NO. A06-0847

State of Minnesota

In Court of Appeals

WAKEFIELD PORK, INC.,

Appellant,

v.

RAM MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF OF *AMICUS CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION

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STATEMENT OF THE ISSUES[1]

1. Whether alleged liability that arises from an integral and anticipated part of a policyholder's day-to-day operations constitutes an "occurrence" under primary and umbrella liability policies.

The District Court concluded "no." *Amicus* CICLA supports this conclusion.

Apposite authority:

Diocese of Winona v. Interstate Fire & Cas. Co., 89 F.3d 1386 (8th Cir. 1996).
Bituminous Cas. Corp. v. Bartlett, 307 Minn. 72, 240 N.w.2d 310 (1976).
Dakhue Landfill, Inc. v. Employers Ins. of Wausau, 508 N.W.2d 798 (Minn. Ct. App. 1993).
Franklin v. W. Nat'l Mut. Ins. Co., 574 N.W.2d 405 (Minn. 1998).

2. Whether alleged noxious and offensive "odors and gases" released by the policyholder's farming operations fall within the pollution exclusions in those same policies.

The District Court concluded "yes." *Amicus* CICLA supports this conclusion.

Apposite authority:

Lobeck v. State Farm Mut. Auto. Ins. Co., 582 N.W.2d 246 (Minn. 1998).
Newberg v. Commercial Union Ins. Co., 619 N.W.2d 757 (Minn. Ct. App. 2000).
Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888 (Minn. 1994).

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[1] While the parties may address other issues in their briefs, CICLA addresses only these issues in its submission.

INTEREST OF *AMICUS CURIAE*[2]

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance companies that was formed, in part, to present the position of its members in insurance law cases and to assist courts in the determination of important insurance coverage questions.[3] Since its formation as the Insurance Environmental Litigation Association ("IELA") in 1986, CICLA has appeared as *amicus curiae* in numerous state and federal courts around the country, including in several cases before this Court and other Minnesota courts.[4]

This case addresses, among other things: (1) whether liability that arises from an integral and anticipated part of a policyholder's day-to-day operations constitutes an

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[2] Pursuant to Rule 129.03 of the Minnesota Rule of Civil Appellate Procedure, counsel for the *Amicus Curiae* certify that they have authored this brief in its entirety and that no persons or entities other than the *Amicus Curiae* have made monetary contributions to the preparation or submission of the brief.

[3] CICLA submits this brief on behalf of the following member companies: the AIG Insurance Companies; Chubb & Son, a Division of Federal Insurance Company; Farmers Insurance Group of Companies; Hartford Insurance Group; Liberty Mutual Insurance Company; St. Paul Fire and Marine Insurance Company; Selective Insurance Company of America; The Travelers Indemnity Company and Zurich American Insurance Company.

[4] *See, e.g.*, *OneBeacon Am. Ins. Co. v. A.P.I., Inc.*, No. 06-CV-00167-JRT (D. Minn., brief filed Jan. 24, 2006); *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405 (Minn. 2003); *State of Minnesota v. Employers Ins. of Wausau*, 644 N.W.2d 820 (Minn. Ct. App. 2002); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724 (Minn. 1997); *Anderson v. Minnesota Ins. Guar. Ass'n*, 534 N.W.2d 706 (Minn. 1995); *SCSC Corp. v. Allied Mut. Ins. Co.*, 533 N.W.2d 603, *clarified* 536 N.W.2d 305 (Minn. 1995); *Bituminous Cas. Corp. v. Tonka Corp.*, 9 F.3d 51 (8th Cir. 1993), *cert. denied*, 511 U.S. 1083 (1994); *Bureau of Engraving, Inc. v. Fed. Ins. Co.*, 5 F.3d 1175 (8th Cir. 1993); *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990).

"occurrence" under primary and umbrella liability policies; and (2) whether alleged noxious and offensive "odors and gases" released by the policyholder's farming operations fall within the pollution exclusions in those policies. This Court's ruling on these issues is important for insurers and policyholders in Minnesota, and the member companies on whose behalf this submission is made have substantial, independent interests in the issues presented here.

CICLA's members write a substantial percentage of the liability coverage placed in Minnesota and they have issued insurance policies to a great many insureds in Minnesota and throughout the nation that contain definitions of "occurrence" and pollution exclusions worded similarly to those at issue here. Accordingly, CICLA's members are vitally interested in the judicial interpretation of these provisions.

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW[5]

The Respondent, RAM Mutual Insurance Co. ("RAM"), issued a series of farm liability and umbrella liability policies to the Plaintiff-Appellant, Wakefield Pork, Inc. ("Wakefield"). These policies provide that RAM will pay for amounts "'which an insured is liable by law because of bodily injury or property damage caused by an

[5] CICLA relies on the facts and prior history as described in the Brief of the Appellant ("Appellant's Brief"), the Brief of the Respondent ("Respondent's Brief"), the order of the District Court below, *Wakefield Pork, Inc. v. RAM Mutual Ins. Co.*, No. 52-CV-04-915 (Minn. Dist. Ct., Nicollet Co. Mar. 9. 2006) (the "District Court Order") and the opinion of this Court in the underlying action, *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App. 2003). Only those facts and proceedings relevant to CICLA's brief have been included.

occurrence.'" Appellant's Brief at 21. The policies define "occurrence" as "[a]n accident which is neither expected nor intended, including continuous or repeated exposure to substantially similar conditions." Respondent's Brief at 21. The policies also contain pollution exclusions precluding coverage for "liability which results directly or indirectly from . . .the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land [or] the atmosphere . . . except as provided by Incidental Liability Coverage." *Id.* at 4-5.

The Forst family and the Wendinger family were long-time neighbors and farmers in Nicollet County, Minnesota, dating to at least 1970. *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 549 (Minn. Ct. App. 2003). In 1994, Wakefield entered into an agreement with the Forsts, as operators of Forst Farms, Inc., under which the Forsts agreed to construct and operate a "confined-animal feeding operation" ("CAFO") for over 2,000 hogs to be supplied by Wakefield. *Id.*; Respondent's Brief at 4. The operation involved the construction of a 1.6 acre "two-stage outdoor concrete manure lagoon" which held liquid animal waste until the fall, when manure would be pumped out of the lagoon and spread on area fields. *Wendinger*, 662 N.W.2d at 549. Prior to construction of the lagoon, the Forsts used a "'scrape and haul'" system for dealing with waste from their livestock. *Id.* After the lagoon was pumped out for the first time in the fall of 1995, the Wendingers began to complain about odors that they believed were emanating from

the Forst feeding operation. "Between late 1995 and 2000, the Wendingers filed scores of further odor complaints with various state and local authorities." *Id.*

In 2001, the Wendingers sued Wakefield and the Forsts in Minnesota state court for nuisance, trespass and negligence, alleging that "[f]rom the beginning, the site has produced extremely noxious and offensive odors and gases, causing the Wendingers to complain and request relief" and that "[g]ases, hydrogen sulfide among others, from the Defendants' hogs and hog farm operation" migrated onto the plaintiffs' property, curtailed the use and enjoyment of their land and exacerbated their existing physical ailments. Appellant's Appendix ("A.A.") 156-57 (Underlying complaint ¶¶ 7, 10).

Wakefield tendered defense of the complaint to RAM, which denied coverage, asserting, among other things, that: (1) the Wendinger complaint did not allege an "occurrence" under its policies and; (2) that coverage was precluded by the policies' pollution exclusions. A.A. 359 (District Court Order at 1). Wakefield defended itself against the complaint. After the district court granted summary judgment to Wakefield on all counts, a ruling that was partially reversed by this court, a jury concluded that the farm did not constitute a nuisance and awarded no damages to the Wendingers. *Id.* at A.A. 360 (District Court Order at 2). Wakefield then filed the instant coverage action to recover approximately $280,000 in defense costs. *Id.*

Earlier this year, the District Court granted summary judgment to RAM, concluding that there was no "occurrence" under either of the policies because "the release of odors complained of in the Wendinger Action is not arguably accidental or

unexpected." *Id.* at A.A. 363 (District Court Order at 5). The court noted that the underlying allegations made clear that the alleged liability arose out of the day-to-day operations of the policyholder's business and were "part and parcel of running an operation with significant negative impacts on neighboring properties." *Id.* According to the court, the policyholder contracted to construct a CAFO and manure lagoon near an existing residence "with complete knowledge of the potential liabilities," and, in that regard, it "consciously control[led] its risk of loss." *Id.* at A.A. 365 (District Court Order at 7). The court, therefore, concluded that Wakefield and "not the casualty insurer, bears the burden of fielding the complaints of neighbors adversely affected by the odor" because the loss arose out of an "integral and anticipated part" of the policyholder's business and insurers "are not in the business of indemnifying their clients from the consequences of poor decision making." *Id.* at A.A. 363-64 (District Court Order at 5-6).

The court also concluded that the pollution exclusions applied to bar coverage. The court emphasized that the alleged damage caused by the offensive "odors and gases" fell squarely within the terms of the exclusions and rejected Wakefield's contention that the pollution exclusions did not apply because odors are not regulated by the Minnesota Pollution Control Agency. *Id.* at A.A. 365-66 (District Court Order at 7-8). Wakefield appealed the decision.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE WENDINGERS' LAWSUIT DID NOT ALLEGE AN "OCCURRENCE."

A. Minnesota Law is Consistent with Other Jurisdictions in Recognizing that Insurance is Designed to Cover Only Fortuitous Losses.

As the Eighth Circuit has said, in a case applying Minnesota law, "[a] review of Minnesota and Eighth Circuit decisions recognizes the fundamental premise that an insurance policy protects an insured from fortuitous loss." *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386, 1392 (8th Cir. 1996). "Insurers distribute losses among large numbers of policyholders. They are able to properly set premiums and supply coverage only if those losses are uncertain from the standpoint of any single policyholder. If a single insured is allowed to consciously control the risks covered by the policy, a central concept of insurance is violated." *Id.* at 1392 n.7 (citing to *Bituminous Casualty Corp. v. Bartlett*, 307 Minn. 72, 78, 240 N.W.2d 310, 313 (1976), *overruled on other grounds*, *Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389 (1979)).

Indeed, every basic explanation of the nature of insurance includes the concept of fortuity, *i.e.*, that insurance responds to risks, not certainties. *See, e.g.*, 7 Russ & Segalla, *Couch on Insurance 3d* § 102:7 (1997) ("Implicit in the concept of insurance is that the loss occur as a result of an event that is fortuitous, rather than planned, intended or anticipated."); Robert E. Keeton, *Insurance Law* § 5.4(a) at 288 (1971) ("A requirement that loss be accidental in some sense in order to qualify as the occasion for liability of an insured is implicit, when not expressed, because of the very nature of insurance."). One

buys insurance in order to guard against possible losses resulting from some unplanned event that may occur. An insurer is able economically to sell insurance precisely because the events that it insures are fortuitous and will not arise as to all policyholders. Neither the buyer nor the seller of insurance knows with certainty whether a given loss will befall that policyholder, but the insurer is able to calculate the likely number of losses among a large number of policyholders and so it can price its product to spread the risk of large losses among that large class of insurance buyers. This risk spreading is the primary function of insurance, and the notion of fortuitous loss is basic to its operation.

Judicial decisions from other jurisdictions have recognized the fundamental limitation of insurance to contingent events. As the court in *Epmeier v. United States*, 199 F.2d 508 (7th Cir. 1952), stated:

> Insurance, of ancient origin, involves a contract, whereby, for an adequate consideration, one party undertakes to indemnify another against loss arising from certain specified contingencies or perils. Fundamentally and shortly, it is contractual security against possible anticipated loss. Risk is essential and, equally so, a shifting of its incidence from one to another.

Id. at 509-10 (citations omitted). Similarly, the court in *Sidman v. United States*, 336 F. Supp. 474, 476 (S.D.N.Y. 1971), *aff'd*, 1972 WL 2624 (2nd Cir. 1972), identified "the general indicia of insurance—that is, a contract by which one party undertakes to indemnify another against loss arising from an unknown or contingent event." (citations omitted); see also *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 724 (Ind. Ct. App. 2004) (citing with approval to Couch and Keeton).

It is clear in Minnesota that losses that are planned, intended or anticipated simply are not insurable. *See, e.g., Hauenstein v. St. Paul-Mercury Indem. Co.*, 242 Minn. 354, 358-59, 65 N.W.2d 122, 126 (1954) ("Accident, as a source and cause of damage to property, within the terms of an accident policy, is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause.") (emphasis added) (citations omitted); *Bartlett*, 307 Minn. at 78 n.8, 240 N.W.2d at 313 n.8 ("'The occurrence of the event insured against must be fortuitous. What the requirement anticipates is that the outcome of the event not be known in advance by the insured. One cannot insure against a certainty.'") (quoting Herbert S. Denenberg, et al., *Risk and Insurance* 146 (1974)). And consistent with this principle, the liability policies issued by RAM to Wakefield provide coverage only for liability resulting from an "occurrence," defined as "[a]n accident which is neither expected nor intended." (emphasis added).

B. The Losses Alleged by the Wendingers Were Not Fortuitous.

The allegations contained in the Wendinger complaint, along with the facts surrounding the institution of that action, indicate that the District Court below was entirely correct in concluding that the injuries alleged by the Wendingers' were not the result of a fortuitous happening, but rather were an expected response to the "negative externalities" imposed by a large-scale animal feeding operation.

Pursuant to their contract, Wakefield and the Forsts constructed an animal feeding operation for over 2,000 hogs—including an open-air manure lagoon to be used to spread

manure on area fields—in a location near other neighbors where there previously was none. The smell of manure "is an integral and anticipated part of the business of hog-farming on a significant scale," A.A. 363 (District Court Order at 5), and one that many people find unpleasant and irritating, often leading to complaints by the facilities' neighbors. *See* Minnesota Planning Agency Environmental Quality Board, *FINAL Animal Agriculture Generic Environmental Impact Statement* at 74 (Sept. 2002), *available at* http://www.eqb.state.mn.us/geis/GEIS-AnimalAgFinal.pdf ("The case study research points to quality of life impacts for Minnesota residents that seem to cross all boundaries of place and group. . . . Participants whose home property neighbors a large-scale animal production facility (almost always a confinement operation) reported the greatest reduction in quality of life. Odors, noise, increased truck traffic, health problems and concerns about well-water safety curtail their ability to enjoy their home and conduct day-to-day activities."). Certainly, Wakefield, as a sophisticated company that is "one of the nation's largest pork producers," Respondent's Brief at 3, knew or should have known that the result of constructing a CAFO in an area near other residents would be to inundate their neighbors with "noxious and offensive odors and gases." *See Dakhue Landfill, Inc. v. Employers Ins. of Wausau*, 508 N.W.2d 798, 804 (Minn. Ct. App. 1993) ("In determining whether [the policyholder] expected or intended any release of pollutants from the landfill, we apply the objective standard of what a reasonable insured should have known."); *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 480 N.W.2d 368, 372 (Minn. Ct. App. 1992) ("Amicus . . . suggests the plain language of the policies

requiring that damage be 'neither expected nor intended from the standpoint of the insured' mandates application of a subjective standard. In the amicus' view, the actual expectations and intentions of the operator are controlling. We disagree and apply the objective standard of what a reasonable insured should have known."). Nevertheless, Wakefield chose to have the CAFO constructed anyway.

Moreover, after construction of the feeding operation and lagoon, but prior to the Wendingers' initiation of their lawsuit, Wakefield had actual knowledge that the Wendingers considered the operation to be a nuisance that was preventing them from enjoying their land and causing them health problems. *See Wendinger*, 662 N.W. 2d at 449 ("Between late 1995 and 2000, the Wendingers filed scores of further odor complaints with various state and local authorities."); Brief *Amicus Curiae* of Land Stewardship Project, *Wendinger v. Forst*, No. CX-02-1603 at 12 (Minn. Ct. App. brief filed Dec. 4, 2002), *available at* http://www.flaginc.org/topics/news/amicus/20021204_WendingerAmicus.pdf ("[Wakefield] also was well aware of the Wendingers' complaints concerning and the difficulty of effectively addressing the odors emanating from the Forsts' facility. For example, on August 5, 1998, representatives of Wakefield Pork participated in a meeting regarding the Wendingers' complaints against the Forsts' facility. . . . Wakefield Pork was also aware that the Wendingers had complained to the Minnesota Pollution Control Agency and that the odor problems had not been resolved.") (citations omitted). The fact that Wakefield contracted to locate its operation in an area near other residences and then failed to rectify issues that were causing complaints

represent calculated business decisions and Wakefield should not be heard now to argue that the Wendingers' alleged injuries were somehow unexpected or accidental. *See Franklin v. W. Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 408 (Minn. 1998) ("[The policyholder] made intentional decisions, not to comply with the [underlying plaintiffs'] notice to vacate and to commence a declaratory judgment suit against the [plaintiffs]. The [plaintiffs'] response was a highly predictable outcome of [the policyholder's] business decision and does not qualify as an 'occurrence' under the CGL policy.").

Wakefield argues that *American Family Insurance Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001), compels a different conclusion. Its reliance on *Walser* is misplaced. As RAM describes, the policy language is distinguishable. Respondent's Brief at 24-25. Moreover, while reasonable persons may disagree as to whether two teenagers "expected" or "intended" to hurt their friend while goofing around in a high school gymnasium, the present case involves injury arising out of the core operations of one of the nation's largest pork producers.

Failure to uphold the principal of fortuity—as reflected in Minnesota law and the definition of "occurrence" in the RAM policies—in cases where a policyholder's regular business activities result in anticipated complaints and allegations of bodily injury by neighbors would encourage policyholders to continue to engage in such activities without internalizing their costs. An insurance purchaser is at least marginally less disposed to avoid risk or harmful behavior when insurance is available to cushion the financial consequences of loss. "A person who is not going to lose much if there is an accident has

less reason to take pains to avoid the accident." Carol A. Heimer, *Reactive Risk and Rational Action* 8-9 (1985). Businesses that cause negative externalities as part of their routine operations should not be able to transfer the costs of their everyday activities to their insurers, thereby substantially diminishing their incentives to act as responsible corporate citizens. Instead, this Court should uphold the basic limitation of insurance to liability for unexpected and unintended losses, not calculated routine business activities.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE POLLUTION EXCLUSION COULD BAR COVERAGE FOR THE WENDINGERS' LAWSUIT.

Under well-settled Minnesota law, if the language of an insurance policy is clear and unambiguous, it must be enforced as written. *See e.g., Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998) ("When insurance policy language is clear and unambiguous, 'the language used must be given its usual and accepted meaning.'") (quoting *Bobich v. Oja*, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960)).[6] Here, the plain language of the pollution exclusions bar coverage for claims alleging bodily injury or property damage liability "which results directly or indirectly from . . . the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic

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[6] The language of an insurance policy is ambiguous "only if it is reasonably subject to more than one interpretation." *Newberg v. Commercial Union Ins. Co.*, 619 N.W.2d 757, 759 (Minn. Ct. App. 2000) (citing to *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn. 1979)). "Courts will not redraft insurance policies to provide coverage where the plain language of the policy indicates no coverage exists." *Newberg*, 619 N.W.2d at 759 (citing to *Ostendorf v. Arrow Ins. Co.*, 288 Minn. 491, 494-95, 182 N.W.2d 190, 192 (1970)).

chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land [or] the atmosphere" to the extent that coverage is not available under the Incidental Liability Coverage provisions. Respondent's Brief at 4-5.

The underlying complaint alleges that the hog operation at Forst Farms produced "extremely noxious and offensive odors and gases" and that these "gases, hydrogen sulfide among others . . . have caused and/or exacerbated Plaintiffs [sic] health problems." A.A. 156-57 (Underlying complaint ¶¶ 7, 10) (emphasis added). Because these pollution exclusions clearly apply to the claims asserted in the Wendinger complaint, Wakefield and the *amici* supporting its position are forced to assert two perplexing arguments in an attempt to persuade this Court to conclude otherwise.

First, Wakefield asserts that "[i]t is not damage to the environment that forms the gravamen of [the Wendingers'] complaint; it is the bodily injury that they claim to have experienced by living in proximity to the Forst operation, and as significantly, it is the presence and trapping of odors within their home which formed the basis for their claims." Appellant's Brief at 31. The pollution exclusions cannot apply, Wakefield reasons, because, pursuant to the holding in *Board of Regents of University of Minnesota v. Royal Insurance Co. of America*, 517 N.W.2d 888 (Minn. 1994), pollution exclusions that require the discharge, dispersal, release or escape of pollutants "into or upon . . . the atmosphere" "'do[] not exclude coverage . . . for the contamination or pollution of air within a building.'" Appellant's Brief at 32 (citing to *Royal*, 517 N.W.2d at 893).

Wakefield forgets, however, that the noxious "odors and gases" allegedly discharged and released from the Forst property did not magically appear inside the Wendinger home to cause irritation, but rather traveled from the Forst property to the Wendinger property through the atmosphere. Indeed, the Wendingers' assertions that "they 'made substantial investments and modifications in an effort to keep these odors out of their home,'" Appellant's Brief at 12, indicates that the source of the contamination was the release of irritants and contaminants in the atmosphere outside of their home, rather than a release of contaminants or irritants inside their home, as was the case in *Royal.*

Second, both Wakefield and the *amici* present convoluted arguments of how "odors" are not "pollutants," how they are "distinct from the individual chemical compounds and/or particulate matter associated with a particular type of livestock or the waste that they generate" and they are not "smoke, a vapor, soot or fume." *Id.* at 35-36. Again, Wakefield glosses over the fact that the Wendingers alleged that the feeding operation produced "noxious and offensive <u>odors and gases</u>," including "hydrogen sulfide among others" which "caused and/or exacerbated their health problems." A.A. 156-57 (Underlying Complaint ¶¶ 7, 10) (emphasis added). The complaint here plainly and clearly alleges bodily injury "directly or indirectly resulting from" the discharge, dispersal, release or escape of noxious "vapors", "fumes" or "gases."

In fact, the District Court's conclusion is consistent with the conclusions of numerous other courts which have found pollution exclusions to unambiguously apply to

claims that alleged injury or damage caused by the dispersal or release of gases, vapors, fumes and/or odors into the environment. For example, in *City of Spokane v. United National Insurance Co.*, 190 F. Supp. 2d 1209 (E.D. Wash. 2002), the court held that pollution exclusions substantially similar to those at issue here precluded coverage for claims for nuisance, trespass, negligence and inverse condemnation arising from the release of odors from a municipal waste facility. The court held that the "[m]igration of odors from a solid waste facility clearly constitutes contamination, or pollution, of the environment" and that the pollution exclusions barred coverage for the claims arising from such migration. *Id.* at 1219.

In *Indiana Lumbermens Mutual Insurance Co. v. West Oregon Wood Products, Inc.*, 268 F.3d 639, 644-45 (9th Cir. 2001), the Ninth Circuit concluded that the plain language of a pollution exclusion that defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste" barred coverage for property damage and personal injury claims alleging nuisance, trespass, negligence and strict liability arising from the alleged emission of "gases, smoke and pollutants" from the policyholder's factory. *See also Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821, 825 (4th Cir. 1998) (pollution exclusion bars negligence claim arising out of the release of "'fumes, particulates and gases'"); *Am. States Ins. Co. v. Nethery*, 79 F.3d 473 (5th Cir. 1996) (pollution exclusion bars coverage for injuries arising out of paint fumes); *United States Fid. & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988) (pollution

exclusion bars coverage for property damage and personal injury arising out of discharges of coal dust into the atmosphere); *Technical Coating Applicators, Inc. v. United States Fid. & Guar. Co.*, 157 F.3d 843 (11th Cir. 1998) (pollution exclusion unambiguously bars coverage for claims arising out of the emission of vapors from roofing materials); *Kruger Commodities, Inc. v. United States Fid. & Guar. Co.*, 923 F. Supp. 1474 (M.D. Ala. 1996) (pollution exclusion bars coverage for fumes from an animal rendering plant).

State court decisions are also in accord. In *City of Bremerton v. Harbor Insurance Co.*, 963 P.2d 194, 197 (Wash. Ct. App. 1998), for example, a Washington state court held that a pollution exclusion unambiguously excludes claims arising from "fumes" and "gases" from coverage and that "the specified examples of 'irritants or contaminants' in the exclusion language . . . [are] illustrative and not exhaustive and odors are effectively excluded as well." Likewise, in *National Union Fire Insurance Co. v. CBI Industries, Inc.*, 907 S.W.2d 517, 522 (Tex. 1995), the Texas Supreme Court held that a pollution exclusion defining "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste material" barred coverage for bodily injuries caused by the release of hydrofluoric acid fumes. *See also, Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100 (Pa. 1999) (pollution exclusion unambiguously precludes coverage for bodily injuries arising from exposure to fumes from a curing substance); *Peace v. Nw. Nat'l Ins. Co.*, 596 N.W.2d 429 (Wis. 1999) (pollution exclusion bars coverage for a property owner's claim of bodily injury resulting from lead-based paint chips, flakes and dust); *Deni Assocs. of*

Florida, Inc. v. State Farm Fire & Cas. Co., 711 So. 2d 1135 (Fla. 1998) (pollution exclusion bars coverage for bodily injury claims arising out of the release of ammonia fumes); *TerraMatrix, Inc. v. United States Fire Ins. Co.*, 939 P.2d 483 (Colo. Ct. App. 1997) (pollution exclusion precludes coverage for claims alleging bodily injuries and property damage arising out of the dispersal of ammonia gas).

As CICLA has shown, applying the pollution exclusions in this case is supported by the plain language of the exclusions themselves, Minnesota precedent, and the weight of authority nationwide.

III. ENFORCING UNAMBIGUOUS CONTRACT TERMS SERVES THE PUBLIC INTEREST BY PROTECTING THE STABILITY OF THE SOCIALLY-BENEFICIAL INSURANCE MECHANISM.

The insurance underwriting process, which relies heavily on contract predictability, would suffer if the terms of insurance contracts are not enforced. Insurers assume certain contractually defined risks in return for premiums, which are calculated through actuarial science. Insurers are able to respond to random catastrophes because, on a large scale, the frequency of such events is reasonably predictable. By evaluating and distributing risks in this fashion, insurance allows individuals and businesses to engage in socially useful activities that would be impossible to undertake if the associated risks had to be borne alone. *See, e.g.*, Robert E. Keeton & Alan I. Widiss, *Insurance Law* 12-13 (1998). This important economic and social function is accomplished by means of the risk-for-premium exchange that is essential to the integrity of the underwriting process. Expanding the risk assumed by the insurer beyond that upon which the premium

calculation was based necessarily undermines this process. To disregard unambiguous provisions defining the risks that insurers have agreed to cover would create excessive uncertainty and confound insurers' actuarial projections of their expected loss experience.

Furthermore, if insurers are forced to cover liabilities for which the policyholder has not paid a premium, they must account for such liabilities in their rate structure through increased premiums for all consumers of insurance. These increased costs of insurance would necessarily affect the availability of insurance, particularly for individuals and small businesses who lack the resources to self-insure. Moreover, the ability of insurers to respond to everyday claims and catastrophic events such as hurricanes, floods, and other disasters would be undermined. As the California Supreme Court has recognized, judicially created coverage leaves "ordinary insureds to bear the expense of increased premiums necessitated by the erroneous expansion of their insurers' potential liabilities." *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 711 (Cal. 1989) (en banc) (citation omitted).

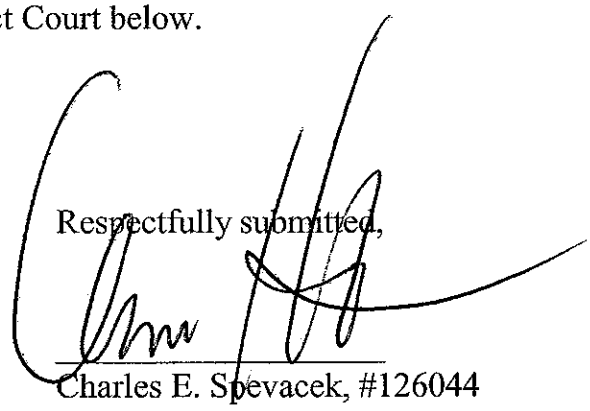
Fundamental policy considerations therefore reinforce what Minnesota law requires: that insurance apply only to fortuitous losses that are not expected or intended by policyholders and that the pollution exclusions at issue apply to claims arising from the discharge of noxious "odors and gases" from confined animal feeding operations.

CONCLUSION

For the foregoing reasons, *amicus curiae* CICLA respectfully requests that the Court affirm the judgment of the District Court below.

Dated: July 12, 2006

Respectfully submitted,



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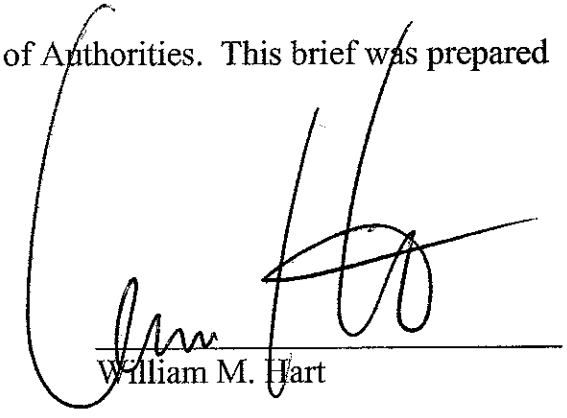
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this *Amicus Curiae* Brief of the Complex Insurance Claims Litigation Association ("CICLA") conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and subd. 3(a)(1), for a brief produced with a proportional font. The font used in this brief is Times New Roman 13-point. This brief contains fewer than 5,500 words, exclusive of the cover page, Table of Contents, and Table of Authorities. This brief was prepared using Microsoft Word 2003.

Dated: July 12, 2006



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