IN THE SUPREME COURT OF MISSOURI

No. SC96107

THE DOE RUN RESOURCES CORP.,

Plaintiff-Respondent

v.

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 AMICUS CURIAE ASSOCIATED INDUSTRIES OF MISSOURI IN SUPPORT OF RESPONDENT, AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The Associated Industries of Missouri ("AIM") is a non-profit membership organization that was founded in 1919. Hundreds of Missouri businesses are members, including some of the State's largest and smallest businesses. AIM engages in advocacy and education for Missouri companies. While AIM includes a broad variety of businesses, the majority of its members are manufacturers. Virtually every member of AIM purchases liability insurance, and has a vested interest in the interpretation of insurance policies in Missouri. Insurance protection is critical to the conduct of business. As the leading representative of business in Missouri, AIM is uniquely placed to be an appropriate amicus curiae in this case.

This case concerns the application of the so-called pollution exclusion to Respondent The Doe Run Resources Corporation's ("Respondent") core business of production, storage and handling of lead. Every business in Missouri could find itself labeled a polluter. This is particularly true of manufacturers, whose core business operations include substances that may be deemed hazardous or toxic, a pollutant or a waste, in one context or another. Missouri companies need this Court to protect them from overbroad interpretations of pollution exclusions that attack the very way in which the companies conduct their businesses. Missouri companies also need to maintain settled rules of insurance policy construction and insurance practice in order to properly evaluate risk. The liability insurance policy of every member of AIM contains some form of pollution exclusion. Without clarification of the reach of that exclusion,

Missouri businesses will not be able to externalize risk with any certainty. As a result, amicus has a substantial interest in this Court's treatment of the Court of Appeals decision below.

*This brief is not submitted on behalf of Doe Run, which is a member of AIM.

CONSENT OF THE PARTIES

Amicus curiae adopt and incorporate by reference the jurisdictional statement and statement of facts set forth in Respondent's brief.

Pursuant to Missouri Supreme Court Rule 84.05(f)(2), Amicus certifies that appellant St. Paul Fire & Marine Insurance Company has not consented to the filing of this brief.

ARGUMENT

"[I]nsurance is designed to furnish protection to the insured, not defeat it." Krombach v. Mayflower Insurance Company, 827 S.W. 2d 208 (Mo. 1992). This appeal provides this Court with an important opportunity to protect the rights of Missouri corporate policyholders. In this case, St. Paul Fire & Marine Insurance Company ("Appellant") knew that its policyholder was a company engaged in the lead business. As the Court of Appeals noted, the insurance policy itself stated that Appellant rated Respondent's premium based on the basis of "ore" and assigned Respondent to the classification of "mining, smelting, recycling and fabrication of base metals." Appellant knowingly accepted the risks associated with Respondent's lead business. Respondent had a reasonable expectation that it had externalized the risk of lead claims arising out of

its operations. Appellant could have placed a lead exclusion in the policy, but chose not to.

Not only did Appellant fail to include a lead exclusion in its policy, it failed to include the so-called Missouri pollution exclusion. The pollution exclusion in Respondent's policy basically applied to 'pollutants.' Hocker Oil Co., Inc. v. Barker-Phillips-Jackson, Inc., 997 S.W. 2d 510 (Mo. Ct. App. 1999) held that same exclusion to be ambiguous, finding that the exclusion did not apply to gasoline at a gas station. Immediately, the insurance industry developed a new exclusion that applied to pollutants "even if such irritant or contaminant has a function in your business, operations, premises, site or location" – the so-called Missouri pollution exclusion. LR001026. The insurance industry specifically designed this pollution exclusion to counter Hocker Oil. Thus Appellant had the choice of using a pollution exclusion that the Missouri Court of Appeals had held to be ambiguous, or a specially designed new pollution exclusion specifically designed to avoid that ambiguity. Appellant chose to use the prior version of the exclusion that the Missouri Court of Appeals had held to be ambiguous. Appellant cannot now be heard to complain that the Court of Appeals once again held this pollution exclusion to be ambiguous.

These facts raise critical issues of insurance coverage for Amicus and its members. Companies rely upon insurance to externalize the risks of their business operations. This is fundamental. Companies need to know that they have externalized risk successfully. Uncertainty as to the externalization of risk can be fatal to a business. Appellant created such uncertainty by knowingly using an ambiguous pollution

exclusion. This is unacceptable. Appellant had the obligation to draft a clear policy. Language was easily available that would have clarified the scope of the pollution exclusion, but Appellant chose not to use it. If Appellant intended to exclude Respondent's core business operation, it could have used a lead exclusion or the Missouri pollution exclusion. An insurance company cannot promise a business that it has secured insurance protection for its core business, and then use an ambiguous exclusion to deny coverage. The decision below correctly held Appellant to its promise to Respondent that Respondent had successfully externalized risk. Every business in Missouri needs to know that when it purchases insurance coverage, it has purchased protection for its core business operations.

The court below held that Appellant had a duty to defend Respondent – the decision did not reach the duty to indemnify. The duty to defend is an essential component of the externalization of risk. When a business receives a summons and complaint, the business takes them to its insurance company so the insurance company can appoint counsel and defend. This duty to defend is a critical, often the critical, component of an insurance policy. The duty to defend is extremely broad, and should be sacrosanct. "An insurer's duty to defend is broader than that of the duty to indemnify." Piatt v. Indiana Lumbermen's Mutual Insurance Company, 461 S.W. 2d 788 (Mo. 2015); Allen v. Continental Western Insurance Company, 436 S.W. 3d 548 (Mo. Ct. App. 2013). On the basis of the allegations of the complaints against Respondent, the Court of Appeals was correct in ordering Appellant to defend Respondent for allegations of liability arising directly out of its core operations. Amicus' members need to know that

they can rely on their insurance companies to defend them when they are sued for claims that go to the core of their business.

Insurance companies draft insurance policies – policyholders do not. Appellant drafted the pollution exclusion in the policy at issue. Businesses are often at the mercy of insurance companies. As a result, courts have developed rules to aid in the construction of insurance policies and to protect businesses and individuals. One of these rules is that courts construe ambiguities in an insurance policy against the drafter. "An ambiguity exists when there is duplicity, indistinctness or uncertainty in the meaning of the language in the policy." Seeck v. Geico General Insurance Co., 212 S.W. 2d 129, 132 (Mo. 2007). See also, Martin v. United States Fidelity & Guaranty Co., 996 S.W. 2d 506, 510 (Mo. 1999); Ritchie v. Allied Property & Casualty Insurance Co., 307 S.W. 3d 132, 140-41 (Mo. 2009) ("It is well-settled that where one section of an insurance policy promises coverage and another takes it away, the policy is ambiguous.") This rule is to protect the businesses so they can know that they have successfully externalized risk and will not be trapped by some unexpected, unsupported construction of a policy term. The rule against ambiguities in particular protects the policyholder against 'retroactive underwriting.' Appellant knowingly used a pollution exclusion that the Missouri Court of Appeals had held to be ambiguous, and did so when clearer exclusions that would have clarified the problem were available. Appellant knowingly created an ambiguity in Respondent's policy. This Court should construe that ambiguity against Appellant and in favor of coverage. "An ambiguous insurance policy is construed against the insurer because the policy's purpose is to provide protection." Krombach at 210.

When a policy term is ambiguous, Missouri courts enforce the policyholder's reasonable expectations. Missouri businesses expect that when they purchase insurance, they have externalized business risk. This is objectively reasonable. Just as the Hocker Oil court found that an insurance company could not sell a gasoline company an insurance policy that excluded gasoline, this Court should find that Appellant cannot sell an insurance policy to a lead company and then assert that the policy excludes lead. If Appellant had intended to exclude lead liabilities from Respondent's core business operations from its insurance policy, Appellant had an obligation clearly and categorically to do so. Appellant had the tools available to exclude lead, but chose not to use them. "Certainly, [an insurance company] is free to contract with its policyholders for whatever type of insurance it wishes to provide." McCormack Baron Management Services, Inc. v. American Guarantee & Liability Insurance Company, 989 S.W.2d 168 (Mo. 1999). Appellant had the freedom to place an unambiguous pollution exclusion in Respondent's policy. Appellant failed to do so, and the Court of Appeals correctly found coverage.

Thus, affirmation of the Court of Appeals decision is necessary to protect Missouri businesses. When they purchase insurance policies, they should be certain that they have externalized risk. Ambiguity in the insurance policy undercuts that certainty. Moreover, in this case, Appellant intentionally used ambiguous language. Appellant should be held to the promise that it made to Respondent that Respondent had successfully externalized risk. This Court should affirm the decision below.

I. THIS COURT SHOULD RESPECT THE SETTLED EXPECTATIONS OF MISSOURI BUSINESSES

The Missouri Court of Appeals decided Hocker Oil in 1999. It held that the pollution exclusion used by the insurance company in that case was ambiguous because it excluded the core element of the policyholder's business. In response, the insurance industry quickly introduced the so-called Missouri pollution exclusion in 2000. The insurance industry designed the Missouri exclusion specifically to address the ambiguity identified in Hocker Oil. Since then, this has been the status quo. Pursuant to Hocker Oil, the pollution exclusion that appeared in Respondent's policy did not apply to the core operations of a business. However, insurance companies had the right to use the Missouri pollution exclusion, or other exclusions such as a lead exclusion. There is no evidence that this multi-exclusion approach has proven problematic for either Missouri businesses or for insurance companies that do business in Missouri. Insurance companies can select the exclusion that best meets their needs in a given circumstance.

Missouri businesses and insurance companies should continue to have these options. In the case of Respondent, Appellant chose to use the knowingly ambiguous exclusion of limited applicability instead of the Missouri exclusion or a lead exclusion. Now that a claim has arisen, Appellant wants to engage in retroactive underwriting – construing its ambiguous policy language after the fact in such a way as to destroy insurance coverage. If Appellant is allowed to use this subterfuge to escape coverage, it will upset the settled expectations of both businesses and insurance companies who contract to place insurance policies in Missouri.

II. THIS COURT SHOULD ENFORCE THE REASONABLE EXPECTATIONS OF MISSOURI POLICYHOLDERS

In Hocker Oil, he Missouri Court of Appeals held that the pollution exclusion found in Appellant's insurance policy was ambiguous in the context of insurance coverage for a company's core operation. Under Missouri law, when a term of an insurance policy is ambiguous, the court can look to the reasonable expectations of the policyholder. "When construing an insurance policy, [Missouri courts] must give the words their plain and ordinary meaning, consistent with the reasonable expectations, objectives, and intent of the parties." Bowan ex rel. Bowan v. General Security Indemnity Co. of Arizona, 174 S.W. 3d 1, 7 (Mo. Ct. App. 2005); See also, American National Property & Casualty Co. v. Wyatt, 400 S.W. 3d 417 (Mo. Ct. App. 2013) ("the existence of ambiguity in the policy language and the fact that the policy was a contract of adhesion makes applicable the doctrine of reasonable expectations"); Kellar v. American Family Mutual Insurance Co., 987 S.W. 452, 455 (Mo. Ct. App. 1999). The expectation of a business when it purchases general liability insurance is that it has externalized risk for its core business operations. Appellant knowingly sold a policy to a lead company, and now says that it does not provide coverage for liability arising from lead. This Court should not permit Appellant to interpret the policy that it sold to Respondent to be illusory.

It is important to look at what this case is not about. It is not a case of disposal of hazardous waste into a landfill. It is not a case of pollution of the groundwater. It is a case where the underlying plaintiffs allege that Respondent's normal

plant operations caused injury. When a Missouri business purchases liability insurance, it expects that it has externalized risks arising from its core operations. Certainly, the insurance policy contains exclusions, but those exclusions have a circumscribed impact. Under Missouri law, courts must interpret exclusions in an insurance policy narrowly. "Ambiguous provisions of a policy designed to cut down, restrict, or limit insurance coverage already granted, or introducing exceptions or exemptions must be strictly construed against the insurer."" Krombach, 827 S.W. 2d at 211. An insurance company should not be allowed to construe exclusions in such a way that they devour and vitiate the coverage that the insurance policy is designed to provide. Such a construction of an exclusion adversely impacts businesses, because they are not able to know with certainty to which risks they remain exposed, and cannot take other measures to protect themselves. The externalization of risk must be definitive if the insurance industry is to create an environment in which businesses can operate confidently.

A well-regulated and supervised insurance industry is essential to a successful business climate. That includes the use by the insurance industry of clear language that lets businesses know the parameters of the protection against risk that they have purchased. Appellant had the availability of the unambiguous Missouri pollution exclusion drafted specifically to be consistent with Missouri law. Instead, Appellant used a pollution exclusion that the Missouri Court of Appeals had held to be ambiguous. Now, Appellant asserts that the ambiguous exclusion that is utilized has the same reach as the Missouri exclusion that was specifically drafted to avoid the very ambiguity that is at issue in this case. "An insurer may, of course, cut off liability under its policy with a

clear language, but it cannot do so with that dulled by ambiguity." Aetna Casualty & Surety Company v. Haas, 422 S.W. 2d 316 (Mo. 1968), citing Boswell v. Travelers Indemnity Company, 38 N.J. Super. 599 (App. Div. 1956); Gulf Insurance Company v. Noble Broadcase, 936 S.W. 2d 810, 814 (Mo. 1997) ("When policy language is ambiguous, it must be construed against the insurer.")

As the insurance company, Appellant bore the burden to "phrase exceptions and exclusions in clear and unmistakable language" and of establishing that a "claim is specifically excluded." MacKinnon v. Truck Insurance Exchange, 73 P.3d 1205, 1213 (Cal. 2003) (citations omitted.) "The language of the insurance policy being reasonably open to different constructions, the language is ambiguous and must be construed applying the interpretation most favorable to the insured." American National Property & Casualty Co. v. Wyatt, (Mo. Ct. App. 2013.) Courts have developed these rules to protect policyholders. Insurance companies have a heavy burden to draft a clear policy that adequately informs policyholders of the parameters of coverage. Appellant has fundamentally failed to meet its burden of drafting an unambiguous policy. Since it knowingly used an ambiguous exclusion, the exclusion must be construed in favor of coverage. This Court should affirm the decision below.

III. THIS COURT SHOULD PROTECT MISSOURI'S BROAD APPLICATION OF THE DUTY TO DEFEND

When a business, particularly a small business, receives a summons and complaint, it may have no idea what to do. That business relies upon its insurance company. The insurance company appoints counsel and takes the lead role in defending

the case. This is where the insurance company is skilled and experienced, and the business often is not. This defense by the insurance company is an integral part of the protection that a business receives when it purchases an insurance policy. Moreover, that defense obligation is typically separate from the policy limit and uncapped. This is very valuable coverage.

Recognizing the importance of the duty to defend, numerous Missouri courts have ruled that the duty to defend must be construed broadly. For example, in Allen, supra, the court stated:

> "In Missouri, an insurer's duty to defend is broader than that of the duty to indemnify. Penn-Am. Ins. Co. v. The Bar, Inc., 201 S.W.3d 91, 96 (Mo. App. W.D. 2006); see also Lumber Mut. Ins. Co. v. Reload, Inc., 113, S.W.3d 250, 253 (Mo. App. E.D. 2003) ("An insurer may have a duty to defend claims falling within the policy even if it may not ultimately be obligated to indemnify the insured."). "The duty to defend arises whenever there is a *potential or possible liability* to pay based on the facts at the outset of the case and is not dependent on the probable liability to pay based on the facts ascertained through trial." McCormack Baron Mgmt. Serv., Inc. v. Am. Guar. & Liab., 989 S.W.2d 168, 170 (Mo. Banc 1999) (citations omitted) (emphasis added). In determining an insurer's duty to defend a suit against its insured, the court compares the language of the insurance policy with the allegations asserted in the

> plaintiff's petition. Stark Liquidation Co. v. Florists' Mut. Ins. Co., 243 S.W.3d 385, 392 (Mo. App. E.D. 2007). If the plaintiff's petition merely alleges facts giving rising to a claim potentially within the insured's policy coverage, the insurer has a duty to defend. Id." As the Circuit Court below found, "based on the facts of this particular case and the liberal standard on the duty to defend," it found the pollution exclusion "vague and indistinct on these facts."

Here, the basic allegation in the underlying complaint is that, inter alia, Respondent handled, stored, maintained, made decisions concerning, used, and generated lead and other metals. These allegations are sufficient to trigger Appellant's duty to defend. These allegations demonstrate that the underlying plaintiffs' alleged injuries arise from and involve Respondent's core business operations. These are potentially covered allegations that trigger Appellant's duty to defend.

Missouri businesses depend upon an expansive, broad reading of the duty to defend. They need the security that if they are sued, their insurance companies will stand by them. The case at bar does not reach the issue of whether, ultimately, Appellant will have a duty to indemnify Respondent. The sole issue is whether based upon the allegations of the underlying complaints, Appellant must defend Respondent. The inherently ambiguous pollution exclusion in Appellant's policy must be interpreted narrowly in favor of coverage, and is insufficient to demy that defense. This Court should affirm that Appellant must defend Respondent.

IV. THIS COURT SHOULD HOLD INSURANCE COMPANIES TO THEIR PROMISE TO PROVIDE COVERAGE

The insurance industry amici's brief, at pp. 14-16, lists 20 cases from foreign jurisdictions applying the so-called pollution exclusion. Those cases address a broad variety of substances, including cooking grease, carbon monoxide, sealant fumes, home heating oil, and bat guano. None of these cases is relevant here; none deal with liability arising from a company's core business of production, storage and handling of its essential operations. The case at bar is not a waste disposal case.

Moreover, the insurance industry amici omit the many cases that have found the absolute pollution exclusion ambiguous and refused to apply it. Such cases include Belt Painting Corp. v. TIG Insurance Company, 795 N.E. 2d 15 (N.Y. 2003) (overspraying of paint); MacKinnon v. Truck Insurance Exchange, 31 Cal. 4th 635 (2003) (use of pesticides); American States Insurance Co. v. Koloms, 687 N.E. 2d 72 (Ill. 1997) (release of carbon monoxide); Nav- Its, Inc. v Selective Insurance Company, 183 N.J. 110 (N.J. 2005) (fumes from floor sealant). These cases, and in particular Koloms, carefully traced the history of the pollution exclusion and held that it was ambiguous.

Appellant did not underwrite Respondent's insurance policy on a blank page. Appellant was fully aware of Respondent's business. Hocker Oil in 1999 held the absolute pollution exclusion to be ambiguous when applied to gasoline at a gasoline station. The court reasoned that an insurance policy that did not provide coverage for the business' core function was illusory. Just a year later, the insurance industry developed the Missouri exclusion.

Appellant issued an insurance policy to Respondent with full knowledge that Respondent was in the lead business. Nothing compelled Appellant to accept this risk. It did so in exchange for premium dollars, to make a profit. Appellant did not use the Missouri exclusion or the lead exclusion to prevent Respondent from externalizing risks arising from its core business. Instead, Appellant used the ambiguous pollution exclusion addressed in Hocker Oil. Now, Appellant wants this Court to give that ambiguous exclusion the same preclusionary effect that the Missouri exclusion or the lead exclusion would have had. Appellant argues that there is no coverage for Respondent's core operations, for the production, storage and handling of lead. That is wrong. The underlying plaintiffs do not allege that carbon monoxide or sealant fumes escaped from Respondent's plant. Those plaintiffs do not allege spills of home heating oil or cooking grease. They do not allege that Respondent deposited waste in a landfill.

Appellant had a unique opportunity to clarify the pollution exclusion. The insurance industry developed a specific Missouri pollution exclusion that stated that it applied to pollutants in the policyholder's "business, operations, premises, site or location." Appellant knew that Respondent was headquartered in Missouri. Appellant had an unparalleled opportunity to use the Missouri exclusion and write a clear policy – and made the decision not to do so. This Court should not reward Appellant for that decision by giving a broad application to the ambiguous exclusion that Appellant chose to use. Appellant is a highly sophisticated insurance company that should be held to the highest standard. This Court should assume that Appellant knew what it was doing when it chose to use an ambiguous pollution exclusion.

Businesses in Missouri deserve better treatment from their insurance companies. Missouri businesses should not be subject to insurance policy ambiguities. When they buy insurance, they should receive, with certainty, the protection that they expect that they have purchased. This Court should not reward unscrupulous, misleading conduct by insurance companies. If an insurance company intends to exclude a risk, it must do so clearly and unmistakably. Missouri businesses need security when they externalize risk.

The insurance industry amici assert that: "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…." (Amici brief at 18.) That might be true – if the insurance industry wrote clear policies and the parties truly bargained over the terms. When a policy is ambiguous as a result of the insurance industry's drafting, the policyholder loses the benefit of the protection for which it paid premium dollars. When a policy is ambiguous, the insurance company, as in the case at bar, can try to disclaim coverage for complaints arising out of the very essence of what the insurance policy was intended to cover. This frustrates the policyholder and threatens the integrity of the insurance policy.

An insurance policy is a contract, but it is a very special kind of contract. An insurance policy is an adhesion contract. It is prepared by the insurance industry and sold to businesses without negotiation. Missouri businesses do not have the option of negotiating with an insurance company for a policy without a pollution exclusion, or for

different wording. This is the reason why courts are vigilant in protecting businesses from ambiguities created by insurance companies.

This Court should protect Missouri businesses from over-reaching by the insurance industry. That industry must know that it must write clear policies. Insurance companies like Appellant cannot knowingly use ambiguous language, and then argue for its broadest possible application. This Court should protect Missouri businesses and see that they receive the risk externalization that the insurance industry promises to them.

CONCLUSION

On the basis of all of the foregoing, Amicus Curiae Associated Industries of Missouri respectfully requests this Court to affirm the judgment below.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Brief of Amicus 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 Amicus Curiae is 4,422 exclusive of the cover, signature block, and certificates of service and compliance.

By: /s/ Stephen D. Palley

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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.

By: /s/Stephen D. Palley