

No. 131710

IN THE SUPREME COURT OF ILLINOIS

Griffith Foods International Inc., *et al.*,

Plaintiffs-Appellees,

v.

National Union Fire Insurance Company of Pittsburgh, PA,

Defendant-Appellant.

On Certified Question from The United States Court of Appeals for the Seventh Circuit
Case Nos. 24-1217 and 24-1223

**AMICUS CURIAE BRIEF OF ZURICH AMERICAN INSURANCE COMPANY
IN SUPPORT OF DEFENDANT-APPELLANT**

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STATEMENT OF AMICUS CURIAE'S INTEREST

Zurich American Insurance Company (“Zurich”), an Illinois-domiciled insurer headquartered in Schaumburg, Illinois, is an affiliate of the Zurich North America group of insurers. Zurich is one of the world’s leading multi-line insurers. Zurich, its subsidiaries, and affiliates issue insurance policies to Illinois businesses, and thus Illinois law often governs its policies.¹ Among the types of business liability insurance Zurich has written over many decades are: (1) commercial general liability policies, which are subject to pollution exclusions; and (2) pollution liability policies, which are underwritten, priced, and drafted specifically to cover pollution events.

For over a quarter century, policyholders, insurers, and the courts of this and other states, where substantive Illinois insurance law applies, have been guided by this Court’s decision in *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473 (1997). There, the Court held that a pollution exclusion that applies by its plain terms precludes coverage only for injuries caused by “traditional environmental pollution.”² *Id.* at 494. Based on *Koloms*, insurers price, underwrite, and negotiate the terms of different types of liability policies for prospective insureds whose operations involve the discharging of pollutants into the

¹ Where the substantive law of Illinois conflicts with the law of another state, choice of law is determined by which state has the most significant relationship to the insurance policy. *Lapham-Hickey Steel Corp. v. Protective Mut. Ins. Co.*, 116 Ill. 2d 520, 526-27 (1995). The relevant contacts will vary from case to case. However, because Zurich maintains its United States headquarters in Illinois, and based on other factors, Illinois substantive law often will be applied to Zurich policies by the courts of this state and, in certain instances, by courts in other states under their choice-of-law rules.

² Both before and after *Koloms*, Illinois courts have enforced the plain meaning of different forms of pollution exclusions to preclude coverage for policyholder operations that result in ongoing gradual pollution. *See, e.g., Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 123 (1992); *Fruit of the Loom, Inc. v. Travelers Indem. Co.*, 284 Ill. App. 3d 485, 498 (1st Dist. 1996); *Int’l Mins. & Chem. Corp. v. Liberty Mut. Ins. Co.*, 168 Ill. App. 3d 361, 378-79 (1st Dist. 1988).

environment. Simply put, because commercial general liability policies contain pollution exclusions, beginning as early as the late 1970s, insurers have offered a separate type of insurance—pollution liability coverage—to fill the gap in coverage created by commercial general liability policies’ pollution exclusions.

In fact, in 2018, Sotera Health Holdings, LLC (“Sotera”), the parent of Plaintiff-Appellee Sterigenics, U.S., LLC (“Sterigenics”), purchased from a Zurich subsidiary, Steadfast Insurance Company (“Steadfast”), a pollution liability policy (the “Steadfast-Sotera pollution policy”) expressly providing coverage for “pollution events.” The Steadfast-Sotera pollution policy’s liability coverage (Coverage B) was written on a claims-made basis and was effective from July 15, 2018 to July 15, 2021. It provided a \$10 million “Each Pollution Event Limit” and a \$20 million “Aggregate Policy Limit.” Sterigenics submitted claims to Steadfast for defense costs and indemnity coverage in connection with lawsuits in Illinois, Georgia, and New Mexico seeking recovery for injuries allegedly suffered by persons living near Sterigenics facilities that emitted Ethylene Oxide (“EtO”). Steadfast paid the *entire* \$20 million aggregate limit toward Sterigenics’s defense costs in the EtO lawsuits.³

Koloms instructs that “[a] court must construe [a] policy as a whole and take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract,” 177 Ill. 2d at 479, and that a pollution exclusion’s “*raison d’etre*” is important to its fair and proper application. *Id.* at 493. In its opening brief, Defendant-Appellant, National Union Fire Insurance Company of Pittsburgh, PA (“National Union”),

³ Zurich will submit a Bates-stamped copy of the Steadfast-Sotera pollution policy, as it was produced in the underlying EtO lawsuits, if the Court desires to see it.

will explain why, as a matter of law, its policies' unambiguous pollution exclusions preclude coverage for the underlying EtO lawsuits against Griffith Foods International Inc. and Griffith Foods Group Inc. (together, "Griffith") and Sterigenics.⁴

Zurich offers this brief for a different purpose: to explain that the EtO lawsuits are *excluded* from the coverage of commercial general liability policies, such as the National Union policies, but are *covered* by pollution liability policies that have been widely available in the marketplace for many decades, albeit at higher premiums than are generally charged for commercial general liability policies. Such insurance is designed to *and in fact covers* environmental pollution claims, such as the EtO lawsuits, first made (or deemed made) during the policy period.

Particularly because pollution liability insurance has been widely available in the marketplace for so long, there is no basis in the common law or any public policy reason to disregard the plain meaning of commercial general liability policies' pollution exclusions under the guise of the "permitted use" argument discussed in *Erie Insurance Exchange v. Imperial Marble Corp.*, 2011 IL App (3d) 100380. The facts of that case, and the record on which it was decided, differ materially from this case—although, in Zurich's view, those differences are irrelevant because the plain language of the pollution exclusion does not support the application of a permitted use exception in *any* circumstances. In any event, the United States Court of Appeals for the Seventh Circuit appreciated that applying the *Imperial Marble* holding here would have substantial consequences—for this case,

⁴ The alleged EtO emissions came from a sterilization plant in Willowbrook, Illinois that Griffith opened in 1984 and that Sterigenics purchased in 1999 and operated until 2019. *Griffith Foods Int'l v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 134 F.4th 483, 485 (7th Cir. 2025).

others, and indeed the broader insurance market. *Griffith Foods Int'l Inc.*, 134 F.4th at 485. That is correct. Applying *Imperial Marble* here would disrupt the market for liability insurance in this state and across the country, leading to a multitude of undesirable consequences for policyholders, insurers, and Illinois courts.

ARGUMENT

A. **By Design, Pollution Liability Insurance Fills the Gap Created by Pollution Exclusions in Commercial General Liability Policies**

Insurance policy exclusions can be understood in one of two ways: (1) the excluded conduct or event can be insured under a different policy; or (2) the excluded matter is uninsurable under any policy. Examples of the latter are criminal or intentional misconduct. Examples of the former include the types of exclusions found in the National Union policies at issue in this case, including the automobile liability exclusions (commercial auto insurance can be purchased), employers and workers compensation exclusions (workers compensation and employers liability insurance can be purchased), and pollution exclusions (pollution liability insurance can be purchased).

In *Koloms*, this Court provided a detailed overview of the history and evolution of different versions of the pollution exclusion, noting that the first pollution exclusions were endorsed upon or incorporated in the standard-form commercial general liability policy in the early 1970s. 177 Ill. 2d at 489-93. To fill the coverage void (or “gap”) that pollution exclusions created, the insurance industry began selling standalone pollution liability policies in the late 1970s. Eric McCabe, Alex Potente, and Angela Probasco, *Products Pollution Liability Insurance: Another Bridge Spanning the Pollution Exclusion Coverage Gap*, *Environmental Claims Journal*, 2021, Vol. 33, No. 2, 149-60, <https://www.tandfonline.com/doi/full/10.1080/10406026.2021.1885617> [<https://perma.cc/>

RWQ4-KL3R] (last visited June 20, 2025). From 1990 to 2010, the number of insurance companies offering pollution insurance increased substantially. *Id.* at 156. Today, more than fifty insurance companies offer pollution insurance products. *Id.*⁵ Unlike other types of insurance that are subject to more standardized forms, the terms of pollution liability policies are often negotiated and tailored to suit each insured's requests and needs. *Id.* Though there are many different forms of pollution liability coverage, a typical policy applies on a claims-made basis and provides coverage not only for cleanup costs, but also for third-party liability claims. *Id.* at 157.

B. Sotera, Sterigenics, and Other Sophisticated Corporate Policyholders Purchase Pollution Liability Insurance to Protect Against EtO Exposures

Given its business of operating sterilization facilities in several different states across the country, Sotera worked with one of the world's leading insurance brokerage firms, Aon, to procure pollution liability coverage. The resultant Steadfast-Sotera pollution policy provides bodily injury coverage on a claims-made and reported basis for the period July 15, 2018 to July 15, 2021. It provides coverage worldwide for Sotera and its related entities, including Sterigenics. Steadfast even agreed by endorsement to the Sidley Austin firm's service as defense counsel for certain EtO claims, under agreed upon rates, if Steadfast determined it had a duty to defend.

⁵ See David Dybdahl, *Environmental Insurance: Just the Facts* (Oct. 2, 2015), <https://www.irmi.com/articles/expert-commentary/environmental-insurance-just-the-facts> [<https://perma.cc/P9QF7PJ5>]; Heather Turner, *Environmental insurance activity is on the rise* (Mar. 30, 2016), <https://www.insurancebusinessmag.com/us/news/environmental/environmental-insurance-activity-is-on-the-rise-30018.aspx> [<https://perma.cc/WKC5-A6VB>].

The Steadfast-Sotera pollution policy covers “pollution event(s)” under several different coverage parts. Relevant here is Coverage B, which provides liability coverage for “loss” from “claims” for “bodily injury,” “property damage,” and “natural resource damages” resulting from an existing and/or a new “pollution event.” Section V.II. defines “pollution event(s)” to mean:

the discharge, dispersal, release, seepage, migration or escape or any solid, liquid, gaseous or thermal irritant, contaminant or pollutant, including smoke, vapor, soot, fumes, acids, alkalis, toxic or hazardous substances, electromagnetic fields, chemicals, waste (including materials to be recycled, reconditioned or reclaimed, and/or medical, infectious and pathological waste), radioactive waste and materials, asbestos, and lead into or upon land, or any structure on land, the atmosphere, or any watercourse or body of water including groundwater, in concentrations at levels in excess of those naturally present in the environment.

This definition is the substantive equivalent—essentially, a mirror image—of the pollution exclusion in the National Union policies. In other words, the risk that the National Union general liability policies explicitly *exclude* is what the Steadfast-Sotera pollution policy explicitly *covers*.

So, when Sterigenics faced lawsuits seeking recovery for bodily injuries allegedly suffered by residents living near its facilities that emitted EtO, Sterigenics tendered those claims to Steadfast under the pollution liability policy. Steadfast agreed to cover the claims, and it paid defense costs on behalf of Sterigenics totaling \$20 million, the aggregate limit of the Steadfast-Sotera pollution policy. Specifically, Steadfast paid a \$10 million Each Pollution Event Limit for the underlying EtO lawsuits involving a pollution event in Illinois, and it paid the remainder of the \$20 million Aggregate Policy Limit—\$10 million—for EtO lawsuits involving pollution events in Georgia and New Mexico.

In the years immediately before the filing of the first of the EtO lawsuits, Sotera/Sterigenics could have purchased significantly more pollution liability insurance, including

primary and excess layers. See *Environmental Insurance Market Update 2019*, Aon, <https://www.aon.com/getmedia/7d47a6e6-70a8-493a-9234-54227dc3b8e7/2019-Environmental-Insurance-Market-Update.aspx> [<https://perma.cc/JK2L-F9NB>] (last visited June 20, 2025). See also *Growing Trend of Costly Environmental Claims Expected to Continue in 2018*, USI, https://www.usi.com/contentassets/9b3d1b55c13d43398d837159070f88d4/feb_2018_market_outlook_env_v2.pdf?v=4ae1a0#:~:text=Growing%20Trend%20of%20Costly%20Environmental,to%20grow%20and%20remain%20competitive [<https://perma.cc/2EYR-2UHY>] (last visited June 20, 2025); David Dybdahl, *supra*, *Environmental Insurance: Just the Facts* (Oct. 2, 2015). That is, Sotera/Sterigenics could have purchased well more than the Steadfast-Sotera pollution policy's \$20 million aggregate limit in the insurance marketplace during the 2015 to 2020 period.⁶

By intention and design, pollution liability insurance is written to fill the gap in coverage created by the pollution exclusion in standard-form general liability policies. These different types of policies are intended to complement one another, not to provide overlapping coverage. Allowing Sotera/Sterigenics to obtain coverage for the EtO lawsuits under general liability policies, in addition to its pollution liability coverage, would create a windfall for the insured by resulting in overlapping insurance for which Sotera/Sterigenics paid no premium. This is the very type of contextual consideration

⁶ Another company facing hundreds of lawsuits by nearby residents alleging its sterilization operations and emissions caused EtO-related injuries, Medline Industries, also purchased pollution liability insurance. *Ill. Union Ins. Co. v. Medline Indus., Inc.*, 2022 IL App (2d) 210175. Although the Second District Appellate Court held that the policy ultimately did not apply, because Medline did not pay an additional premium for "prior acts" coverage or an earlier retroactive date, the point remains that Medline knew to, and did, purchase pollution liability coverage to protect against its traditional environmental pollution exposure due to its EtO emissions.

Koloms suggests should inform this Court’s analysis. *See Koloms*, 177 Ill. 2d at 479 (“A court must construe [a] policy as a whole, and take into account the type of insurance purchased, the nature of the risks involved and the overall purpose of the contract.”).⁷

C. Recognizing a “Permitted Use” Exception to Pollution Exclusions Would Lead to Disruption in Insurance Markets and Many Other Undesirable Consequences

Were this Court to veer from *Koloms* and recognize a “permitted use” exception to the application of the pollution exclusion, insurance markets would be disrupted substantially and a multitude of undesirable consequences would ensue. This is not hyperbole.

Since this Court decided *Koloms* in 1997, the rules of the road have been known to policyholders, their brokers, insurers, and courts called upon to apply Illinois law. The clear language of pollution exclusions applies to traditional environmental pollution, that is, to gradual or ongoing environmental pollution resulting from an insured’s business operations. Illinois insurers and general liability coverage for policyholders of all types have been impacted by the law pronounced by this Court, including its oft-repeated pronouncements that, in construing the language of an insurance policy, a court’s primary objective is to ascertain and effectuate the parties’ intent based on the words they used to express their agreement. *Acuity v. M/I Homes of Chicago, LLC*, 2023 IL 129087, ¶ 30; *Hobbs v. Hartford Ins. Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005); *Koloms*, 177 Ill. 2d at 479; *Crum & Forster Managers Corp. v. Resol. Tr. Corp.*, 156 Ill. 2d 384, 391 (1993).

⁷ Consistent with *Koloms*, insurers issue general liability policies to insureds engaged in “traditional” pollution activities, with the assurance that such risks are excluded from coverage. And premiums charged for such policies are lower as a result.

Imperial Marble departed from this basic tenet of contract interpretation, and this Court’s recognition of any “permitted use” exception would be a further—and far more consequential—departure. Insurers are entitled to rely on the language of their policies, which are contracts, to define their rights and obligations relative to their policyholders. Even where courts looked beyond the plain language to the documented history of the pollution exclusion, they found the insurers’ predominate motivation in drafting the exclusion was to avoid the “enormous expense and exposure resulting from the explosion of environmental litigation.” *Griffith Foods Int’l Inc.*, 134 F.4th at 490-91 (quoting *Koloms*, 177 Ill. 2d at 492, and *Weaver v. Royal Ins. Co. of Am.*, 674 A.2d 975, 977 (N.H. 1996)). The case law does not even suggest, much less conclude, that the pollution exclusion was intended to differentiate between legally authorized emissions—i.e., those that occur pursuant to a regulatory permit—and legally unauthorized emissions—i.e., those that do not. The absence of any differentiating language within the exclusion plainly manifests an intention not to cover *any* environmental pollution liabilities, full stop.

In certifying its question to this Court, the Seventh Circuit noted that, with constantly evolving environmental regulations, issues of whether authorized pollution levels impact the application of pollution exclusions are likely to recur. 134 F.4th at 492-93. On the one hand, this Court’s enforcement of the pollution exclusion against Griffith and Sterigenics will prompt responsible policyholders to protect themselves and the public by purchasing the type of insurance designed to address traditional environmental pollution: pollution liability coverage. On the other hand, recognizing a regulatory “permitted use” exception would inevitably spawn additional litigation involving countless

insureds in a wide variety of industries regulated by the United States and Illinois Environmental Protection Agencies.

The meaning of pollution exclusions should not vary with the ebbs and flows of the regulatory environment. Words are words. The words comprising National Union's pollution exclusion should be accorded the same meanings now as they had in 1983 and 1984, when National Union issued its policies to Griffith. There are compelling reasons for promoting uniformity and consistency when interpreting contract terms. Without such certainty, contracting parties could never be sure of what they are bargaining for, and otherwise unnecessary disputes and litigation over the meaning of contract language would predictably ensue. *Byrd v. Aetna Cas. & Sur. Co.*, 152 Ill. App. 3d 292, 295 (2d Dist. 1987) (citing *Loc. 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95 (1962)). This of course extends to insurance policies, where the setting of premiums would be a highly speculative and risky exercise were the interpretation of policy terms subject to whim, rather than their plain and ordinary meanings.

CONCLUSION

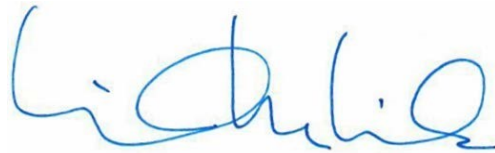
With *Koloms* on the books, Sotera purchased from Steadfast the type of policy the insurance industry specifically designed to fill the coverage gap created by the pollution exclusion in standard-form commercial general liability policies. By its plain and unambiguous terms, the pollution exclusion bars coverage for "traditional" environmental pollution, whether resulting from permitted or non-permitted emissions. The Steadfast-Sotera pollution policy functioned exactly as it was designed to function, providing defense and indemnity coverage for EtO lawsuits against Sterigenics until Steadfast's payments exhausted the \$20 million aggregate limit. Had Sotera purchased sufficiently high additional limits, which were available for purchase in 2018, Sterigenics would have no

need for coverage under the National Union policies and, thus, no need to invoke the “permitted use” exception the Third District crafted in *Imperial Marble* in defiance of the pollution exclusion’s plain language.

Under Illinois law, *the policy language* determines the availability of coverage for a particular loss. Therefore, an insured’s decision not to purchase all necessary types of coverage or, more pertinent here, an insured’s decision to self-insure certain risks above a limited amount should be irrelevant to the coverage determination. Ultimately, the adverse consequences of an insured’s choice not to purchase sufficient pollution liability coverage should be visited upon *the insured*, not its commercial general liability insurer.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 11 pages.



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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on June 24, 2025, a copy of the foregoing *Amicus Curiae* Brief of Zurich North American Insurance Company in Support of Defendant-Appellant, was filed and was served on the following attorneys of record by the Odyssey eFileIL system:

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