

In the
Supreme Court of Illinois

Griffith Foods International, Inc., and Sterigenics, U.S., LLC,

Plaintiffs-Appellees,

v.

National Union Fire Insurance Company of Pittsburgh, P.A.,

Defendant-Appellant.

Question of law certified by the United States Court of
Appeals for the Seventh Circuit, Case Nos. 24-1223 & 24-1217,

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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STATEMENT OF INTEREST OF THE AMICUS CURAE

This *amicus curae* brief is filed in support of Plaintiffs-Appellees Griffith Foods International Inc. and Sterigenics U.S., LLC by United Policyholders. United Policyholders is a non-profit, tax-exempt, 501(c)(3) charitable organization founded in 1991. United Policyholders' mission is to provide valuable information and assistance to the public concerning insurers' duties and policyholders' rights. United Policyholders monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. United Policyholders helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claims handlings. Grants, donations, and volunteers support the organization's work. United Policyholders does not accept funding from insurance companies.

In furtherance of its mission, United Policyholders appears as *amicus curiae* in courts nationwide to advance the position of policyholders in insurance cases. United Policyholders' *amicus* briefs have been cited with approval by the United States Supreme Court, see *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), as well as the Illinois Supreme Court, see *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446, ¶ 53 (2021). Here, United Policyholders seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of the policyholder litigants' primary counsel and drawing the Court's attention to historical context that may not have had the opportunity for full consideration otherwise.

INTRODUCTION

Plaintiffs-Appellees seek affirmation of the district court's holding, which followed the holdings of other Illinois courts that have held consistently since 2011 that a business's emissions pursuant to a governmentally issued permit are not "traditional environmental

pollution” and thus fall outside general liability policies’ standard pollution exclusion, as interpreted by this Court in *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473 (1997). The essential question raised by this appeal is what effect a permit for emissions has on the application of the pollution exclusion to an insurance claim involving damages allegedly caused by such emissions.

Contrary to more than a decade of consistent holdings by Illinois courts, the insurers argue that the answer is effectively *nil*. By their interpretation, whether an emission qualifies as “traditional environmental pollution” can be determined solely on the basis of qualities intrinsic to that emission, such as whether it is potentially harmful to human health or the environment, while extrinsic factors, like the existence of a regulatory apparatus capable of prescribing safe emission levels and issuing permits, are irrelevant. As Defendant-Appellant, National Union Fire Insurance Company of Pittsburgh, PA (“National Union”), puts it, “pollution is pollution” regardless of its context. (National Union’s Appellant’s Brief (“National Union’s Br.”) at 1.)

This view of what constitutes “traditional environmental pollution” is both ahistorical and untenable. It disconnects the concept of pollution from its roots in an environmental movement which had as its primary goal the introduction of regulatory oversight to previously unchecked industrial activity. In this way, the insurers ignore both the century of ecological crisis leading up to the creation of the United States Environmental Protection Agency (“USEPA”) and its state counterparts, as well as the fifty years of progress since. In their view, the modern, well-regulated factory emitting known quantities of byproducts according to a valid permit is just as guilty of “pollution” as was the Hooker Chemical Company, which intentionally dumped 20 tons of hazardous waste

beneath Love Canal decades before the USEPA was even created. See Phillips, A. S., Yung-Tse Hung, and Bosela, P. A. (2007), *Love Canal Tragedy*. J.Perform.Constr.Facil., 21(4), 313-319, p. 313. This bleak outlook would presumably not be shared by the approximately 15,000 workers at the USEPA and 700 at the Illinois Environmental Protection Agency (“IEPA”), who, one suspects, harbor belief that their agencies have accomplished some good in the past half-century. See FY 2023 EPA Budget in Brief, EPA. March 1, 2022. Archived (PDF) from the original on December 29, 2022 (accessed July 28, 2025) and Illinois EPA Information Pursuant to Section 4 of Illinois FOIA (5 ILCS 140/4), Illinois EPA.

This view is also untenable because the quantity, not the quality, of a substance is what makes that substance benign, or alternatively, toxic, carcinogenic, or hazardous – in short, what makes that substance “pollution.” Humans need water and sunlight to live, yet both in high quantities are toxic and carcinogenic. EPA, National Primary Drinking Water Regulations, Disinfection Byproducts. <https://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations#Byproducts> Last updated on December 12, 2024, accessed July 28, 2025; Matsumura Y, Ananthaswamy HN, *Toxic Effects of Ultraviolet Radiation on the Skin*. Toxicol Appl Pharmacol. 2004 Mar 15, 195, 298-308; Koivusalo M, Pukkala E, Vartiainen T, Jaakkola JJ, Hakulinen T., *Drinking Water Chlorination and Cancer- A Historical Cohort Study in Finland*, March 8, 1997, p. 192-200. The beta radiation emitted by a banana is physically identical to that emitted by a fission reactor, just smaller in scale. See EPA, *Natural Radioactivity in Food*, <https://www.epa.gov/radtown/natural-radioactivity-food>, Last updated on July 29, 2025, accessed August 10, 2025. Were the Court to base its determination of what constitutes

“pollution” on intrinsic qualities alone, even “such everyday elements as water or air” might be pollution, since all known substances are capable of causing harm to some person or property under the right circumstance. See *Koloms*, 177 Ill. 2d, 485; see also *American States Ins. Co. v. Kiger*, 662 N.E.2d 945, 948 (Indiana 1996) (“Clearly, this clause cannot be read literally as it would negate virtually all coverage.”) To distinguish between pollution and non-pollution therefore requires something more than mere analysis of an emission’s inherent physical qualities. Indeed, this distinction can only be determined via a judgement about what constitutes an acceptable level of risk.

Under the modern environmental regime, government bodies like the USEPA and IEPA have far-reaching authority to regulate industrial emissions. Through these bodies, civil society is able to discern acceptable levels of risk and formalize its judgments through the passage of laws and regulations. The culmination of this process is the issuance to a business of an emissions permit. Contrary to Defendant-Appellant’s framing, such a permit does not “allow [the permit-holder] to pollute the environment” within agreed-upon bounds. (National Union’s Br. at 3.) Rather, it clarifies that emissions within the agreed-upon bounds are *permitted* by society and thus do not constitute “pollution” as such. The issuance of a permit is the manifestation of society’s judgment that emissions within designated levels are not “pollution” in exactly the same way that water is not “toxic” and a banana not “carcinogenic.” These statements are true, not because the underlying risk has been wholly eliminated, but rather because it exists at a level deemed acceptable by the institutions entrusted with making that determination.

By holding that emissions subject to a valid regulatory permit are not “traditional environmental pollution” within the meaning of *Koloms*, this Court will confirm an

interpretation of the pollution exclusion that is historically accurate and logical. This interpretation, further defined by *Erie Imperial Exchange v. Imperial Marble Corp.*, 409 S.E.2d 692 (“*Imperial Marble*”), and later finding support in *Country Mutual Ins. Co. v. Bible Pork*, 2015 IL App (5th) 140211 (“*Bible Pork*”), advanced the mission the Court undertook in *Koloms* of tethering the pollution exclusion to its historical purpose: avoiding the “yawning extent of potential liability” arising from the “explosion of environmental litigation” over mandated “governmental clean-up costs” of ecological disasters unleashed in the absence of regulatory oversight. See *Koloms*, 177 Ill. 2d at 484, 493. By affirming this interpretation, the Court will also continue to curtail the ambiguity at the heart of the pollution exclusion – an ambiguity resulting from the fact that, while the exclusion is “quite specific on its face,” the sheer “breadth of the language renders application of the exclusion uncertain, if not absurd.” *Id.* at 487-88. The interpretation urged by Plaintiffs-Appellees rectifies this uncertainty, establishing a clear delineation between unacceptable industrial pollution on the one hand, and acceptable industrial activity on the other.

This seemingly linguistic distinction has immense practical implications for the approximately 27,000 “industrial” businesses operating in Illinois¹, the vast majority of which exercise good citizenship by emitting regulated substances only in accordance with valid permits. The day-to-day operations of these legitimate businesses are not equivalent

¹ This rough estimate made by combining approximately 15,000 manufacturing businesses in Illinois, see MNI, *Illinois Manufacturing Facts*, IndustrySelect, <http://www.industryselect.com/illinois-manufacturing-facts> (last accessed July 22, 2025), with approximately 5,000 transportation and warehousing businesses U.S. Census Bureau, 2022 County Business Patterns: Illinois, <http://census.gov/data/tables/2022/econ/cbp/2022-cbp.html> (last accessed July 22, 2025), and approximately 7000 agribusinesses. Intersect Ill., *Illinois Agribusiness*, <http://www.intersectillinois.org/industries/agribusiness> (last accessed July 22, 2025).

to the rapacious destruction of the environment that occurred at the hands of industry prior to the creation of the EPA. These businesses are not “polluters.” As such, they deserve a clear brightline rule separating industrial pollution from normal industrial activity and a predictable metric by which they can determine whether their everyday business activities are covered by their CGL policies. They also deserve the coverage they fairly contracted for when they purchased policies purporting to cover accidental harm resulting from their normal business operations.

ARGUMENT

I. This Court Should Uphold Established Illinois Law.

A. Illinois’ “Permit Rule” Holds Emissions Pursuant To Permits Are Not Excluded.

Since 2011, Illinois courts have consistently held that a business’s emissions pursuant to a governmentally issued permit fall outside general liability policies’ standard pollution exclusion (the “Permit Rule”).

The history of the “Permit Rule” begins with *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473 (1997). The property owners in *Koloms* were sued after a faulty furnace emitted carbon monoxide in a commercial building causing injury. *Id.* at 476. The insurer denied coverage based on its policy’s pollution exclusion. *Id.* at 480-1. The *Koloms* Court disagreed, holding that the pollution exclusion applied only to those injuries caused by traditional environmental pollution and noting its agreement with “those courts which have restricted the exclusion’s otherwise potentially limitless application to only those hazards traditionally associated with environmental pollution.” *Id.* at 489, 494.

Recognizing the slippery slope that would be effected by a literal interpretation of the pollution exclusion, *Koloms* wisely limited the scope of the exclusion to situations

involving injury or damage caused by “traditional environmental pollution,” a term that would not include non-industrial activities.² *Koloms*, 177 Ill. 2d 494. *Koloms* was successful in curtailing the unchecked expansion of the pollution exclusion into all spheres of life as it recognized the fundamental ambiguity at the heart of the exclusion: namely, what is pollution? *Koloms* understood that if anything can be an “irritant” or “contaminant,” if “virtually every substance in existence” could cause damage to “some person or property,” then the exclusion swallows up almost all industrial activity.

Although *Koloms* did not involve emissions from a factory, its reasoning is equally applicable in the industrial context. It is helpful to keep in mind that courts address the arguments made by the parties. In *Koloms*, this Court recounted the policyholder’s argument as follows:

Specifically, *Koloms* assert that both the original pollution exclusion, first instituted in the early part of the 1970s, and the current pollution exclusion, drafted in 1985, were intended solely to protect insurers from having to defend and indemnify insureds ***in connection with governmental clean-up costs***.

Id. at 483-484 (emphasis added). After describing other courts’ rejection of a literal reading of the pollution exclusion, this Court noted:

Like many courts, we are troubled by what we perceive to be an overbreadth in the language of the exclusion as well as the manifestation of an ambiguity which results when the exclusion is applied to cases which have nothing to do with “pollution” in the conventional, or ordinary, sense of the word. ... Accordingly, we agree with those courts which have restricted the exclusion's otherwise potentially limitless application to only those hazards

² Subsequent decisions further defined this boundary. The dry cleaning chemical tetrachloroethane (“perc”), while legal and safe to use in the dry cleaning process, constitutes traditional environmental pollution when it leaks out of a dry cleaner and seeps into the ground, which is beyond the scope its intended use in the dry cleaning process. See, e.g., *Kim v. State Farm Fire & Casualty Co.*, 312 Ill. App. 3d 770, 775-76 (1st Dist. 2000).

traditionally associated with environmental pollution. We find support for our decision in the drafting history of the exclusion, which reveals an intent on the part of the insurance industry to so limit the clause.

Id. at 488-489. The history this Court then looked to is telling. It started with the 1970 changes in the law governing air pollution:

[T]he United States Congress substantially amended the Clean Air Act in an effort to protect and enhance the quality of the nation's air resources. ... Pub. L. No. 91--604, 84 Stat. 1676 (1970) (now codified at 42 U.S.C. §§ 7401 through 7642 (1983), as amended). The passage of these amendments, ***which included provisions for cleaning up the environment***, imposed greater economic burdens on insurance underwriters, particularly those drafting standard-form CGL policies.” (emphasis added). *Id.* at 490. After describing the drafting of the 1970 and 1985 versions of the pollution exclusion, this Court poignantly noted, ***“Significantly, the purpose of the current [1985] exclusion, like its predecessor, is ‘to exclude governmental cleanup costs from [the scope of] coverage.’”***

Id. at 492 (emphasis added).

This Court’s focus on the purpose of the pollution exclusion being to avoid government cleanup costs foreshadowed the Illinois Appellate Court rulings that followed, which held that permitted emissions (*i.e.*, ones that do not subject the policyholder to statutory liability for cleanup costs) do not fall within the ambit of “traditional environmental pollution” that the insurance industry intended to exclude.

B. Post-Koloms: Courts in Illinois Repeatedly Uphold the “Permit Rule”

In *Imperial Marble*, the insured owned a marble manufacturing plant. *Imperial Marble*, 2011 IL App (3d) 100380, ¶ 3. The underlying tort plaintiffs sued the policyholder relating to its use of a chemical in its manufacturing process, the odorous emissions of which were being dispersed into the local environment. *Id.* Imperial Marble conducted its manufacturing and emissions pursuant to a permit issued by the Illinois EPA. *Id.* *Imperial*

Marble held the absolute pollution exclusion to be ambiguous in this context, where the insured emitted pollutants pursuant to a permit, noting:

At this stage in the proceedings, it is not necessary to determine whether Imperial's emissions constitute traditional environmental pollution. Rather, we merely need to find that the policy's pollution exclusion is ambiguous as to this issue ... [I]t is unclear whether permitted emissions constitute traditional environmental pollution that is excluded under the policy Erie issued to Imperial.

Because we must resolve ambiguities in the complaint and policy in favor of Imperial, we find that Erie's duty to defend is implicated and hold that Erie owes a duty to defend Imperial on claims asserted in the underlying action.

Imperial Marble, 2011 IL App (3d) 100380, ¶¶ 22-23.³

In 2015, the Illinois Appellate Court upheld *Imperial Marble* in *Country Mutual Ins. Co. v. Bible Pork*, 2015 IL App (5th) 140211. In *Bible Pork*, the insured was constructing a hog farm that was fully licensed by the State of Illinois. *Bible Pork*, 2015 IL App (5th) 140211, ¶ 3. *Bible Pork* held that the farm's insurer owed it a duty to defend an underlying nuisance lawsuit and that the policy's pollution exclusion did not apply. *Id.* at ¶ 41. *Bible Pork* expressly agreed with and followed *Imperial Marble* and held that the pollution exclusion was ambiguous in the face of permitted emissions. *Id.* at ¶¶ 37, 41.

The Northern District of Illinois has also analyzed whether permitted emissions constitute "traditional environmental pollution." In *Velsicol Chemical, LLC v. Westchester*

³ *Imperial Marble*'s emphasis on construing both the complaint and the policy in favor of the insured for duty to defend purposes explains the comment that it need not determine whether Imperial Marble's emissions constitute traditional environmental pollution. It had found that the complaint could "reasonably be read as alleging harm caused, at least in part, by permitted emissions." *Id.* at ¶ 19. For duty to defend purposes, this was enough. The court did not need to make factual findings that all of the emissions were either permitted or not permitted; its clear holding that the pollution exclusion was ambiguous as to permitted emissions completed the analysis and supported the holding that Erie had a duty to defend.

Fire Ins. Co., the policyholder had an emissions permit and operated in accordance with that permit. *Velsicol Chemical*, No. 15-CV-2534, 2017 U.S. Dist. LEXIS 144698, at *25-26. The Northern District followed *Imperial Marble* and *Bible Pork* but denied summary judgment where there remained a question of fact regarding whether all of the chemicals emitted fell under the purview of Velsicol's permit. *Id.* at *26.

Notwithstanding this clear authority, National Union and its *amici* argue that Illinois courts have not uniformly followed the Permit Rule. National Union argues that *Kim v. State Farm Fire & Casualty Co.*, 312 Ill. App. 3d 770 (1st Dist. 2000), “rejected the insured’s argument that the pollution exclusion does not apply merely because ‘the perc was legally and intentionally placed into the dry cleaning machine as part of the cleaning company’s normal business activity.’” (National Union’s Br. at 26-7.) National Union ignores that the discharge at issue in *Kim* resulted from a malfunction in the machine that allowed the perc to escape from the machine into the environment. The case did not involve a discharge pursuant to a governmentally issued permit, nor was discharging perc into the environment inherent in the policyholder’s business. *Kim* did not reject the Permit Rule.

National Union goes on to also misstate the law in citing *Village of Crestwood v. Ironshore Specialty Ins. Co.*, 2013 IL App (1st) 120112, and *Scottsdale Indem. Co. v. Village of Crestwood*, 673 F.3d 715 (7th Cir. 2012) as contrary to *Koloms*, *Imperial Marble*, and *Bible Pork*. However, neither *Village of Crestwood* nor *Scottsdale* involved a discharge pursuant to a government permit. Instead, both decisions rejected arguments that the pollution exclusion was avoided as long as environmental laws had not been explicitly violated by the emission. There is a vast difference, of course, between unsanctioned activity that doesn’t violate existing laws, and activity approved by a valid regulatory body

via the issuance of a permit. The First District’s *Village of Crestwood* decision even recognized the existence of a permit as crucial. In rejecting the insured’s argument, *Village of Crestwood* stated:

We also reject the Village's contention that the pollution exclusions do not apply when alleged emissions are within permitted [*i.e.* allowed] legal standards, even where the insured is an active polluter. The Village is arguing that the contaminant levels were below the maximum amounts permitted [*i.e.* allowed] by the Safe Drinking Water Act (42 U.S.C. § 300f *et seq.* (1976)) or other environmental regulations. ***The Village, however, did not have a permit*** to distribute any water from the contaminated well. The facts do not support the Village’s contention.

2013 IL App (1st) 120112, ¶ 23 (emphasis added). Here, by contrast, Griffith and Sterigenics did have valid permits for their emissions.

National Union and its *amici* also rely heavily on *Scottsdale Indem. Co. v. Village of Crestwood*, 673 F.3d 715 (7th Cir. 2012) to argue that “permitted” emissions fall within the ambit of the absolute pollution exclusion. In *Scottsdale*, the Village of Crestwood learned, in approximately 1985, that one of its wells was contaminated with perc from a local dry cleaner. *Scottsdale*, 673 F.3d at 716. The Village promised state authorities that it would not use the well, but it continued to do so anyway until 2007. *Id.* In its coverage dispute, the Village argued, in part, that the underlying personal injury lawsuits were not related to pollution because the amount of perc in the well was “below the maximum level permitted [*i.e.* allowed] by environmental regulations.” *Id.* at 721. *Scottsdale* disagreed, finding that even at such levels perc was potentially capable of causing harm, thus triggering the pollution exclusion. *Id.* at 721.

However, there exists an important distinction between *Scottsdale* and this case. When *Scottsdale* spoke of “permitted” levels, it was not referring to permits issued by regulatory authorities, which were not at issue there. *Scottsdale* used the term in the general

sense of something generally allowed, not something specifically approved by a permit. “Permitted” and “permitted” are two distinct words that are spelled identically but hold different meanings and are pronounced differently. Any argument that Plaintiffs-Appellees’ “permitted releases” are not insured under *Scottsdale* is simply a misinterpretation of the word “permitted.” In *Scottsdale*, the Village did not have any special license or permit (a form of the noun, phonetically, /ˈpər mit/) to keep a contaminated well and to distribute contaminated water to village residents from that well. In fact, the Village was specifically advised not to use the water in the contaminated well except in extraordinary circumstances. In *Scottsdale*, a certain level of perc was simply “permitted” (a form of the verb, phonetically, /pər ˈmit/) to exist in the groundwater. *Scottsdale*, 673 F.3d at 721. On the other hand, “permitted” as used in *Imperial Marble*, meant that IEPA issued permits that expressly granted Imperial Marble the authority to emit certain chemicals from its plant in specified amounts over a defined period of time via a written license. *Imperial Marble*, 2011 IL App (3d) 100380, ¶¶ 3-4. Notably, *Scottsdale* does not analyze, cite, or even mention *Imperial Marble*. Also notable is that *Velsicol Chemical*, decided in 2017, declined to analyze *Scottsdale*. This is perhaps due to the fact that *Imperial Marble* had no bearing on *Scottsdale*. And, in turn, *Scottsdale* had no bearing on *Velsicol Chemical* because *Scottsdale* was not a case about emissions pursuant to a permit. Thus, *Scottsdale* does not assist this Court in providing a viable answer to the question presented in this case.

II. Upholding the Permit Rule Comports with the Original Intent Behind the Pollution Exclusion

The story of the pollution exclusion in CGL policies actually begins four years prior to its inception, in 1966, when a number of major insurers switched from “accident”-based

CGL policies to a new standard-form CGL policy based around “occurrences.” Melody A Hamel, *The 1970 Pollution Exclusion in Comprehensive General Liability Policies: Reasons for Interpretation in Favor of Coverage*, 34. Duq. L. Rev. 1083 (1996). In 1965, an insurance industry representative commenting on the proposed change framed this shift as an expansion of coverage, particularly in the area of “waste disposal,” where “a manufacturer’s basic premises-operations-coverage is liberalized most substantially.” *Id.* The logic behind this statement was sound: in contrast with CGL policies based around “accidents” – a term borrowed from automobile liability policies, where it was “generally thought of as a ‘boom’ event where the cause and effect (damages) happened simultaneously,” – the new “occurrence”-based CGL policies were presented by the insurance industry as “provid[ing] coverage for ‘gradual damage resulting over a period of time from exposure to the insured’s waste disposal.’” *Id.* at 1103. An internal memorandum circulated at Liberty Mutual Insurance Company listed “examples” of such expanded coverage as including “the gradual adverse effects of smoke, fumes, air or stream pollution, contamination of water supply or vegetation.” *Id.*

When the standard pollution exclusion was pitched to insurance regulators just four years later, in 1970, it too was carefully framed as a mere “clarification” of the “occurrence” definition, which insurers promised during the regulatory approval process “was not intended to be ... a significant reduction in pollution coverage from the 1966 occurrence-based CGL Policy.” *Id.* “In efforts to gain approval” for the new exclusion, the Mutual Insurance Rating Bureau (a predecessor to the Insurance Services Office) submitted an exploratory memorandum to the regulatory authorities of most states in which it stated:

Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended

and thus are excluded by the definition of occurrence. The above exclusion clarifies this situation so as to avoid any questions of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident.

Id. at 1104. An internal underwriter's handbook from the same time period confirmed this framing, noting that "the exclusion simply reinforces the definition of occurrence," which together provide that the policy "will cover incidents which are sudden and accidental—unexpected and not intended." *Id.* at 1105. Tellingly, in submitting the pollution exclusion to state regulatory boards, insurers at the time "did not apply for any corresponding premium reduction for what it now represents to have been a significant curtailment of coverage." *Id.* at 1106.

In May of 1970, insurers first introduced the pollution exclusion as a mandatory endorsement to the standard, occurrence-based CGL policy. At first, it was limited by an exception for sudden and accidental damage; then, in 1986, the industry reformulated the exclusion to be an "absolute" exclusion without any exceptions. This new "absolute pollution exclusion" disclaimed coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soots, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants." John N. Ellison & Timothy P. Brady, *The 1970 Pollution Exclusion in Comprehensive General Liability Policies: A Broken Promise to Pay?*, 34 Duq. L. Rev. 1104 (1996). According to insurers at the time, the pollution exclusion merely "clarified" the policy's definition of "occurrence" by specifying that "coverage for pollution and contamination is not provided in most cases because the damages can be said to be expected or intended and are thus excluded by the definition of occurrence." *Id.*

Despite these assurances, the following decades saw the pollution exclusion being applied to an ever-widening cross-section of claims, with relationships to traditional “pollution” that were tenuous, at best. See *Koloms*, 177 Ill. 2d at 487-8. Given the consistent, contemporaneous representations of the insurance industry, two plausible explanations emerge for the dramatic expansion of the pollution exclusion over time: either the insurance industry “intentionally misled regulators in 1970, or the industry did not intend, in 1970, that the pollution exclusion effect a significant reduction in coverage.” Ellison and Brady, *The 1970 Pollution Exclusion in Comprehensive General Liability Policies*, 34 Duq. L. Rev. at 1114. Assuming for the moment the latter, one possible alternative motivation for insurers was less substantive than performative: in the wake of repeated environmental calamities in the 1960s and 70s and a growing public awareness of environmentalism, “the insurance industry wanted to assure that it was viewed in the eyes of the public as being ‘against polluters,’ and saw the pollution exclusion as a way to effectuate this public relations goal.” *Id.*; see also *New Castle County*, 933 F.2d at 1197 (“According to the [insured], the insurers appended the exclusion onto their policies in order to reaffirm existing limits on pollution coverage, ***thus distancing themselves in the public mind from deliberate polluters.***”) (emphasis added).

In either case, whether understood as an intentional reduction in coverage for intentional pollution events or as a symbolic clarification of the fact that such events were never covered in the first instance, it is clear at least that the *originally stated* intention of the pollution exclusion was to disclaim coverage for large-scale remediation efforts caused by intentional acts of industrial malfeasance, while maintaining coverage for “innocent” accidental damages resulting from normal business operations—a coverage that, just four

years prior, had been deliberately expanded to include the “gradual adverse effects of smoke, fumes, air or stream pollution, contamination of water supply or vegetation.” Melody A Hamel, *The 1970 Pollution Exclusion in Comprehensive General Liability Policies*, 34. Duq. L. Rev. at 1103. This explanation best comports with the contemporaneous explanations of insurers, who assured both government and the public alike that no reduction in coverage for normal accidents was intended, and with the zeitgeist of the time, characterized as it was by outrage at the egregious acts of largescale deliberate industrial polluters.

III. Adoption of the Permit Rule Best Resolves the Pollution Exclusion’s Fundamental Ambiguity.

The absolute pollution exclusion fails to address how it should be applied in the face of permitted emissions. The Permit Rule is a fair and logical solution to address this ambiguity in the exclusion. The last century has seen dramatic shifts in the metrics by which society appraises environmental health, harm, and preservation. Starting in the early 20th Century, the budding environmental movement was concerned primarily with the public health risks of raw sewage entering public waterways and carrying disease. After World War II, this concern shifted into one for large-scale environmental damage wrought by industrial pollution. Ecological catastrophes like the Cuyahoga River fire, the Santa Barbara oil spill, and the Love Canal disaster were highly publicized and spawned a strong federal response, culminating in the creation of the USEPA and passage of landmark environmental laws like the Clean Water Act (“CWA”) and Clean Air Act (“CAA”). See Silbergeld and Graham, *The Cuyahoga is still burning*, NIH, April 2008, and Spezio, *The Santa Barbara Oil Spill and Its Effect on United States Environmental Policy*, <https://doi.org/10.3390/su10082750>.

Thankfully, these responses have been largely successful: in 1997, the USEPA reported that the air was the cleanest it had been since record keeping began in 1970, and in 2020, it reported that 74% of the nation's waterways were safe for swimming and fishing, more than double the amount from thirty years prior. USEPA, *50th Anniversary of the Clean Air Act*, www.epa.gov/clean-air-act-overview/50th-anniversary-clean-air-act (accessed July 22, 2025); USEPA, *Providing Safe Drinking Water in America: 2020 National Public Water Systems Compliance Report*, www.epa.gov/compliance/providing-safe-drinking-water-america-2020-national-public-water-systems-compliance (accessed July 22, 2025). Locally, Illinois rivers have seen the reemergence of “sentinel” species such as the river otter. Illinois Department of Natural Resources, *River Otters Make their Return to Urban Chicagoland Area*, <https://outdoor.wildlifeillinois.org/articles/river-otters-make-their-return-to-urban-chicagoland-area> (accessed August 27, 2025). River otters are highly sensitive to human pollutants and human activity, and thus their presence in Illinois waterways is a sign of “positive waterway health.” *Id.*

With the success of the regulations emerging out of the 1970s came a second paradigm shift. Having cleared the “low-hanging fruit” of large-scale toxic events - archetypically caused by the negligence, recklessness, greed, and general malfeasance of industrial polluters⁴ - environmentalism moved on to a far broader and more systemic approach to the *prevention* of all manner of mundane, invisible, and ephemeral risks to public health and the environment. Today, the EPA regulates industrial emissions of 188

⁴ See, e.g., *Love Canal and the Poisoning of America*, The Atlantic, Dec. 1979 at p. 27 (“Despite knowing children were playing on the site and suffering burns from exposed residues, Hooker [Chemical] chose not to issue public warnings to avoid legal repercussions.”)

airborne and 126 waterborne categories of chemical and organic compounds and offers effluent guidelines for numerous others. USEPA, *Toxic and Priority Pollutants Under the Clean Water Act*, www.epa.gov/eg/toxic-and-priority-pollutants-under-the-clean-water-act (accessed July 22, 2025).

Accompanying this shift in focus for environmental law has been a parallel shift in our scientific understanding of environmental harm, from one “where the causal relation between the activity and the resulting damage was relatively clear, to the maddeningly complex world of risk assessment and management.” A. Dan Tarlock, *Environmental Law: Then and Now*, 32 Wash. U. L.J. & Policy 1, 26 (2010) (hereafter cited as “Tarlock”). Paradigmatic of this framework, the National Emissions Standards for Hazardous Air Pollutants (“NESHAP”) requires industries to implement the “maximum degree of reduction in emissions” feasible, mandates constant monitoring of point sources, and sets emissions targets at levels designed to “provide an ample margin of safety to protect human health or to prevent an adverse environmental effect.” USEPA, *Fact Sheet: Proposal to Repeal Revisions to the Mercury and Air Toxics Standards for Power Plants*, June 11, 2025, p. 3. Yet, even within this “margin of safety,” each NESHAP specifies a maximum allowable increase in cancer risk from a given industrial activity. *Id.* This fact provides the key to understanding the modern, risk-based framework: “safe” within this framework does not mean “entirely without risk,” since risk can only ever be reduced, never fully eliminated. For an activity to be “safe” means only that its inherent risks have been reduced to carefully calibrated levels.

The “maddening complexity” of these numbers lies in the fact that, fundamentally, it is “almost impossible to prove that low-level exposure to many chemicals [is] either safe

or unsafe.” Tarlock, 32 Wash. U. L.J. & Policy at 26. The difference between 100 out of one million (.01%) and 1000 out of one million (.1%) is simply too small for science to measure against the “baseline” lifetime cancer rates of approximately 40% for individuals living in the United States.⁵ Thus, even for an individual diagnosed with a specific cancer in the vicinity of industrial activity known to increase risk of that cancer, “precise causation” is “often speculative,” as our science cannot “definitively establish causal links between low-level exposures and specific health effects like cancer.” *Id.*, p. 27.

It is this same maddening complexity that renders the insurers’ view of the pollution exclusion ambiguous in exactly the way outlined thirty years ago by this Court in *Koloms*:

[W]e believe that a purely literal interpretation of the disputed language, without regard to the facts alleged in the underlying complaints, fails to adequately resolve the issue presented to this court. Like many courts, we are troubled by what we perceive to be an overbreadth in the language of the exclusion as well as the manifestation of an ambiguity which results when the exclusion is applied to cases which have nothing to do with “pollution” in the conventional, or ordinary, sense of the word. See, *e.g.*, *Minerva Enterprises, Inc. v Bituminous Casualty Corp.*, 312 Ark. 128 (1993).

177 Ill. 2d 473, 488-489. One key implication of the risk-based framework is that no objective line can ever be drawn between safe and unsafe levels of emissions. There is no environmental regulation capable of rendering industrial activity perfectly safe. Yet, the absence of such objective criteria has not prevented the USEPA and other regulators from creating standards for industrial activity with the goal of punishing polluters and promoting

⁵ For an individual, this means that their personal lifetime risk of developing cancer increases by about 0.01% as a result of continuous lifetime exposure to the maximum level of environmental EtO permitted by law (for reference, the baseline lifetime cancer risk for individuals residing in the United States is about 40%). At a population level, it means that for every 1 million people exposed continuously to EtO emissions for 70 years at the maximum permitted level, approximately 100 cancers would be expected to develop that would not have developed otherwise. Nat’l Cancer Institute, *Cancer Statistics*, <http://www.cancer.gov/about-cancer/understanding/statistics> (last visited July 22, 2025).

public safety. This apparent paradox can only be resolved by understanding that “safe,” in the environmental context, means something other than “containing no risk,” and “pollution” something other than “capable of causing harm.” Objectively, nothing is entirely safe; everything is potentially harmful. These concepts only become useful when placed in their proper social context.

While *Koloms* curtailed some of the unchecked expansion of the pollution exclusion, by limiting it to an industrial context, the exclusion remains ambiguous within that narrowed industrial context, where it potentially applies to virtually every emission of virtually every industry on the planet. Nor will this problem be resolved by time. In fact, it will only get worse, as our scientific understandings improve and allow us to discern ever more nuanced connections between industrial activity and its resulting harm. Were the Court to adopt the view urged by Defendants-Appellants, then no amount of safety or regulatory oversight would ever be sufficient to assure policyholders of coverage for their everyday business activities; some trace of risk would always remain. Paradoxically, as industrial activity grows ever-safer, and its associated risks ever-more-attenuated, the ambiguity remaining in the pollution exclusion will only grow more pronounced. Would it still be pollution, one is left to wonder, if the risks of an emission could be reduced to one in a billion, or one in a trillion? The insurers must answer “yes”, since the plain language of the pollution exclusion makes no reference to quantity or level of danger, and, as Defendants-Appellants argue, this plain, unambiguous language must be honored.

Yet, this was the very danger decried by *Koloms*, which was troubled by “an overbreadth in the language of the exclusion” that “raises an issue as to whether the exclusion is so general as to be meaningless.” *Koloms*, 177 Ill. 2d at 488. In the face of this

ambiguity, *Koloms* recognized that a “purely literal interpretation of the disputed language ... fails to adequately resolve the issue presented to this court,” and so chose to limit its scope based on its historical purpose. Limiting the exclusion to the area of traditional industrial activity was an important countermeasure that prevented it from becoming truly all-encompassing. Yet, within the area of industrial activity, the exclusion remains a Leviathan threatening to swallow up the entirety of coverage, its plain language seemingly applying to every single industrial actor and activity.

By adopting the interpretation urged by Plaintiffs-Appellees, the Court will finally resolve this ambiguity in its last remaining vestige, providing a clear metric by which industrial actors can know with certainty whether or not their everyday business activities are covered by their CGL policies. Only this interpretation is able to cut through the Gordian knot of “risk” and “safety” that problematizes every other definition of “pollution”. For if the inherent qualities of an emission cannot form an objective basis for defining it as pollution, then neither can a legal framework based on those definitions provide any predictability or certainty to policyholders, who deserve to know whether or not their everyday business activities are covered by their CGL policies.

IV. Traditional Canons of Policy Interpretation Still Apply Here and They Demand Coverage, Too.

A. Illinois’ Specific-Exclusion Requirement Dictates The Permit Rule.

National Union and its amici contend that emissions pursuant to lawful permits fall within liability policies’ standard pollution exclusions absent an express exception for such emissions. (Nat. Union Br. at 3.) National Union claims “this Court’s precedent ... precludes a government-authorization exception,” and that when coverage turns “on whether the insured’s conduct was authorized by a governmental authority, the policies

explicitly include language to that effect.” *Id.* at 4, 24. An amicus says the pollution exclusion should apply “where discharges of pollutants are inherent in or incidental to the policyholder’s normal business operations.” (Am. Prop. Cas. Ins. Ass’n Br. at 19-20.) But, National Union and its amici have Illinois law backwards:

It is well settled under the law of Illinois, as well as most other jurisdictions, that if an insurer does not intend to insure against a risk which is likely to be inherent in the business of the insured, it should specifically exclude such risk from the coverage of the policy. *Canadian Radium & Uranium Corp. v. Indemnity Insurance Co.*, 411 Ill. 325, 334-335, 104 N.E.2d 250 (1952). This compliments the general rule that contracts of insurance should be liberally construed in favor of the insured and against the insurer.

Bremen State Bank v. Hartford Acci. & Indem. Co., 427 F.2d 425, 427 (7th Cir. 1970).

Having failed to specifically exclude ethylene oxide emissions pursuant to lawful permits, National Union cannot avoid insuring a risk inherent in Griffith and Sterigenics’ business.

1. This Court Espoused The Specific-Exclusion Requirement Nearly 75 Years Ago.

As the Seventh Circuit noted, this Court set out the “specific-exclusion requirement” for risks inherent in an insured’s business in *Canadian Radium & Uranium Corp. v. Indemnity Insurance Co.*, 411 Ill. 325 (1952). Canadian Radium had developed “a process for producing radon ointment” and “granted Radium Industries, Inc., a license to produce and distribute the ointment.” *Id.* at 326. Canadian Radium supplied Radium Industries with “a sufficient amount of radium in solution for the production of the ointment, together with an emanator and other necessary equipment and supplies” for the production. *Id.* Radium Industries laboratory technician Mary Moore claimed she sustained bodily injuries due to exposure to the radium while working to produce the ointment. Canadian Radium’s comprehensive general liability insurer denied coverage for her suit on the ground that the policy covered sickness or injury caused by “accident,” a

term Workmen's Compensation Act cases had held must be "traceable to a definite time, place and cause" rather than a long term exposure. *Id.* at 328-30. This Court rejected that denial because insurance policy ambiguities must be resolved in favor of the insured "since the insurer prepares the contract." *Id.* at 335. In explaining the specific exclusion requirement aspect of that ambiguity rule, this Court stated:

This rule is particularly applicable where, as here, the very name of the plaintiff should have informed the insurer of the likelihood of occurrences such as the one described in Mary Moore's complaint against plaintiff in the Federal Court, and induced it, if it did not intend to insure against such a risk, to exclude specifically from coverage any liability because of injury, sickness or disease caused by radioactivity.

Id. at 335.

2. Illinois Courts Have Consistently Held To The Specific-Exclusion Requirement.

Illinois courts have applied the specific-exclusion requirement many times after *Canadian Radium* in many different circumstances. In *Triple-X Chemical Labs., Inc. v. Great Am. Ins. Co.*, 54 Ill. App. 3d 676, 679-80 (1st Dist. 1977), the court held that a fire insurer could not rely on a policy's "increase in hazard" provision where "approximately 20 percent of" the insured's "business consisted of mixing, manufacturing and packaging of flammable substances" while using some machines that were not explosion-proof. The court explained:

Accepting defendant's allegations as true and correct, they do not substantiate defendant's defense of increase of hazard. In the absence of fraud or deceit, which are not alleged here, an insurer is deemed to insure against the risks inherent in the business of the insured at the time the policy is issued. In determining the nature and extent of the risks insured against, the insurer is bound by what it knows or should have known concerning the normal and customary hazards inherent in the insured's business. If the insurer does not intend to insure against a risk which is necessarily incident to the business of the insured, it should specifically exclude such risk from the coverage of the policy.

... At the inception of the policy both explosion-proof and non-explosion-proof machines were located on plaintiff's premises. Even a routine inspection of those premises would have revealed that flammable substances were stored in close proximity to non-explosion-proof machines. This would place defendant on inquiry as to whether such machines were used in connection with flammable substances. Since an increase in hazard clause is for the benefit of the insurer, a company which knows or ought to know of facts which would entitle it to take advantage of the clause should not be permitted thereafter to retain the insured's premium and treat the policy as if in full force until a loss occurs and then for the first time seek to secure a forfeiture.

54 Ill. App. 3d at 679-80 (citations omitted). Under those facts, the insurer could not rely on "unexpressed and unwritten assumptions" that the insured "would not use non-explosion-proof machines in connection with flammables" to escape coverage. *Id.* at 680.

The specific-exclusion requirement also defeated an insurer's effort to avoid coverage to its insured messenger company for injuries a pedestrian sustained during a collision with a bicycle riding messenger in *Dash Messenger Service, Inc. v. Hartford Ins. Co. of Illinois*, 221 Ill. App. 3d 1007, 1011 (1st Dist. 1991). The insurer relied on policy terms that restricted coverage to "an occurrence and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto" and defined the "insured premises" as the insured messenger company's headquarters. *Id.* at 1011. Citing *Canadian Radium* and cases that followed it, the court reasoned:

An off-premises bicycle accident is a normal and customary risk likely to be inherent in a messenger business. The name of the applicant and the description of the business in the application should have put Hartford on notice of this risk. Moreover, as in *Triple-X*, the slightest inquiry would have put the insurer on notice that the business was conducted almost exclusively off the premises. Hartford has failed to point to anything in the record indicating that it notified Dash, J.M.B. or Daniel Berman prior to the occurrence that this risk was not covered by their policy, let alone that it excluded this risk in the policy itself.

Id. at 1014 (citations omitted).

The following year, the specific-exclusion requirement was quoted in upholding coverage under a board of education liability insurance policy in *University of Illinois v. Continental Cas. Co.*, 234 Ill. App. 3d 340, 351 (4th Dist. 1992). A few years after that, in *Missouri Pac. R.R. v. American Home Assur. Co.*, 286 Ill. App. 3d 305 (2d Dist 1997), the court relied on the specific-exclusion requirement in rejecting insurers’ attempt to escape coverage for noise induced hearing loss (“NIHL”) claims against the railroad they insured. The court held that “if the insurers in this case knew about NIHL and issued the CGL policies without an exclusion, they cannot claim that they are not liable for these losses.” *Id.* at 315.

In *Great American Ins. Co. v. West Bend Mut. Ins. Co.*, 311 Ill. App. 3d 534 (1st Dist. 2000), the court applied the specific-exclusion requirement to preclude a general contractor’s insurer from escaping coverage for a Structural Work Act suit. After quoting *Dash Messenger*’s holding that an insurer not intending to insure a risk likely to be inherent in the insured’s business must specifically exclude the risk, the court held:

Construction work frequently entails a risk of injury due to violations of the Act. The insurance policy here has no provision clearly excluding coverage for violations of the Act or other statutory torts, although West Bend easily could have modified its policy so to provide. We hold that the policy here could provide coverage for violations of the Act....

311 Ill. App. 3d at 539-40 (citation omitted).

The specific-exclusion requirement defeated Maryland Casualty’s effort to use “the territoriality provisions of” a policy to avoid coverage for another “worker’s compensation claim filed in Illinois” in *Lenny Szarek, Inc. v. Md. Cas. Co.*, 357 Ill. App. 3d 584, 585 (1st Dist. 2005). The court held that provision “should be construed as setting forth only a choice of law provision” requiring applying Wisconsin law “regardless of where the claim

is filed” rather than one restricting coverage to suits filed in Wisconsin. *Id.* at 590. The court said its approach was “consistent with the general principle” that policy language that can be interpreted multiple ways “should be construed against the insurer and in favor of coverage.” *Id.* It continued:

This approach further comports with the well established principle that “if an insurer does not intend to insure against a risk which is likely to be inherent in the business of the insured, it should specifically exclude such risk from the coverage of the policy,” which Maryland could easily enough have done.

Id. at 590-91 (quoting *Univ. of Ill.*, 234 Ill. App. 3d at 351) (quoting *Bremen*, 427 F.2d at 427).

Finally, the specific-exclusion requirement was decisive in preserving coverage in the face of another “designated-premises endorsement” in *Indiana Ins. Co. v. Royce Realty & Management, Inc.*, 2013 IL App (2d) 121184, ¶ 34. There, a property management company sought coverage under a policy Indiana Insurance Company had issued for a suit to recover injuries to Cathy Stackhouse when a tree fell on her while she was walking on a golf course the insured oversaw. The court rejected the insurer’s reliance on an endorsement that purported to restrict coverage to claims arising out of “the ownership, maintenance or use” of the insured’s offices. *Id.* ¶ 23. The court held that Illinois’ “principle” that “if an insurer does not intend to insure against a risk likely to be inherent in the insured’s business, the insurer should expressly exclude that risk from the coverage of the policy” applied. *Id.* ¶ 33 (quoting *Dash*, 221 Ill. App. 3d at 1014). It explained:

Indiana knew that Royce Realty was in the business of providing property management services to a variety of commercial properties, including golf courses, townhouses, and shopping centers. The potential for accidents that could give rise to lawsuits against such a property manager is obvious. Indeed, the very type of accident experienced by Stackhouse was “a risk likely to be inherent in the insured’s business.” Nevertheless, Indiana chose to issue Royce Realty a CGL policy—a type of policy intended to protect

against risks associated with business operations—but then apparently sought to quietly convert it to a premises liability policy (that would leave such risks without coverage) by simply inserting the Endorsement into the policy. Like the court in *Dash*, we find that the designated premises endorsement did not qualify as an express exclusion that would put the insured on notice that the fundamental nature of the policy had changed and that most of the coverage under the CGL policy was nullified.

2013 IL App (2d) 121184, ¶¶ 23, 33 (citation omitted).

3. The Specific-Exclusion Requirement Dictates Coverage Here.

The specific-exclusion requirement applies here. As shown above, National Union and its amici recognize that emissions due to an insured’s permit are inherent in its operations. An insurer can learn of them in underwriting a risk. National Union should have complied with Illinois’ specific-exclusion requirement, which has been a feature of Illinois law since at least this Court’s 1952 *Canadian Radium* decision. National Union should not be allowed to ask this Court to supply the specific exclusion it failed to include.

The express exclusion requirement not only defeats National Union’s pollution exclusion argument, it serves the very interest National Union urges in disputing coverage. National Union says that “[t]o price insurance accurately, insurers generally need [to] know what risks they are assuming at the time the policy is issued.” (Nat. Union Br. at 24.) Policyholders need to know the same thing, and requiring express inclusion of permitted emissions is designed to ensure that both parties know whether the risks of those emissions are covered.

National Union’s lament that much “pollution would fall outside the exclusion” if emissions pursuant to permits are not included within the exclusion is another false contention. (Nat. Union Br. at 32.) Insurers are free to exclude emissions pursuant to permits as long as they specifically do so. It is unfair to ask this Court to retroactively rewrite their policies for them. Nor is National Union correct that emissions exceeding the

permits “arguably would fall outside the exclusion.” *Id.* at 33 (citing *Imperial Marble*, 2011 IL App (3d) 100380, ¶ 19.) Illinois’ Permit Rule is for emissions within permitted levels. National Union bases its argument on *Imperial Marble*’s holding that “[b]ecause Imperial operated pursuant to an emissions permit, it cannot be considered to have expected or intended to injure the underlying plaintiffs’ persons or properties” so as to fall within the policy’s “expected or intended injury exclusion.” 2011 IL App (3d) 100380, ¶ 19. That reasoning in no way negates the argument that, if insurers wish to exclude emissions-related claims from coverage, they must do so with a specific exclusion.⁶

4. Illinois’ Permit Rule Is No Outlier.

National Union is further mistaken in claiming Illinois’ Permit Rule renders it an “Outlier.” Rather than cite cases deciding the impact of an insured’s permit on what might be considered traditional environmental pollution triggering its pollution exclusion, it offers cases treating broader arguments that the exclusion cannot apply to emissions that

⁶ United Policyholders suspects that National Union may contend in reply that the First District’s *Village of Crestwood* decision in some way conflicts with applying the specific-exclusion test here, though the argument would be meritless. As noted above, *Village of Crestwood* did not involve an insured with a permit to distribute well water containing perc, and the Appellate Court stressed the lack of a permit in applying the exclusion. 2013 IL App (1st) 120112, ¶ 23. The insured cited *West Am. Ins. Co. v. Tufco Flooring East, Inc.*, 409 S.E.2d 692, 697-99 (N.C. App. 1991), which preserved coverage for “the central business activity” of an insured. The First District said it failed “to comprehend how the Village could take advantage of the “central business activity” concept when it is not the Village’s central business activity to work with the chemicals that contaminated the well.” *Id.* ¶ 24. The court added that *Koloms* cited *Tufco* without adopting its “central business activity” holding and that the First District was “not persuaded to adopt it” for the case before it. *Id.* *Village of Crestwood* said nothing about the specific-exclusion requirement this Court established, something that apparently was not argued to it, nor did it suggest that requirement would not apply where a business operated under a permit that rendered claims arising from that operation a risk inherent in that business. “A reviewing court opinion is a precedent only for what is actually decided” rather than questions not reached by the court. *In re David B.*, 367 Ill. App. 3d 1058, 1067 (5th Dist. 2006).

were “legal” in nature. (Nat. Union Br. at 37-40.) Such cases in no way undermine Illinois’ Permit Rule or the specific exclusion requirement’s support of it. The impact of a permit on the pollution exclusion has been noted outside of Illinois as well. See *JTO, Inc. v. Travelers Indem. Co. of Am.*, 242 F. Supp. 3d 599, 607 (N.D. Ohio 2017) (complaints claiming “that over the course of several years JTO dredged and filled protected wetlands without a permit to do so” alleged “traditional environmental contamination”).

Illinois’ Permit Rule enjoys commentator support, too. In Robert Hartzer, *Comment: Construing the Pollution Exclusion in Illinois*, 52 UIC J. Marshall L. Rev. 805, 829 (2019), the author explained that “construing the [absolute pollution exclusion] to be ambiguous when applied to permitted emissions is firmly rooted in the methods commonly used to interpret insurance policies.” National Union’s contention that “everyone would understand” that emissions pursuant to permits constitute “heartland ‘pollution’” also rings hollow. (Nat. Union Br. at 33.) That Illinois courts have consistently held that emissions pursuant to permits fall outside the exclusion disproves National Union’s contention.

V. Continued Adherence to the Permit Rule Promotes Sound Public Policy.

A. It Is Sound Public Policy to Encourage Businesses to Adhere to Regulatory Permits.

National Union further errs in arguing that Illinois’ Permit Rule operates to “encourage pollution in Illinois and could disrupt insurance markets.” (Nat. Union Br. at 41.) Nonsense. Just the opposite is true. As long as the insurance industry resists following Illinois’ specific exclusion rule for risks that are inherent in the businesses they insure, like those posed by EtO for sterilizers, the existence of the Permit Rule will encourage all businesses in Illinois to make sure they have permits and strictly follow their requirements to avoid application of the pollution exclusion, thus reducing pollution in Illinois.

As the commentator cited above observed, holding emissions pursuant to permits outside the standard exclusion “makes for sound public policy.” 52 UIC J. Marshall L. Rev. at 830. As he noted:

The purpose of using permits is to prevent excessive amounts of pollution by balancing the benefits of industry against the costs of pollution. Permitting thus represents an attempt by policy makers to strike a balance between industry and society. This balance should be considered when it is applicable to the [absolute pollution exclusion].

Id. at 831 (footnote omitted). Issuance of a permit is a determination by the Illinois Environmental Protection Agency that the policyholder’s business activity, such as the lifesaving sterilization of surgical instruments by Griffith and Sterigenics, outweighs the public health risk posed by the industry’s limited emissions. The Permit Rule ensures that courts are aligned with the regulators making this determination, incentivizing the industrial activity that has been deemed worthy of pursuit by democratically-elected officials and accountable public institutions. Simultaneously, it allows for punishment of industrial actors who act outside of the law or fail to adhere to its standards.

Businesses acting in good faith to restrict their activities in accordance with governmentally approved limits should not be punished by a legal framework that treats this good behavior as irrelevant. This is doubly true with regard to an exclusion that the Court has held to be overbroad and ambiguous in its application.

B. The Sky Is Not Falling

Nor will the insurance markets be upended by continued adherence to the Permit Rule. The Rule simply requires an insurer to specifically exclude emissions pursuant to a permit if it intends not to cover claims stemming from them. Conversely, insurers can continue to rely on existing policy language to exclude damages arising from traditional environmental pollution, a category that includes industrial emissions in the absence of, or

in excess of, a valid permit. Importantly, the insurers' hollow claim of industry-wide damage is no basis to decide coverage: insurance policies should not be interpreted with the Court's thumb on the scale, to the benefit of either insurer or policyholder, because of the impact the result would have to that party's industry. The insurance industry should not be favored over the manufacturing industry. Rather, insurance contracts should be interpreted according to long-standing precedent and established rules of construction.

Too often, when insurers have faced a significant new loss, or when laws have changed that may lead to a proverbial avalanche of claims, insurance companies have sounded a false alarm of industry-wide insolvency. Typically, this is paired with a claim that their insurance policies "never meant to cover that." Of course, the serially predicted death of the insurance industry has again and again turned out to be greatly exaggerated. This was true thirty-five years ago, when insurers predicted their own bankruptcies from the liability from claims launched by CERCLA⁷, just as it was true when the same occurred with regard to asbestos, hurricane Katrina, and the World Trade Center attacks on 9/11. In all cases, the predicted crisis never materialized; insurers survived, despite the fact that many courts found a basis for coverage. As stated in a recent law review article:

The right lesson to draw from this experience is not that insurance markets need legal certainty, but rather that insurance markets are resilient and innovative enough to handle even extreme legal uncertainties. If the liability insurance market can absorb widespread, retroactive, and truly strict liability for asbestos injuries and the costs of cleaning up hazardous waste, then legal scholars, judges, and legislators can safely focus more on identifying the just distribution of legal rights and obligations and less on

⁷ In testimony given before Congress in 1990, insurance industry representatives sounded the alarms, claiming that the cost of cleaning up even part of the pollution issues will be five times their total "surplus" and could be ruinous. *See Insurer Liability for Cleanup Costs of Hazardous Waste Sites*, No. 101-175 (101st Cong., 2d Sess., Sept. 27, 1990) (Committee on Banking, Finance, and Urban Affairs), pp. 18-29 and 75-76.

the destabilizing impact that moving toward that distribution might have on insurance markets.

Tom Baker, *Uncertainty > Risk: Lessons for Legal Thought from the Insurance Runoff Market*, 62 B.C. L. Rev 59, 105 (2021). It would be unwise and unjust to allow professed concerns about the number of claims and amount of losses facing the industry to guide the interpretation of the terms of the policy before the Court. Rather, the appropriate thing to do is to follow the rules of construction and let precedent and sound legal reasoning guide us where they may.

In fact, enforcing an insurer's defense obligation promotes Illinois' public policy. This Court has recognized that "the state has an interest in having an insured adequately represented in the underlying litigation." *Cincinnati Companies v. West American Ins. Co.*, 183 Ill. 2d 317, 329 (1998). Policyholders who are owed a defense should not have to go it alone. Moreover, a "fundamental policy of Illinois is that when payment of a premium is made by an insured and accepted by the insurance company and coverage is promised in return therefor, the insurer should be required to fulfill its contractual obligations." *International Surplus Lines Ins. Co. v. Pioneer Life Ins. Co. of Ill.*, 209 Ill. App. 3d 144, 157 (1st Dist. 1990). National Union's request that this Court protect insurer profits at the expense of their policyholders should be refused.

CONCLUSION

Accordingly, the Court should answer the certified question in favor of Plaintiffs-Appellees Griffith Foods International Inc., Griffith Foods Group, Inc., and Sterigenics U.S., LLC and hold that a business complying with valid permits issued by environmental regulators is not engaged in "traditional environmental pollution" within the meaning of

Koloms, and that the pollution exclusion is therefore not applicable to its regulated emissions.

Dated: August 27, 2025

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that this Brief conforms to the requirements of Illinois Supreme Court Rules 341 and 345. The length of this Brief, excluding the 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 appended to the brief under Rule 342(a) is 10,138 words.

Dated: August 27, 2025

/s/ John S. Vishneski III

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the foregoing **BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS** was electronically filed via the Odyssey efileIL system and a copy of the foregoing document was served upon the attorneys of record of all parties to the above-styled case by serving same via email and the Odyssey efileIL system.

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