating an undesirable incentive for owners of vacation or seasonal homes to neglect their properties. "Moral hazard refers to the effect of insurance in causing the insured to relax the care he takes to safeguard his property because the loss will be borne in whole or part by the insurance company." *A.M.I. Diamonds Co. v. Hanover Ins. Co.*, 397 F.3d 528, 530 (7th Cir. 2005). If left standing, the Court of Appeals' conclusion that a loss allegedly caused by the odor emanating from an accumulation of bat guano is not excluded from coverage will create a disincentive for homeowners to be diligent in taking steps to avoid or redress accumulations of animal excrement in or near their properties. This concern takes on added significance in the context of vacation homes or second homes like the Hirschhorns', which may be unoccupied by their

owners or another caretaker for weeks or months at a time. This Court should interpret the pollution exclusion in a manner that is consistent with the reasonable expectations of reasonably careful homeowners and that encourages homeowners to be proactive in monitoring and caring for their homes.

CONCLUSION

The Court of Appeals' decision should be reversed and the judgment of the circuit court should be reinstated.

Dated this 17th day of June, 2011.

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I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of the brief is 1,641 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. (Rule) § 809(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated this 17th day of June, 2011.

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SUPREME COURT

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Plaintiffs-Appellants,

Appeal No: 2009AP002768

v.

Cir. Ct. Case No. 2008CV000202

AUTO-OWNERS INSURANCE COMPANY,
Defendant-Respondent-Petitioner.

RESPONSE BY PLAINTIFFS-APPELLANTS JOEL HIRSCHHORN AND EVELYN F. HIRSCHHORN TO NON-PARTY BRIEF OF WISCONSIN DEFENSE COUNSEL IN SUPPORT OF DEFENDANT-RESPONDENT-PETITIONER AND IN SUPPORT OF REVERSAL

REVIEW OF A FINAL JUDGMENT OF THE CIRCUIT COURT FOR ONEIDA COUNTY, JUDGE MARK MANGERSON, DISMISSING PLAINTIFFS'-APPELLANTS' COMPLAINT

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INTRODUCTION

The non-party brief submitted by the Wisconsin Defense Counsel ("WDC")[1] in support of Auto-Owners Insurance Company's ("AOI") position and reversal of the Court of Appeals' decision, relies (much like AOI's arguments) on an improper and expansive misinterpretation of the Court of Appeals decision. WDC provides no supplemental controlling or relevant authority/precedent which would warrant a reversal of the Court of Appeals decision. In fact, WDC, just as AOI, has totally ignored this Court's recent decision in Zarder v. Humana Ins. Co., 2010 WI 35, 324 Wis. 2d 325, 782 N.W.2d 682. As previously argued, Zarder[2] is directly on point and controlling Wisconsin Supreme Court case law. Simply put, WDC's arguments are repetitive, misguided, and wholly unsupported.

WDC essentially makes three (3) arguments:

1) the Court of Appeals ignored the plain and ordinary meaning of the term "waste" and incorrectly limited the scope of "waste" to byproducts of manufacturing or industrial processes;

---

[1] Plaintiff-Appellants, Joel Hirschhorn and Evelyn F. Hirschhorn, will be referred to as "HIRSCHHORNS." Defendant-Respondent-Petitioner, Auto-Owners Insurance Company, will be referred to as "AOI." Non-party brief authors, Wisconsin Defense Counsel, will be referred to as "WDC." References to WDC's non-party brief will be (WDC.B., p. ___). References to the record will be (R.Doc#:P#).

[2] So as not to belabor the record, HIRSCHHORNS refer this Court to their Answer Brief filed on May 2, 2011.

2) the Court of Appeals decision is inconsistent with the reasonable expectations of insurers and homeowners in a rural area of Wisconsin;

3) the Court of Appeals decision provides an incentive for Wisconsin seasonal homeowners to neglect their properties.

WDC's first argument is based on an improper and expansive misinterpretation of the Court of Appeals decision and is not supported by any controlling Wisconsin case law. WDC's second argument ignores the fact that AOI's policy fails to put a reasonable insured on notice of what is specifically encompassed by the term "waste." WDC fails to acknowledge that as the drafter of the policy, all ambiguities are construed against AOI. WDC's third argument belies the policy itself, failing to recognize the "faulty maintenance" provision in the policy, (R1: 27), that would control any neglect of seasonal properties.

Nothing in WDC's brief logically advances AOI's position. For these reasons, the Court of Appeals' decision should be affirmed, and this case remanded to the trial court for further proceedings.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THE TERM "WASTE" AMBIGUOUS AND DID NOT LIMIT ITS MEANING TO ONLY MANUFACTURING OR INDUSTRIAL PROCESSES

WDC contends that the Court of Appeals' analysis (which held the term "waste" was ambiguous as set forth in the pollution exclusion provision of the insurance policy at issue), is flawed in two respects: 1) that the analysis "disregards the common and ordinary meaning of the term 'waste,' which, as the Court of Appeals acknowledged, includes excrement," (WDC.B., p. 3), and 2) "the Court of Appeals' limiting construction of the term 'waste' improperly relies on the *ejusdem generis* canon of construction." (WDC.B., p. 4). However, both of these arguments are without merit.

To support the argument that the Court of Appeals disregarded the common and ordinary meaning of the term "waste," WDC quotes a definition of waste found in Webster's Ninth New Collegiate Dictionary 1331 (1987). WDC uses one (1) of at least three (3) definitions of "waste" provided by this dictionary: "'refuse from places of human or animal habitation: as (1): GARBAGE, RUBBISH (2) *pl.* : EXCREMENT (3) : SEWAGE." (WDC.B., p. 3). WDC further suggests that Wisconsin Courts should adopt this definition of "waste," claiming it is consistent

with one non-Wisconsin case, i.e., a Missouri Court of Appeals decision, Boulevard Inv. Co. v. Capitol Indem. Corp., 27 S.W.3d 856, 858 (Mo. Ct. App. 2000).

WDC's reliance on yet another dictionary definition of "waste," found in a case from a foreign jurisdiction, is not a sufficient basis to reverse the Court of Appeals' ruling that "waste," in this context, is ambiguous. With this additional definition of "waste" provided by WDC there have now been ten (10) definitions provided in the briefs submitted to the Court of Appeals, the Court of Appeals decision, and the briefs submitted to this Court.

WDC has obviously overlooked this Court's recent admonition, that "[i]f words or phrases in a policy are susceptible to more than one reasonable construction, they are ambiguous." Zarder v. Humana Ins. Co., 2010 WI 35, ¶ 26, 324 Wis. 2d 325, 782 N.W.2d 682. Since ten (10) different definitions have now been provided, clearly indicating multiple reasonable constructions, no common and ordinary definition of "waste" exists. "Waste," as used in AOI's policy, can only be described as ambiguous. Hence, specificity is required. WDC's additional definition supports HIRSCHHORNS' argument, not AOI's. Thus, because Wisconsin courts always construe ambiguities against the insurer and in favor of coverage, the Court of Appeals' decision was

correct and should stand. Kaun v. Industrial Fire and Cas. Ins. Co.,148 Wis.2d 662, 436 N.W. 2d 321 (1989).

The Missouri Court of Appeals case upon which WDC relies is neither controlling law nor on point. In Boulevard Inv. Co. the disputed issue was whether or not the insurance company's pollution exclusion barred coverage due to the occupants' "release of grease and other kitchen waste into a sewer line." Boulevard Inv. Co., 27 S.W.3d at 858. The case sub judice is easily distinguishable. First, in Boulevard Inv. Co., it was the insured itself (a restaurant) which created the damage with its own "waste." Here, the HIRSCHHORNS' home was infested by bats, despite regular and careful maintenance being performed over the years. (R.18:5-17). Here, unlike Boulevard Inv. Co., no fault could be or was attributed to the reasonable insured homeowner. Here, as a natural result of the bat infestation, bat guano accumulated and caused the damage. A bat infestation, and the concomitant accumulation of bat guano as a result, is simply not analogous to a restaurant dumping its own "waste," such as "kitchen grease, scour pads, heavy plastic, and underwear," into its own plumbing system and causing damage. Boulevard Inv. Co., 27 S.W.3d at 857.

Second, Boulevard Inv. Co. does not address excrement, but rather "grease and other kitchen waste." These substances, which the Missouri Court of Appeals found to be "waste," are clearly distinguishable from bat guano and are consistent with the Court of Appeals decision sub judice. Grease and kitchen waste are garbage or rubbish – bat guano is not. Since Boulevard Inv. Co. does not hold that animal excrement is considered "waste," WDC's attempt to cite this definition is not only misguided, but actually supports the Court of Appeals decision that the term "waste" is ambiguous as set forth in AOI's pollution exclusion provision. It is hard to believe that this inapplicable Boulevard Inv. Co. is the best case WDC could find – even as a result of a nationwide search of reported Appellate decisions.

To support the contention that "the Court of Appeals' limiting construction improperly relies on the *ejusdem generis* canon of construction," (WDC.B., p. 4), WDC relies on cases that would prevent courts from applying interpretive canons of construction due to the plain and unambiguous nature of the term at issue. Here, however, that is not the case – "waste" is most certainly ambiguous in the context of this pollution exclusion provision. *See* Donaldson v. Urban Land Interests Inc.,211 Wis. 2d 224, 564 N.W. 2d 728 (1997).

Furthermore, WDC boldly makes the blanket statement that "[t]he term [waste] as used in the instant policy plainly and unambiguously includes bat guano within its scope." (WDC.B., p. 4). However, WDC stops there, providing no explanation as to how or why this statement is so. The reason – because bat guano does not fall into the scope of the term "waste." Not one case, from Wisconsin or any foreign jurisdiction, has been cited by either AOI or WDC indicating otherwise. It is clear the term "waste" as used in AOI's policy is ambiguous and does not include bat guano within its scope. The Court of Appeals' decision is correct.[3]

Finally, WDC contends that the qualifying word "any" in the definition of pollutant "manifests an intent not to constrict the term waste only to materials left over from manufacturing or industrial processes." (WDC.B., p. 5). The Court of Appeals' decision in no way constricts the term "waste" to **only** manufacturing or industrial processes.[4] The specific language, in reference to "discharge, release, escape, seepage migration or dispersal of pollutants," is "[] the bodily processes by which wastes such as carbon dioxide, urine or feces move

[3] A reasonable insured here (a vacation homeowner in the Wisconsin Northwoods who diligently and regularly maintained and inspected the home) would not read the pollution exclusion and believe bat guano was within the scope of the term "waste." A reasonable insured would believe s/he was covered by his/her/their insurance policy in the event of unexpected and uninvited bat infestation. *See* Issue II, infra.
[4] Again, see HIRSCHHORNS' Answer Brief, pp. 23 to 28.

out of an organism would more commonly be described as respiration, elimination, excretion or some other term suggesting a biological process. Thus, **at best**, the pollution clause's action words **do not suggest** to the reader a biological process, and **they may even suggest** that biological processes are not part of the exclusion." Hirschhorn v. Auto-Owners Ins. Co., 2010 WI App 154, ¶15, 330 Wis. 2d 232.

Thus it is clear that the policy language at issue sub judice can easily be read in a number of different ways by a reasonable insured – hence the language is, of necessity and under the law, ambiguous. What this language from Hirschhorn, Id., does not conclude is that there is a biological processes exception to the pollution exclusion provision. The Court of Appeals language simply deems the term "waste" ambiguous. WDC's argument is meritless and the Court of Appeals decision should thus be affirmed.

II. THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE REASONABLE EXPECTATIONS OF THE PARTIES AND DOES NOT SERVE AS A DISINCENTIVE TO OWNERS OF VACATION HOMES TO PROPERLY MONITOR THEIR PROPERTY, BUT AS AN INCENTIVE FOR INSURANCE COMPANIES TO UPDATE THEIR POLICIES IF THEY WANT TO EXCLUDE COVERAGE DUE TO BAT INFESTATION[5]

WDC contends that the Court of Appeals decision should be rejected because it "(1) is inconsistent with the reasonable expectations of insurers and homeowners concerning the types of risks which are covered and excluded from coverage under a homeowner's insurance policy," and because (2) it "discourages Wisconsin homeowners, in particular those who are not physically present in their homes throughout the calendar year, from taking preventative measures to guard against similar occurrences." (WDC.B., p. 5). However, WDC's arguments again rely on an overly expansive and improper misinterpretation of the Court of Appeals' opinion, fail to cite any relevant or controlling Wisconsin case law/precedent, and ignore the terms of the insurance policy itself.

To support the contention that the Court of Appeals' decision is inconsistent with a reasonable Wisconsin homeowner's expectations of

[5] This is a new argument, raised for the first time by WDC.

what is included within the pollution exclusion provision, WDC relies on a single proposition:

> [m]any homes in Wisconsin are located in rural or urban residential areas far from factories, plants and other facilities where manufacturing or industrial activities occur. In contrast, bats and other animals live above, below and around residential areas. The close proximity between animals and human dwellings informs the expectations of a homeowner concerning the scope of the term "waste." (WDC.B., p. 6).

While these facts about bats and animals living in close proximity to homes in rural Wisconsin may well be true, WDC fails to acknowledge that the pollution exclusion language in the policy at issue simply does not in fact put a reasonable insured on notice that such a claim is NOT covered by AOI's insurance policy.

This is not the first time AOI has been before Wisconsin Appellate Courts (this year alone) on the issue of what a reasonable person in the position of the Hirschhorns would have understood the language of an insurance policy to cover and exclude. In Wadzinski v. Auto-Owners Ins. Co., 2011 Wisc. App. LEXIS 155, the Third District Court observed:

> Of primary importance is that the language of an insurance policy should be interpreted to mean what a reasonable person in the position of the insured would have understood the words to mean.

The term "waste," under which AOI and WDC contend bat guano falls, is further explained by the policy as "including materials to be recycled,

reconditioned or reclaimed." Not one of these terms relates in any way to bat guano. A reasonable insured would not have understood the term "waste" to include the accumulation of bat guano. Thus, it is clear that a reasonable insured would expect coverage for damage resulting from the unexpected and uninvited accumulation of bat guano in their home.

To support WDC's bizarre second contention that the Court of Appeals' decision creates an incentive for seasonal homeowners to neglect their properties, WDC cites to a "moral hazard" theory from a foreign jurisdiction and totally ignores the "faulty maintenance" provisions of the very policy at issue which, of course, provide more than adequate protection to AOI from the "moral hazard" so feared by WDC.

The case cited by WDC, A.M.I. Diamonds Co. v. Hanover Ins. Co., 397 F.3d 528, 530 (7th Cir. 2005), is neither controlling precedent nor does it address the "waste" or the pollution exclusion provision of an insurance policy. A.M.I. Diamonds Co. dealt with an insurance company's liability for loss where a diamond salesman who had carelessly left $100,000.00 worth of diamonds in his unlocked car, from which the diamonds were subsequently stolen. A.M.I. Diamonds Co., 397 F.3d 528. These facts are clearly distinguishable from this case.

Sub judice, we have a homeowner who diligently and regularly maintained the home at issue.[6] There was no neglect of the property at issue. While a "moral hazard" theory may apply to a careless diamond salesmen, that argument fails here, as the HIRSCHHORNS were extremely attentive and concerned homeowners.

Although apparently overlooked by WDC, AOI's insurance policy clearly and unambiguously excludes coverage for "faulty maintenance:"

> Except as to ensuing loss not otherwise excluded, we do not cover loss resulting directly or indirectly from:
> …
> (3) Faulty, inadequate or defective:
> …
> (e) maintenance
> … of a part or all of the residence premises or any other property. (R1: 27).

Based on this provision of AOI's insurance policy, any damage to the property as a result of "faulty, inadequate or defective…maintenance," i.e. neglect,[7] is already excluded from coverage by AOI's policy. WDC, in arguing its unique "moral hazard" theory, has totally ignored this provision in the policy. Moreover, since AOI did not deny coverage because of faulty maintenance or neglect

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[6] As the trial court found, HIRSCHHORNS had either a next door, or nearby, neighbor or house cleaner, access the home at least 1-2 times per month, year round, to inspect, confirm no damage to the interior and exterior of the home, and/or clean or otherwise make any and all necessary repairs and improvements/maintenance to the house. (R.18:5-17; R.26: 1).

[7] If AOI is concerned that the phrase "faulty, inadequate or defective … maintenance" does not include "neglect," perhaps AOI will have to amend its insurance policy.

(and the trial court so found), (R.18: 120-121; R.26: 3-4), and because the HIRSCHHORNS diligently and regularly maintained and inspected their home, WDC's argument is wholly without merit.

Thus, the Court of Appeals' decision does not "creat[e] an undesirable incentive for owners of vacation or seasonal homes to neglect their properties," as argued by Amicus (WDC.B., p. 6), because AOI's policy already excludes coverage for such damage caused by neglect.

The Court of Appeals' decision provides an incentive for AOI to change the language in its policy. AOI, as the drafter of its policies, is solely able to avoid creating ambiguity and confusion by including specific and appropriate language. If AOI wanted to exclude coverage of a bat infestation and the accumulation of bat guano as a result thereof, AOI could and should have written that language into their policy. Thus, in accordance with the time honored principle of law that "[a]n insurance company which authors ambiguous language in its insurance policy should expect a judicial construction contrary to what it claims it intended," McPhee v. American Motorist Ins. Co., 57 Wis.2d 669, 205 N.W. 2d 152 (1973), AOI may well have to modify its policy in accordance with the Court of Appeals' decision if it wants to exclude coverage in cases involving bat infestation and guano accumulation. If

so, that is left for AOI for another day. Today this Court should affirm the Court of Appeals decision in Hirschhorn.

CONCLUSION

The Court of Appeals' decision correctly found in favor of coverage and the ruling below should be affirmed. This cause should be remanded to the Circuit Court for further proceedings.

Respectfully submitted,
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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), with proportional serif font (Century 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief is 2,815 words.

_____
JOEL HIRSCHHORN

CERTIFICATION OF ELECTRONIC FILING

Pursuant to section 809.19(12)(f), Stats., I certify that the text of the electronic copy of Plaintiffs'-Appellants' Response is identical to the text of the paper copy of Plaintiffs'-Appellants' Response.

Date: _____

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JOEL HIRSCHHORN

CERTIFICATE OF SERVICE

I certify that this brief was sent via Federal Express to the Clerk of the Wisconsin Supreme Court and a copy was sent via U.S. Mail to: Arthur E. Kurtz, Esq., and Timothy M. Barber, Esq., Axley Byrnelson, LLP, Counsel for AOI, 2 East Mifflin Street, Suite 200, Post Office Box 1767, Madison, Wisconsin 53701-1767 and Beth Ermatinger Hana, Esq., and Daniel J. Kennedy, Esq., Gass Weber Mullins LLC, Counsel for WDC, 309 North Water Street, 7th Floor, Milwaukee, WI 53202, on July ___ , 2011.

Date: _____

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JOEL HIRSCHHORN