IN THE SUPREME COURT OF MISSOURI

No. SC96107

THE DOE RUN RESOURCES CORP,

Plaintiff-Respondent,

v.

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY AND LEXINGTON INSURANCE COMPANY

AND

ST. PAUL FIRE AND MARINE INS. CO.,

Defendant-Appellant

On Appeal from the Circuit Court of St. Louis County
Cause No. 10SL-CC01716

On Transfer from the Missouri Court of Appeals, Eastern District
Case No. ED103026

BRIEF OF *AMICI CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF APPELLANT, AS *AMICI CURIAE*

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INTEREST OF AMICUS CURIAE

The Complex Insurance Claims Litigation Association ("CICLA") and the American Insurance Association ("AIA") are trade associations consisting of major property and casualty insurers.[1] Many of *Amici's* members have issued policies containing pollution exclusions similar or identical to the one at issue in this case within Missouri and nationwide. *Amici* are therefore vitally interested in this appeal, which involves an important question about the scope of such exclusions under Missouri law.

CICLA and AIA have appeared as *amici curiae* in numerous complex insurance cases throughout the country, including before this Court[2] and the Missouri Court of Appeals,[3] to assist courts in resolving important insurance coverage questions. *Amici* also appeared in support of the petition for review in this case to explain the importance of the issues concerning the interpretation and application of the pollution exclusion presented here. Due to their members' extensive experience with the insurance policy provisions before this Court, CICLA and AIA have a unique perspective on the issues

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[1] This brief is not submitted on behalf of The Travelers Indemnity Co., St. Paul Fire and Marine Ins. Co., American Guarantee and Liability Ins. Co., or Lexington Ins. Co., each of which are members of the *amici* trade groups.

[2] AIA appeared as *amicus curiae* in *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (2012).

[3] CICLA's predecessor Insurance Environmental Association appeared as amicus curiae in *Casualty Indem. Exchange v. City of Sparta*, 997 S.W.2d 545 (Mo. Ct. App. 1999).

presented. As such, *Amici* respectfully submit that their participation may assist the Court in deciding this case.

CONSENT OF THE PARTIES

Amici Curiae adopt and incorporate by reference the jurisdictional statement and statement of facts set forth in Appellant's brief.

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), *Amici Curiae* certify that The Doe Run Resources Company has not consented to the filing of this brief.

ARGUMENT

This appeal presents an important opportunity for this Court to reinforce longstanding principles of Missouri law which mandate that the terms of a contract be enforced in accordance with their plain language in order to effectuate the parties' intent. The decision below violated these fundamental axioms by imposing an unwritten requirement on the absolute pollution exclusion clause in the parties' agreement. It also undermined the ability of insurers and other commercial entities to structure their affairs with confidence that their contracts will be enforced as written.

Missouri courts interpret contracts according to their plain terms, and this Court has long held that insurance policies are subject to these ordinary rules of contract interpretation. *See Allen v. Cont'l Western Ins. Co.*, 436 S.W.3d 548, 554 (Mo. 2014); *see also*, *Peters v. Employers' Mut. Casualty Co.*, 853 S.W.2d 300, 301-303 (Mo. 1993). These well-settled rules are vital to commercial law, as commercial entities throughout the State, including in the insurance and other financial services industries, expect that Missouri courts, if called upon to resolve a dispute, will follow these fundamental rules in interpreting private contracts. Judicial fidelity to these basic principles is therefore vital

to the confidence of the business community at large that the agreement made will be the agreement enforced.

In this case, the circuit court disregarded the terms of the insurance policy at issue, imposing limitations on the pollution exclusion not found in the terms of the insurance contract. The absolute pollution exclusion does not apply solely to claims involving industrial or hazardous waste. To the contrary, as is clear under existing Missouri law, the exclusion reaches any claim arising out of the release of a pollutant from premises owned or occupied by the insured. This Court should reject the circuit court's effort to evade application of the exclusion in this case. On the facts here, the lead and other contaminants released from the policyholder's facility plainly were, and were alleged to be, pollutants. The exclusion is written specifically to exclude harm arising out of the discharge of pollutants.

An insurance contract expresses an insurer's agreement to accept, in return for a premium, a bounded and defined risk. When insurers cannot rely on clear policy language to support rational premiums, the adverse consequences fall on the insurance-buying public – and in the cases of commercial policyholders, especially on small and medium-sized businesses that cannot afford to self-insure. Courts have commented that judicial expansion of liability may force insurers to raise premiums paid by all policyholders. *See Garvey v. State Farm Fire & Cas. Co.* 770 P.2d 704, 711 (Cal. 1989) (judicially created insurance coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities"). Giving straightforward and consistent effect to the policy language as written assures the stability of the underwriting process.

In this case, Doe Run seeks to circumvent the plain language of the pollution exclusion by arguing that the language is ambiguous and by imposing artificial limitations on its scope. But Missouri courts, like those in many other states, have already held that the absolute pollution exclusion is unambiguous and applies according to its terms. *See, e.g., Cincinnati Ins. Co. v. German St. Vincent Orphan Assoc., Inc.*, 54 S.W.3d 661, (Mo. App. E.D. 2001); *see also Boulevard Investment Co. v. Capitol Indemn. Corp.*, 27 S.W.3d 856 (Mo. App. E.D. 2000). To preserve settled expectations of insurers, policyholders and all persons doing business in this State, this Court should reverse the decision below. These broader considerations reinforce why it is important for this Court to apply the absolute pollution exclusion in the policy according to its terms.

To disregard the express contractual provision that defines and circumscribes the risks the insurer agreed to cover would undermine established Missouri precedent and the insurance system at large. Judicial redrafting of insurance policy language, instead of giving effect to that language as written, will ultimately result in excessive uncertainty over risk assessment. Shoehorning pollution claims into policies that do not cover them undermines an insurer's underwriting and pricing of insurance in a rational manner. For these reasons, and as more fully explained below, CICLA and AIA respectfully request that this Court reverse the circuit court's ruling, and hold that the absolute pollution exclusion unambiguously precludes coverage in this case.

I. THE PLAIN MEANING OF THE POLLUTION EXCLUSION BARS COVERAGE IN THIS CASE

It is well established as a matter of Missouri law that insurance policies are contracts, and as such are subject to the general rules of contract interpretation. *Peters*,

853 S.W.2d at 301-303. If an insurance policy is found to be ambiguous, the ambiguity is construed against the insurer. *Allen v. Cont'l Western Ins. Co.*, 436 S.W.3d 548, 554 (Mo. 2014). However, "[a]n ambiguity exists only when a phrase is 'reasonably open to different constructions.'" *Id.* (*quoting Mendenhall v. Property and Cas. Ins. Co. of Hartford*, 375 S.W.3d 90, 92 (Mo. banc 2012)). Where, as here, the insurance policy is unambiguous, it must be enforced as written. *Id.; see also Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. 1992).

This Court previously recognized the critical importance of contract certainty, and cautioned that courts may not "create ambiguity to enforce a particular construction which it might feel is more appropriate." *Rodriguez v. General Acc. Ins. Co.*, 808 S.W.2d 379, 382 (Mo. 1991). As such, Missouri courts interpreting insurance contracts are required to give the language of the policy its plain meaning, which is what an ordinary person would understand the meaning to be in purchasing insurance. *Id.*; *see also Allen v. Cont'l Western Ins. Co.*, 436 S.W.3d 548, 554 (Mo. 2014); *Wilson v. American Family Mutual Ins. Co.*, — S.W.3d —, 2015 WL 2405299, at *5 (Mo. App. W.D. 2015). Here, the plain and ordinary meaning of the pollution exclusion in Doe Run's policy bars coverage for claims caused by the discharge of lead and other contaminants from the industrial smelting facility into the environment.

A. The Absolute Pollution Exclusion at Issue is Plain and Unambiguous.

Under Doe Run's Policy, coverage is excluded for "injury or damage . . . that result from pollution at, on, in or from . . . [Doe Run's] premises . . . ." *See* LR000336, 000473. "Pollution" is defined as "any actual, alleged, or threatened discharge, dispersal, escape, migration, release, or seepage of any pollutant." "Pollutant" is broadly defined to

include "any solid, liquid, gaseous, or thermal irritant or contaminant, including: smoke, vapors, soot, fumes; acids, alkalis, chemicals; and waste." *Id.*

Courts throughout the country generally agree that pollution exclusions like the one at issue here unambiguously preclude coverage for traditional environmental or industrial pollution.[4] Missouri courts repeatedly have enforced such exclusions, even in settings other than industrial pollution or hazardous waste. *See e.g., Cincinnati Ins. Co. v. German St. Vincent Orphan Assoc., Inc.*, 54 S.W.3d 661, (Mo. App. E.D. 2001) (pollution exclusion barred coverage for claims arising from the release of friable asbestos during the removal of old vinyl flooring); *Boulevard Investment Co. v. Capitol Indemn. Corp.*, 27 S.W.3d 856 (Mo. App. E.D. 2000) (absolute pollution exclusion barred coverage for a property damage claim arising from kitchen grease and other waste creating a blockage in a plumbing system). Similarly, consistent with existing Missouri law, this Court should enforce the plain meaning of the pollution exclusion in Doe Run's policy barring coverage for pollution injury or damage.

B. Industrial Pollution Falls Within the Plain Reach of the Pollution Exclusion.

Here, the third-party claims against Doe Run clearly fall within the exclusion. "Pollutant" is defined as "any solid, liquid, gaseous, or thermal irritant or contaminant,

[4] Although a minority of courts limit the application of the exclusion to traditional environmental industrial pollution, the majority of states, including Missouri, apply its plain meaning in a straightforward way. *See, e.g., Hartford Underwriter's Ins. Co. v. Estate of Turks*, 206 F. Supp. 2d 968, 977 (E.D. Mo. 2002).

including: smoke, vapors, soot, fumes; acids, alkalis, chemicals, and waste," and the policy makes clear that there is no coverage for "injury or damage . . . that result from pollution at, on, in or from . . . [Doe Run's] premises . . ." *See* LR000336, 000473. In the underlying claims, the plaintiffs allege that they have been "exposed to and injured by the harmful and toxic substances released from [Doe Run's Smelting Facility]" including but not limited to "lead, arsenic, cadmium, and sulfur dioxide." *See* LR000646, 000662. These substances are plainly "pollutant[s]" within the policy's definition.[5] Therefore, such claims are well within the scope of the pollution exclusion.

The circuit court's finding that the pollution exclusion is ambiguous as applied to these claims is unreasonable, and contrary to established precedent. Although a handful of jurisdictions have limited the application of absolute pollution exclusions to instances of so-called traditional "industrial" or "environmental" pollution,[6] Missouri courts have

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[5] *See, e.g., St. Leger v. American Fire and Cas. Ins. Co.*, 870 F.Supp. 641, 643 (E.D. Pa. 1994), *aff'd*, 61 F.3d 896 (1995) ("'[l]ead is a chemical that irritates and contaminates.' . . . This is widely understood.") (quoting *Kaytes v. Imperial Casualty & Indem. Co.*, No. 93-1583 (E.E. Pa. Jan. 6, 1994). Even in the setting of indoor lead paint exposure, numerous courts throughout the country have held that pollution exclusions bar coverage. *See, e.g., Auto-Owners Ins. v. Hanson*, 588 N.W.2d 777 (Ct. App. Minn. 1999); *St. Leger*, 870 F.Supp. 641; *Peace ex rel. Lerner v. Northwestern Nat. Ins. Co.*, 596 N.W.2d 429 (Wis. 1999).

[6] Arguments that applying the pollution exclusion outside a "traditional" hazardous waste context unduly restricts the insurance protection afforded by the policy have been

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recognized that absolute pollution exclusions have a broader application, and are not limited in this way. *See, e.g., Hartford Underwriter's Ins. Co. v. Estate of Turks*, 206 F. Supp. 2d 968, 977 (E.D. Miss. 2002). Moreover, the claims at issue in this case involve exactly the kind of traditional industrial environmental pollution which courts across the country have consistently found unquestionably fall within pollution exclusions, even those employing a narrow view of absolute pollution exclusions.[7] In light of this, *Amici*

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rejected by numerous courts throughout the country. The United States Court of Appeals for the Third Circuit found this argument to be "patently without merit." *See Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 897 (3d Cir. 1997). Another court explained that applying a pollution exclusion in a straightforward manner leaves in place coverage under the policy for many other types of claims, such as "fire, slip-and-fall accidents, or injuries resulting from negligent use of heavy equipment." *Wagner v. Erie Ins. Co.*, 801 A.2d 1226, 1233 (Pa. Super. Ct. 2002), *aff'd*, 847 A.2d 1274 (Pa. 2004).

[7] *See, e.g., Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037 (7th Cir. 1992) ("[O]ne could not characterize the discharge onto land of 80 gallons of PCB-laden oil [at a scrap metal processing facility] as anything but pollution"); *Garamendi v. Golden Eagle Ins. Co.*, 25 Cal. Rptr. 3d 642, 646 (Cal. Ct. App. 2005) ("[T]he widespread dissemination of silica dust as an incidental by-product of industrial sandblasting operations most assuredly is what is 'commonly thought of as pollution' . . ."") (internal citations omitted); *Emp. Mut. Cas. Co. v. Indus. Rubber Prods., Inc.*, No. 04-3839, 2006 WL 453207, at *2-4 (D. Minn. Feb. 23, 2006) (plain language of the

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submit that there is no ambiguity in the application of the pollution exclusion to the industrial release of lead and other contaminants from a smelting facility.

In fact, in two recent cases, the Eighth Circuit held that similar pollution exclusions precluded coverage for harms resulting from the alleged release of toxic substances, including lead, from other Doe Run facilities. *Doe Run Resources Corporation v. Lexington Insurance Co.*, 719 F.3d 868 (8th Cir. 2013) ("*Doe Run I*"); *Doe Run Resources Corp. v. Lexington Insurance Co*., 719 F.3d 876 (8th Cir. 2013) ("*Doe Run II*"). Although these cases concerned different facilities, they involved the same policyholder and similar claims under Missouri law. The Eighth Circuit noted that such industrial pollution claims are "the kind of underlying environmental liability claims that the exclusion was primarily intended to exclude." *Doe Run I*, 719 F.3d at 876. In light of these cases, established Missouri law, and the significant authority recognizing that pollution exclusions bar coverage for industrial pollution, Doe Run could not reasonably have expected coverage in this case. As such, *Amici* respectfully submit that the circuit court erred when it determined that the pollution exclusion was ambiguous.

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pollution exclusion applied to discharges of particulates stemming from policyholder's steel grit blasting process for cleaning industrial parts).

II. MISSOURI LAW REQUIRES, AND STRONG PUBLIC POLICY CONSIDERATIONS SUPPORT, ENFORCING THE UNAMBIGUOUS TERMS OF THE POLLUTION EXCLUSION

By asking this Court to affirm the circuit court's ruling, Doe Run asks this Court to ignore the plain meaning of the pollution exclusion. It argues that the definition of "pollutant" in its policy is somehow ambiguous because, as a producer of lead, it would not reasonably expect lead to be excluded as a "pollutant" unless it was specifically named as such. This argument is deeply in conflict with longstanding principles of Missouri contract interpretation intended to protect contract certainty, the stability of the insurance system, and the public interest. For the reasons discussed below, CICLA respectfully urges this Court to reject Doe Run's attempt to create ambiguity. This Court should enforce the unambiguous terms of the insurance contract agreed to by the parties.

A. *Hocker Oil* Is An Outlier Case That Should Not Be Extended Here.

Doe Run asks this Court to affirm the circuit court's conclusion that the pollution exclusion was ambiguous as applied to this case. However, the circuit court's decision was made in reliance on *Hocker Oil Company, Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510 (Mo. Ct. App. 1999), a decision that neither this Court nor the courts of appeal have cited favorably since it was decided. *See United Fire & Cas. Co. v. Titan Contractors Service, Inc.*, 751 F.3d 880, 885 (2014). *Amici* submit that this reliance was misplaced, as *Hocker Oil* does not reflect the current state of Missouri law.

In *Hocker Oil*, the Missouri Court of Appeals considered the application of a pollution exclusion in a gas station owner's policy to gasoline-related harms. Rather than focusing on the toxic characteristics of gasoline when released into the environment, the

court focused instead on the fact that the "pollutant" was the insured's product. *See Doe Run v. Lexington Ins.*, 719 F.3d at 874-75. Reasoning that "it would be an oddity for an insurance company to exclude that insured's major source of liability," the Court found the pollution exclusion ambiguous and held that gasoline was not a "pollutant" since it was not specifically identified as such. *Hocker Oil*, 997 S.W.2d at 518. Doe Run asks this Court to apply similar reasoning here. However, here, it was not Doe Run's product that claimants were exposed to, but Doe Run's smelting operations.

The *Hocker Oil* court expressly limited its holding to gasoline as a product. *See Hocker Oil*, 997 S.W.2d at 516 (noting that "cases involving substances other than gasoline are not particularly helpful [because] . . . 'clauses can, of course, be ambiguous in one context and not another'") (quoting *Continental Casualty Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 512 (1993). Recognizing that *Hocker Oil*'s reasoning is not particularly persuasive outside the context of its unique facts, Missouri courts have been very reluctant to extend its reasoning.[8] In fact, in the very same year that *Hocker Oil* was decided, the Missouri Court of Appeals found an identical pollution exclusion applicable

[8] *See, e.g., American Nat'l Prop.& Cas. Co. v. Wyatt*, 400 S.W.3d 417, 424 (Mo. App. W.D. 2013) (Hocker Oil is not "particularly persuasive" in determining whether a pollution exclusion applies in a different context); *Am. Western Ins. Co. v. Utopia Acq.*, L.P., 08-CV-419, 2009 WL 792483, at *2 (W.D. Mo. Mar. 24, 2009) (Missouri law) ("[Hocker Oil], however, rested on the unique facts of that particular case; particularly, the oddity of having a policy issued to a gas station exclude coverage for spilled gasoline").

even though the pollutant at issue was also a valuable byproduct of the insured's operation. *See Casualty Indem. Exchange v. City of Sparta*, 997 S.W.2d 545 (Mo. Ct. App. 1999) (holding that absolute pollution exclusion unambiguously barred coverage for harms caused by sludge containing toxic substances).

Notably, the Eighth Circuit has already rejected a similar attempt by Doe Run to extend the application of *Hocker Oil*, concluding that "the Supreme Court of Missouri would not interpret *Hocker Oil* in the manner urged by Doe Run in this case, which involves a sophisticated insured and the kind of underlying environmental claims that the exclusion was primarily intended to exclude." 719 F.3d 868, 873 (2013). In that case, the court called into doubt the continuing validity of the case, noting that *Hocker Oil* "took the minority position when it was adopted, has been almost uniformly rejected by appellate courts in other jurisdictions, and has not been cited or referred to favorably by the Supreme Court of Missouri." *Doe Run v. Lexington Ins.*, 719 F.3d at 873. Similarly, in another case applying Missouri law, the Eighth Circuit expressly questioned whether *Hocker Oil* still represents "the best evidence of Missouri law." *Titan*, 751 F.3d at 885. Given the questionable status of *Hocker Oil*, and the significant differences between the facts of that case and those at issue here, this Court should not extend the reasoning of *Hocker Oil* to this case.

B. Missouri Courts Will Not Create Ambiguity In a Contract In Order to Support an Alternative Construction.

The line of reasoning employed by the circuit court and pursued by Doe Run on appeal is "out of step with Missouri's deeply-entrenched rule that a court may not 'create ambiguity in order to enforce a particular construction which it might feel is more

appropriate.'" *Titan*, 751 F.3d at 885 (quoting *Rodriguez*, 808 S.W.2d at 382); *see also Allen*, 436 S.W.3d at 554 (*quoting Todd v. Mo. United Sch. Ins. Council*, 223 S.W.3d 156, 163 (Mo. 2007)) ("courts may not unreasonably distort the language of a policy or exercise inventive powers for the purpose of creating an ambiguity where none exists."). The pollution exclusion unambiguously bars coverage for claims related to the release of pollutants. As the Eighth Circuit has noted, "That its toxic or hazardous materials are valuable products if Doe Run properly contains them does not make them any less 'pollutants' when they are abandoned into the environment." *Doe Run v. Lexington Ins.*, 719 F.3d at 873.

Furthermore, it is irrelevant that Doe Run's policy did not specifically name lead as a "pollutant." The definition of "pollutant" is sufficiently clear and broadly defined to include lead. The failure to mention a particular irritant or contaminant by name does not make the definition of "pollutant" ambiguous nor does it make the substance any less of a "pollutant." As the Seventh Circuit has noted, "drafters cannot anticipate all possible interactions of fact and text, and if they could the attempt to cope with them in advance would leave behind a contract more like a federal procurement manual than like a traditional insurance policy. . . . The resulting contract would be not only incomprehensible but also more expensive." *Harnischfeger Corp. v. Harbor Ins. Co.*, 927 F.2d 974, 976 (7th Cir. 1991). Rather than requiring insurers to draft – and policyholders to pay for – revisions to pollution exclusions each time a new factual situation presents itself, the vast majority of courts throughout the nation have allowed for the less expensive and more practical use of the absolute pollution exclusion. *See, e.g., Truitt Oil & Gas Co. v. Ranger Ins. Co.*, 498. S.E.2d 572, 574 (Ga. App. 1998). ("That 'gasoline'

is referred to by terms other than 'gasoline' does not make the term 'pollutants' ambiguous. 'Pollutants' is clearly defined in the policy as including any liquid or gaseous contaminant.").

C. Courts Across the Country Enforce Pollution Exclusions Like the One at Issue Here Under Similar Circumstances.

Missouri courts' enforcement of the pollution exclusion is in accord with the majority view. Courts throughout the nation have repeatedly applied the plain language of total or absolute pollution exclusions to a wide variety of settings where injuries resulted from the release of pollutants. Indeed, an overwhelming majority of courts nationwide have enforced pollution exclusions in a variety of circumstances, including state high courts from:

- Alabama: *Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 967 So. 2d 705 (Ala. 2007) (exclusion barred coverage for liabilities arising out of leaks from a gasoline supplier's storage tanks even though gas is not a pollutant when used as intended);
- Alaska: *Whittier Properties, Inc. v. Alaska Nat'l Ins. Co.*, 185 P.3d 84 (Alaska 2008) (exclusion barred coverage for gasoline leaks from underground storage tanks);
- Colorado: M*ountain States Mutual Casualty Co. v. Roinestad*, 296 P.3d 1020 (Colo. 2013) (exclusion barred coverage for bodily injuries arising out of cooking waste dumped into a sewer);
- Connecticut: *Heyman Assocs. No. 1 v. Ins. Co. of Pa.*, 653 A.2d 122 (Conn. 1995) (exclusion excluded coverage for liabilities arising out of a fuel oil spill);

- Florida: *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998) (exclusion barred coverage for bodily injury claims caused by ammonia spill and insecticide overspray);
- Georgia: *Reed v. Auto-Owners Ins. Co.*, 667 S.E.2d 90 (Ga. 2008) (exclusion barred coverage for carbon monoxide claim);
- Iowa: *Bituminous Cas. Corp. v. Sand Livestock Sys., Inc.*, 728 N.W.2d 216 (Iowa 2007) (exclusion barred coverage for carbon monoxide claims);
- Kansas: *Union Insurance Co. v. Mendoza*, No. 104,087 (Kan. Oct. 8, 2010) (exclusion barred coverage for bodily injury claim arising from release of anhydrous ammonia);
- Massachusetts: *McGregor v. Allamerica Insurance Co.*, 449 Mass. 400, 868 N.E.2d 1225 (Mass. 2007) (exclusion barred coverage for claim arising from home heating oil spill);
- Montana: *Montana Petroleum Tank Release Compensation Bd. v. Crumleys, Inc.*, 341 Mont. 33, 174 P.3d 948 (Mont. 2008) (exclusion barred coverage for damages caused by diesel fuel leak at gas station);
- Nebraska: *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112 (Neb. 2001) (exclusion barred coverage for property damage to food caused by solvent-based sealant fumes);
- Nevada: *Aerolite Chrome Corp. v. Hartford Ins. Co.*, 916 P.2d 187 (Nev. 1995) (Table) (exclusion barred coverage for hazardous waste discharge);

- New York: *Town of Harrison v. Nat'l Union Fire Ins. Co.*, 675 N.E.2d 829 (N.Y. 1996) (exclusion was clear and unambiguous, and barred coverage for the illegal disposal of noxious waste);
- Oklahoma: *Bituminous Cas. Corp. v. Cowen Constr., Inc.*, 55 P.3d 1030 (Okla. 2002) (exclusion precluded coverage for lead paint poisoning);
- Pennsylvania: *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100 (Pa. 1999) (exclusion unambiguously precluded coverage for bodily injuries arising from worksite exposure to a concrete curing substance);
- South Dakota: *S.D. State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 616 N.W.2d 397 (S.D. 2000) (pollution exclusion barred coverage for harm arising out of the discharge of cement dust);
- Texas: *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995) (pollution exclusion barred coverage for bodily injuries caused by the release of hydrofluoric acid fumes);
- Virginia: *City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc.*, 628 S.E.2d 539 (Va. 2006) (pollution exclusion unambiguously barred coverage for alleged bodily injuries arising out of the consumption of a contaminated water supply);
- Washington: *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733 (Wash. 2005) (en banc) (where policy included an absolute pollution exclusion for bodily injury or property damage "arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants," the court expanded the reach of the exclusion to cover non-

traditional toxins – i.e., toxic fumes that are not necessarily known to cause traditional environmental harms);

- Wisconsin: *Hirschhorn v. Auto-Owners Insurance Co.*, No. 2009AP2768 (Wisc. 2012) (pollution exclusion unambiguously barred coverage for claim arising from the accumulation of bat guano).

All told, over 100 appellate court cases have concluded that pollution exclusions like the one here unambiguously bar coverage for liabilities arising from the release or discharge of pollutants as a result of a policyholder's operations. *See Deni Assocs.*, 711 So. 2d at 1137 n.2 (noting number and citing cases); *Quadrant Corp.*, 110 P.3d at 738 (same); *see also Apana v. TIG Ins. Co.*, 574 F.3d 679, 682 (9th Cir. 2009) (citing more than thirty states that have applied absolute pollution exclusions). This Court should reinforce that Missouri will also give effect to insurance policy language as written, and honor the settled expectations of all contracting parties that the bargain made will be the bargain enforced.

D. Enforcing the Plain Meaning of Insurance Contracts is Critical.

Public policy considerations support what Missouri law requires: enforcing the unambiguous terms of an insurance contract. An insurance policy is first and foremost a contract representing an agreement between the insurer and the policyholder. The insurer agrees to protect the policyholder against certain specified risks in return for payment of a premium. It is critical that an insurer know exactly what risks it is assuming so that it may determine the appropriate premium. Through the use of exclusions, the insurer is able to remove certain risks from its general acceptance of coverage, thereby enabling the policyholder to pay a lower premium.

In this case, the absolute pollution exclusion precludes coverage for all injuries caused by pollutants, which is a narrow subset of possible injuries covered by the policies. That the exclusion places a limit on the types of injuries for which coverage is afforded should come as no surprise. As the Michigan Supreme Court recognized: "Simply stated, it is our belief that exclusions exclude." *Upjohn Co. v. N.H. Ins. Co.*, 476 N.W.2d 392, 396 n.6 (Mich. 1991). In this case, Doe Run bought and paid for coverage that would insure it for a wide variety of accidents, just not those accidents where damage was caused by pollutants.

The failure to enforce insurance policies as written not only frustrates the intentions of the parties but also threatens the integrity of the insurance underwriting system, which depends on predictable enforcement of contract provisions. This is particularly true when it comes to interpreting and enforcing coverage exclusions. The possibility that a court may stretch the limits of a policy so that an insurer would be required to incur liabilities for which it has not collected premiums significantly increases the risk insurers must bear when providing coverage. In the context of environmental pollution claims like those at issue here, failing to adhere to enforcing the plain, unambiguous policy language could expose insurers to massive unintended liabilities.

CONCLUSION

For the reasons stated herein, *amici curiae* the Complex Insurance Claims Litigation Association and the American Insurance Association respectfully urge that this Court hold that the pollution exclusion unambiguously bars coverage for the claims at issue here.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Brief of *Amici Curiae* includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06.

Relying on the word count of the Microsoft Word Program, the undersigned certifies that the total number of words contained in the Brief of *Amici Curiae* is 4,813 exclusive of the cover, signature block, and certificates of service and compliance.

/s/ Alan K. Goldstein

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2017, I electronically filed the foregoing document with the Clerk of Court using the Missouri Courts e-Filing system, which will send a notice of electronic filing to the counsel of record in this case.

/s/ Alan K. Goldstein