SUPREME COURT OF THE STATE OF COLORADO
CASE NO. 89SC646

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

HECLA MINING COMPANY, a Delaware corporation,
Petitioner,

v.

NEW HAMPSHIRE INSURANCE COMPANY and INDUSTRIAL INDEMNITY COMPANY,
Respondents.

CERTIORARI TO THE COLORADO COURT OF APPEALS
(Case Nos. 87CA0082, 87CA0092)

Division II
Opinion by Judge Kelly, Metzger and Marquez, J.J., concurred

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TAB 24 Industrial Indemnity Advertisement, Risk Management Magazine at 55, Sept. 1987.

TAB 25 Abraham, "Environmental Liability and the Limits of Insurance," 88 Col. L. Rev. 942, 954-55 (1988).

Testimony of Kenneth S. Abraham, Rulemaking Proceeding Regarding the Appropriate Regulatory Treatment of the Manufacturing Site Cleanup Costs, DPU No. 89-161, Vol. I, transcript at 190-91, 200 (Feb. 15-16, 1990).

ISSUE CERTIFIED FOR REVIEW

Whether the Court of Appeals erred in ruling as a matter of law that Hecla Mining Company's "mining activities were outside the scope of coverage" of standard-form comprehensive general liability policies and that the plaintiff insurance companies had no duty to defend Hecla, a third-party defendant in the ongoing CERCLA lawsuit, and no duty to indemnify Hecla if it were found liable?

STATEMENT OF THE CASE

The Colorado Municipal League hereby adopts and fully incorporates by reference the Statement Of The Case in the opening brief to be submitted to this Court by Petitioner, Hecla Mining Company.

SUMMARY OF ARGUMENT

Comprehensive general liability ("CGL") policies provide broad coverage for all potential liabilities, unless expressly and clearly excluded from coverage. Insurance companies intended standard form CGL policies to provide coverage for pollution-related liabilities, whether gradual or instantaneous.

Insurance policies should be interpreted in accordance with the reasonable expectations of policyholders that standard form CGL policies provide coverage for pollution-related liabilities. Insurance companies, and their parent corporations,

have themselves espoused this expectation of coverage as reasonable.

For more than six decades, insurance companies have sold "loss control" services as an important part of their coverage programs. It is unreasonable that a policyholder who pays for these services should lose coverage because the insurance company which collects the premiums failed properly to control the loss.

Standard form comprehensive general liability policies do not have either an "ordinary consequences" or a "foreseeability" exclusion. The correct interpretation of the CGL policy bars coverage only where the policyholder subjectively expects or intends specific harm giving rise to the liability for which coverage is sought. Imposition of a "foreseeability" standard would deny coverage to tortfeasors for mere negligence. This would nullify the purpose of insurance -- to insure against tort liability.

INTEREST OF AMICUS CURIAE

Amicus Curiae Colorado Municipal League ("The League") is a non-profit organization representing the interests of Colorado municipalities. Many of these municipalities provide waste treatment and disposal services for their residents, and some own and operate sanitary landfills as a public service.

This case presents an issue of exceptional importance to Colorado municipalities. The Court of Appeals' decision deprives taxpayers of millions of dollars of insurance coverage

for the most significant form of property damage liability now facing many municipalities -- environmental cleanup costs.

The standard form comprehensive general liability insurance policies issued to Hecla Mining Company are virtually identical to CGL policies sold to many municipalities. Industrial Indemnity Company and New Hampshire Insurance Company are seeking improperly to use the courts as a forum for nullifying these standard form CGL policies.

Environmental cleanup liabilities may arise out of private-party lawsuits brought by persons in the vicinity of pollution-related property damage. More often cleanup liability is imposed under various federal and state remedial statutes.[2] The state and federal statutes and regulations impose strict, retroactive, and joint and several liability.

The net of these environmental cleanup laws is far-reaching: potentially responsible parties ("PRPs") include past and present owners and operators of property where hazardous waste is located, in addition to waste transporters and generators. Municipalities face the prospect of liability because they may fall into one, or even all, of these categories.[3]

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2. Liability arises under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") of 1980, as amended, 42 U.S.C. § 9601 et seq. and the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq. See also Colo. Rev. Stat. §§ 25-15-301 et seq. (1989); Colo. Rev. Stat. §§ 25-16-101 et seq. (1989).

3. Even though municipal activities are conducted for the benefit of the public, there is only one limited exception carved (continued...)

The financial consequences of revitalizing polluted natural resources is staggering. The EPA estimates that the average Superfund cleanup costs between $20 and $30 million per site.[4] Absent insurance coverage, these costs will strain the limited budgetary capacity of many municipalities and jeopardize their ability to provide essential public services.

One point cannot be overstated: the position of The League in this case is not unique. Standard form CGL insurance policies cover a policyholder's liability for environmental damages. This interpretation is endorsed by well over a score of governmental entities that have supported policyholders in

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out for municipalities in the hazardous waste regulations. The United States Environmental Protection Agency ("EPA") recently announced it would not name as PRP's municipalities, in actions brought by the government under CERCLA, if the municipality disposed exclusively of household waste. However, "[n]othing in the interim policy affects any party's potential legal liability under CERCLA . . . [it] does not mean that potential CERCLA legal liability no longer applies. In particular, nothing in the interim policy precludes a third party from initiating a contribution action." See Municipal Settlement Policy, 54 Fed. Reg. 51071 (December 12, 1989).

4. The cities of Englewood, Littleton and Lakewood, Colorado are currently faced with potential environmental liabilities in the multi-million dollar range. These cities disposed of municipal waste at Lowry Landfill in Denver. The United States Environmental Protection Agency named Englewood and Littleton as potentially responsible parties under CERCLA for cleanup of the Lowry Landfill. Both cities are parties in a declaratory judgment action against their insurance companies pending in the United States District Court for the District of Colorado. The cities are seeking a declaration that their insurance companies have a duty to defend and indemnify the cities in the underlying environmental action. City of Littleton v. Commercial Union Assurance Co., No. 89-C-859 (complaint filed D. Colo. May 17, 1989).

insurance coverage actions similar to this case.[5] Not a single

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5. Many public entities are playing a prominent, active role as Amici Curiae in these cases. See Memorandum of the United States as Amicus Curiae in Support of Certification (filed June, 1990), Jones Truck Lines v. Transport Insurance Co., No. 72650 (S. Ct. Mo.); Brief of Amicus Curiae State of Colorado (filed July 27, 1990), Hartford Accident & Indem. Co. v. Broderick Investment Co., No. 90-1112 (D. Colo.); Amicus Curiae Brief on Behalf of Wisc. Public Intervenor, et al., (filed Nov. 8, 1989), Just v. Land Reclamation, Ltd., No. 88-1656 (Wisc. S. Ct.); Brief of Amici Curiae State of Delaware and Commonwealth of Pennsylvania in support of Appellee New Castle County (filed April 6, 1990), New Castle County v. Continental Casualty Co., Nos. 89-3814, 90-3012, 90-3030 (3d Cir.) Supplementary brief of respondent State of New Jersey, Department of Environmental Protection (filed Feb. 13, 1990), State of New Jersey Environmental Protection v. Signo Trading, Inc., No. 30 960 (N.J. Sup. Ct.); Brief and appendix on behalf of amicus curiae New Jersey State League of Municipalities (filed Feb. 2, 1990), Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co., No. A-694-89T1 (N.J. Super. Ct., App. Div.); Amicus curiae brief of the Insurance Commissioner of West Virginia (filed Jan. 17, 1990), Liberty Mut. Ins. Co. v. Triangle Indus., Inc., No. CC999 (W. Va. Sup. Ct. App.); Memorandum of the State of Maryland as amicus curiae in support of the motion of appellant Allied-Signal Inc. for certification of certain questions of law to the Court of Appeals of Maryland (filed Jan. 16, 1990), Travelers Indem. Co. v. Allied-Signal Inc., No. 89-2468 (4th Cir.); Application to file amicus brief and proposed brief of sixty-two California cities and counties in support of appellant and real party in interest (filed Jan. 9, 1990), AIU Ins. Co. v. Superior Court, No. S012525 (H005467) (Cal. Sup. Ct.); Motion for leave of State of Indiana to file amicus curiae memorandum in support of plaintiff's motion for partial summary judgment (filed Dec. 28, 1989), Ulrich Chem., Inc. v. American States Ins. Co., No. 73C01-8901-CP016 (Ind. Cir. Ct., Shelby County); Brief amicus curiae of West Virginia Municipal League and West Virginia Manufacturers Association (filed Dec. 11, 1989), Liberty Mut. Ins. Co. v. Triangle Indus., Inc., No. CC999 (W. Va. Sup. Ct. App.); Brief of amicus curiae State of Missouri in support of appellants/cross-appellees (filed Dec. 11, 1989), Jones Truck Lines, Inc. v. Transport Ins. Co., Nos. 89-1759, 89-1729 (3d Cir.); Amicus curiae brief [of the Attorney General of the State of Maine] in support of appellants Norman and Julia Marois d/b/a S&M Market (filed Dec. 7, 1989), Patrons Oxford Mut. Ins. Co. v. Marois, No. KEN-89-284 (Me. Sup. Jud. Ct.); Brief and appendix for Kentucky Natural Resources and Environmental Protection Cabinet, amicus curiae (filed Oct. 16, 1989), James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., No. 88-CA-2405-MR (Ky. App. Ct.); Motion of the California Attorney General for leave to file brief as amicus curiae and amicus

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5.(...continued)
curiae brief in support of appellee Intel Corporation (filed July 19, 1989), Intel Corp. v. Hartford Accident & Indem. Co., No. 89-15165 (9th Cir.); Brief in support to petition for allowance of appeal filed on behalf of amicus curiae, Commonwealth of Pennsylvania Department of Environmental Resources (filed May 9, 1989), Lower Paxton Township v. United States Fidelity & Guar. Co., No. 93 M.D. Allocateur D.K. 1989 (Pa. Sup. Ct.); Brief of Attorney General (filed May 4, 1989), State v. Aetna Cas. and Sur. Co., No. DOL 88094569 (N.Y. App. Div.); Brief of amicus curiae, The Pennsylvania Local Government Conference in support of petition of allowance of appeal (filed May 3, 1989), Lower Paxton Township v. United States Fidelity & Guar. Co., No. 93 M.D. Allocateur D.K. (Pa. Sup. Ct.); Brief of Intervenor State of Minnesota (filed Jan. 4, 1989), Joslyn Corp. v. Liberty Mut. Ins. Co., No. C9-88-2296 (Minn. Sup. Ct.); Brief of the State of Minnesota as amicus curiae (filed Nov. 16, 1988), Minnesota Mining and Mfg. Co. v. Travelers Indem. Co., C4-88-1931 (Minn. Sup. Ct.); Application to file supplemental amicus curiae brief and supplemental brief of the California Attorney General in support of the petition for writ of mandate (filed Sept. 13, 1988), Aerojet-General Corp. v. Superior Court, No. A042785 (Cal. Ct. App.); Motion and brief of amicus curiae, The Commonwealth of Pennsylvania Department of Environmental Resources (filed Aug. 18, 1988), United States Fidelity & Guar. Co. v. Lower Paxton Township, No. 141 HBG 88 (Pa. Super. Ct.); Motion and brief of amicus curiae, The Pennsylvania Local Government Conference (filed Aug. 29, 1988), United States Fidelity & Guar. Co. v. Lower Paxton Township, No. 141 HBG 88 (Pa. Super. Ct.); Application for leave to file amicus curiae brief in support of petition for writ of prohibition or mandate and amicus curiae brief of John K. Van De Kamp, Attorney General of the State of California, in support of petitioners Aerojet-General Corporation and Cordova Chemical Company (filed July 13, 1988), Aerojet-General Corp. v. Superior Court, No. A042785 (Cal. Ct. App.); Attorney General for the State of Missouri's Petition for Rehearing En Banc (filed March 11, 1988), Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., No. 85-1940WM (8th Cir.); Brief of amicus curiae, Michigan Municipal League (filed Feb. 5, 1988), City of Evart v. Home Ins. Co.,. No. 103-621 (Mich. Ct. App.); Brief for amicus curiae, Neil F. Hartigan, Attorney General of the State of Illinois (filing date unknown), United States Fidelity & Guar. Co. v. Wilkin Insulation Co., No. 87-2684 (Ill. App. Ct.); Attorney General for the State of Missouri's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit (filing date unknown), and reply brief (filing date unknown), Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., No. 87-1953 (U.S.); Supplemental brief for the United States as amicus curiae on rehearing en banc (filed April __, 1987), Continental Ins. Cos. v. Northeastern Pharmaceutical &
(continued...)

governmental entity has filed a brief opposing insurance coverage in these cases.

Taxpayers who purchased all-risk insurance to protect against unanticipated losses should not now be forced to pay for environmental cleanups. If insurance companies are not made to honor their contractual obligations, taxpayers will be paying a TRIPLE penalty -- they will have paid premiums for the insurance coverage they did not receive, PLUS they will pay for defense costs, PLUS they will pay for cleanup of the landfills.

ARGUMENT

I. THE PURPOSE OF STANDARD FORM COMPREHENSIVE GENERAL LIABILITY POLICIES IS TO INSURE AGAINST ALL RISKS NOT EXPRESSLY EXCLUDED FROM COVERAGE

The insurance industry first promulgated standard form comprehensive general liability ("CGL") policies in 1940.[6] Standard form CGL policies, like those that are the subject of this litigation, are "all-risk" policies. These policies provide insurance coverage for all types of liability, except those liabilities specifically and explicitly excluded by the clear and unambiguous language of the policy. When a policyholder buys

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5.(...continued)
Chem. Co., No. 85-1940WM (8th Cir.); Amicus curiae brief of the Commonwealth of Massachusetts in support of plaintiff-appellee (filed May 30, 1984), Shapiro v. Public Serv. Mut. Ins. Co., No. 83-1366 (Mass. App. Ct.).

6. Prior to 1940, policyholders bought separate liability policies which provided insurance coverage for damages arising from specific causes. These policies were known as "named peril" policies.

standard form comprehensive general liability insurance, it buys five distinct services:

1. Loss Prevention and Safety Engineering Services - The insurance company helps promote safety and reduce claims;

2. Investigation - The insurance company agrees to investigate claims made against the policyholder;

3. Defense - The insurance company agrees to defend the policyholder whenever there is an attempt to impose legal liability upon the policyholder because of bodily injury or property damage;

4. Indemnity - In the event of trouble, the insurance company agrees to pay losses, settlements and judgments;

5. Loss Mitigation - In the event of trouble, the insurance company agrees to institute loss mitigation measures to minimize or to prevent claims.

When CGL policies were first sold in the 1940's, John H. Eglof, Supervisor of the Field Service for The Travelers Insurance Company, aptly proclaimed the virtues of this "comprehensive" coverage:

> How much better it is to say -- 'We cover everything except this and this and this' --instead of 'We cover only this and this and this.'
>
> * * *
>
> Since a risk cannot choose the kind of accident that will give rise to the need for liability insurance, it is wise to be protected against all losses under one policy -- One policy -- one premium and worry regarding liability insurance is off his mind.

Eglof, Comprehensive Liability Insurance: The Outside, Best's Fire & Casualty News, May 1941, at 19 (emphasis in original). [App. at Tab 1][7]

The purpose of insurance is to insure.[8] The Court of Appeals' decision, however, flies in the face of this basic concept. The Court of Appeals' decision presents a policyholder conundrum and an insurance company bonanza. The conundrum: Colorado requires mining companies to get permits. To get a permit, the mining company must have "public liability insurance." Colo. Rev. Stat. § 34-33-110(5) (1989). However, if the mining company abides by the regulations and buys insurance, the mere existence of those same regulations will prevent the mining company from collecting insurance. Hecla Mining Company ("Hecla") followed the law and purchased insurance for the very purpose for which it is now being sued.[9] By doing so, Hecla bought an empty promise.

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7. For the convenience of the Court, separately bound Appendices are submitted containing copies of relevant unreported decisions and articles cited in this brief. These materials are numbered according to the order in which they first appear in this brief and are cited as "[App. at Tab __]."

8. "[T]he courts have kept in mind that the primary purpose of insurance is to insure, or to provide for indemnity, and have so construed insurance contracts as not to defeat the dominant purpose by technical rules of interpretation."

13 Appelman, Insurance Law & Practice § 7403, at 302-03 (1976) (footnote omitted) (emphasis added).

9. The Court of Appeals' decision negates the legislative intent to "provide for personal injury and property damage protection in an amount adequate to compensate any persons damaged as a result of [mining activities]." Colo. Rev. Stat. § 34-33-110(5) (1989).

The bonanza: The insurance companies collected premiums to provide services required by state regulations. The insurance companies kept the premiums, but never have to provide the services because, they claim, the same regulations nullify the insurance companies' obligations.

According to the Court of Appeals, the mere existence of environmental or health and safety regulation is sufficient to bar coverage. Thus, all automobile drivers expect to injure others through accidents; all physicians expect to injure their patients; all industry expects employees to injure themselves or others. By this reasoning, Colorado policyholders will not be buying insurance policies, they will be buying a nullity.

Courts are, understandably, loathe to interpret insurance policies in a manner that "would require payment of premiums without coverage." D'Agostino Excavators v. Globe Indemnity Co., 7 A.D.2d 483, 493, 184 N.Y.S.2d 378, 380 (1st Dept. 1959). Indeed, in its amicus curiae brief to the Court of Appeals in this case, the Insurance Environmental Litigation Association ("IELA")[10] argued that "a contract must be construed so as to render none of its provisions completely ineffective."[11]

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10. "The IELA is a trade organization of major property and casualty insurance companies formed in part to present the position of its members in environmentally-related insurance law cases." Amicus Curiae Brief of Insurance Environmental Litigation Association at 1 (filed June 10, 1987), New Hampshire Ins. Co. v. Hecla Mining Co., Nos. 87CA0082 and 897CA0092 (Colo. Ct. App. Oct. 19, 1989) ("IELA Amicus Brief").

11. IELA Amicus Brief, supra n.10, at 12-13 (quoting Marez v. Dairyland Ins. Co., 638 P.2d 286, 291 (Colo. 1981)).

To the contrary, the Court of Appeals' decision inflates the "expected and intended" exclusion to the point of bursting the insurance bubble.

II. COLORADO POLICYHOLDERS REASONABLY EXPECT INSURANCE COVERAGE FOR ENVIRONMENTAL LIABILITIES

This Court should honor the reasonable expectations of policyholders when determining the scope of insurance coverage. "[C]ourts apply the equitable doctrine of 'reasonable expectations' and read the policy in accordance with the insured's reasonable expectations, emphasizing substance over form." Gurr, Comprehensive General Liability Insurance Coverage for CERCLA Liabilities: A Recommendation for Judicial Adherence to State Canons of Insurance Contract Construction, 61 U. Colo. L. Rev. 407, 414 (1990) (citations omitted). Courts favor insurance coverage when the language of the policy, or the actions of the insurance companies, nurtured a belief that the policyholder was covered. See Averbach, Comparing the Old and the New Pollution Exclusion Clauses in General Liability Insurance Policies: New Language -- Same Results?, 14 Envtl. Affairs L. Rev. 601, 619, n. 132 and surrounding text (1987). [App. at Tab 2]

That policyholders expect their CGL insurance to cover liability arising out of gradual pollution-related property damage is no secret to the insurance industry. Recently, Thomas Crisham and Janet Davis, partners in a law firm which regularly

represents insurance companies in disputes with their policyholders, stated:

> Once an entity is identified by a governmental agency as a party potentially responsible for the contamination of a site,...the potentially responsible party is likely to turn to its insurers, both past and present, to seek defense and indemnification for the clean-up required by the government.
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> * * *
>
> From the standpoint of the insured, in purchasing a CGL policy it purchased the broadest form of coverage available, including coverage for 'all sums' it may be liable to pay as a result of property damage, including clean-up costs.

Crisham & Davis, CGL Coverage for Hazardous Substances Clean-up, For The Defense, at 21, 30 (March 1988) (emphasis added).

Similarly, another commentator favoring the insurance industry stated:

> Businesses purchasing either comprehensive general liability ('CGL') or excess liability ('Umbrella') policies typically expect insurers to defend them against actions for violations of environmental statutes or regulations and to indemnify them for fines or penalties.

Kaufmann, Liability Insurance Coverage in Illinois for Environmental Damages, 12 ITLA J. 25, n.2 (Fall/Winter 1989) ("Kaufmann") (quoting McCall, Insurance Coverage for Environmental Liabilities, 77 Ill. B.J. 546 (June 1989)). [App. at Tab 3]

Xerox Corporation is the parent of one of the nation's largest insurance conglomerates, Crum and Forster, of which

defendant Industrial Indemnity is a member.[12] Xerox Corporation stated, in its role as a policyholder in an environmental coverage action, that "Xerox has spent and will spend millions of dollars in clean-up costs. Xerox understands that such costs were covered under the [CGL] policies." Memorandum of Law of Defendant Xerox Corporation in Support of Its Motion to Compel Plaintiff to Produce Documents, (filed May 12, 1989) Employers Insurance of Wausau v. Xerox Corp., No. B-87-625 (TFGD) at 24 (D. Conn.) ("Xerox Brief"). [App. at Tab 5] Xerox expected that environmental cleanup costs were covered by its CGL insurance policies. Surely no policyholder with expectations paralleling those of Xerox could be considered less than reasonable. Insurance policies do not mean one thing when the parent of one of the largest insurance companies in the United States is seeking coverage as a policyholder, and another thing when a Colorado taxpayer is seeking coverage.

Much of the current environmental coverage litigation focuses on the interpretation of standard-form CGL policy language. Bradbury, Original Intent, Revisionism, and the Meaning of the CGL Policies, 1 Envtl. Claims J. 279, 280 (Spring 1989) ("Bradbury"). [App. at Tab 6] Standard form CGL policies were originally developed by insurance companies with the intent of providing coverage for pollution claims arising from long-term exposure to hazardous substances. See, e.g., Just v. Land

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12. See Xerox Corporation advertisement indicating Crum & Forster is "part of Xerox Financial Services," Risk Management Magazine, June 1990. [App. at Tab 4]

Reclamation, Ltd., No. 88-1656, slip op. (Wisc. Sup. Ct. June 19, 1990) ("Just") [App. at Tab 7]; Kaufmann, supra p. 12, at 49-51.

The insurance companies' post-hoc construction of terms in the CGL policies is a disingenuous reaction to the recent rise in the number and dollar value of environmental coverage claims. It is not a principled statement of their original underwriting intent. As early as 1965, Gilbert L. Bean, a key person involved in drafting the 1966 CGL standard form policies, discussed pollution-related damage, stating that policyholders "need this protection and should legitimately expect to be able to buy it, so we have included it." Quoted in Sayler & Zolensky, Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards, Mealey's Litigation Reports (Insurance) 4425, 4432 (1987) ("Sayler & Zolensky"). [App. at Tab 8]

The most accurate indicator of the true meaning of the policy language is the meaning placed upon it by the people who wrote it. This meaning is embodied in the drafting history of the policies.[13] Many Courts have recognized the value of drafting history in considering environmental coverage claims. "Time and again courts have made clear that when they receive a timely and forceful presentation of [drafting history documents],

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13. Insurance companies initially directed the courts to this drafting history. In 1981, Travelers Insurance Company argued that the industry-wide drafting history of standardized policy language provided the best evidence of the policy drafters' intent and the parties' expectations of coverage. Travelers' Reply Memorandum in Support of Coordination (filed Jan. 8, 1981) at 7-8, Armstrong Cork Co. v. Aetna Cas. & Sur. Co., No. C 31567, consolidated into Asbestos Ins. Coverage Cases, Judicial Coord. Proc. No. 1072 (Cal. Super. Ct.) (emphasis added). [App. at Tab 9]

they will adopt the policyholders' interpretation." Price, "Evidence Supporting Policyholders in Insurance Coverage Disputes," Paper Presented at the Executive Enterprises, Inc. Environmental Insurance Litigation Inst., at 15 (1988). [App. at Tab 10] See also Price, "Evidence Supporting Policyholders in Insurance Coverage Disputes," 3 ABA J. of Nat. Res. & Envt., No. 2 at 17 (Spring 1988).

Every appellate court that has specifically mentioned the drafting history of the standard form CGL policies has ruled in favor of policyholders. See United States Fidelity & Guaranty Co. v. Specialty Coatings Co., 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1st Dist. 1989), appeal denied, 545 N.E.2d 133 (Ill. 1989); Claussen v. Aetna Casualty & Surety Co., 676 F. Supp. 1571 (S.D. Ga. 1987), question certified, 865 F.2d 1217 (11th Cir. 1989), certified question answered, 259 Ga. 333, 380 S.E.2d 686 (1989), later opinion, 888 F.2d 747 (11th Cir. 1989); Kipin Industries, Inc. v. American Universal Ins. Co., 41 Ohio App. 3d 228, 535 N.E.2d 334 (1987); Broadwell Realty Services, Inc. v. Fidelity & Casualty Co. of New York, 218 N.J. Super. 516, 528 A.2d 76 (1987). Most recently, the Wisconsin Supreme Court relied heavily on the drafting history of CGL policies in reaching its decision in Just, supra p. 13-14, slip op. at 10-13. In reaching its decision, the Just court overruled prior precedent by citing new insights provided by examining relevant drafting history.[14]

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14. In contrast, the Maine Supreme Court, in Patrons Oxford Ins. Co. v. Marois, slip op. (Me. Sup. Ct. April 2, 1990) [App. at Tab 11], did not have the benefit of the drafting history that (continued...)

Insurance companies continue to recognize that the 1966 revisions of standard form CGL policies were "undertaken principally to broaden coverage, to clarify the language of the prior standard general liability policy and to make the language more explicit." This statement was made in a brief filed by Xerox Corporation, the parent of defendant, Industrial Indemnity. Xerox Brief, supra p. 13, at 21. In the same brief, Xerox quoted a paper presented to the insurance industry which touted the 1966 revisions as covering gradual environmental damage claims:

> [C]overage for gradual BI [bodily injury] or gradual PD [property damage] resulting over a period of time from exposure to the insured's waste disposal. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation . . .

Id. (quoting G.L. Bean (Assistant Secretary, Liberty Mutual Insurance Company) in an Address to the American Society of Insurance Management (October 20, 1965)). These judicial representations, made by the corporate parent of a defendant in this case to the United States District Court in Connecticut, should be accepted by this Court.

Similarly, First State Insurance Company and a number of Lloyd's syndicates argued that:

> The courts interpreting the standard policies have unanimously determined that the length of an event's

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14.(...continued)
the Just Court found critical in reaching its decision. Contrary to the holding in Patrons Oxford, the policyholders' expectation that the pollution from leaking underground storage tanks would be covered, was reasonable. The Patrons Oxford court may well have reached this conclusion if that court had considered insurance industry statements describing the intent of the 1966 CGL policies to cover pollution damage.

> duration does not determine whether the event should be deemed an 'occurrence.' In fact, the standard definition of 'occurrence' specifically includes incidents of a 'continuing' or 'repeated' nature.

Plaintiff-Appellees' [First State Insurance Company and Lloyd's Syndicates] Brief on Appeal (filed Nov. 6, 1987) at 18-19, The Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 444 N.W.2d 813 (1989), First State's petition for leave to appeal denied, Nos. 86909, 86910, 86911 (Mich. S. Ct. July 13, 1990) (emphasis added).[15] [App. at Tab 12]

Having fostered -- if not created -- the expectation in their policyholders of coverage for environmental liability, insurance companies are now attempting to force those policyholders who face the largest amount of such liability, to abandon their expectations and to forfeit their coverage.[16] This Court

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15. First State Insurance Company petitioned the Michigan Supreme Court for realignment of parties in an attempt to repudiate the representations made by First State in the above-cited brief. In an order on July 13, 1990, the Michigan Supreme Court denied this petition "because we are of the view [First State] is not entitled to the relief requested." The Court also denied First State's motion to withdraw its petition for realignment and accepted review of the case pursuant to a petition filed by Allstate Insurance Company.

16. Insurance companies frequently contend that insurance coverage should be denied to policyholders from whom they have collected the largest premiums. Such policyholders, they say, are "sophisticated policyholders." There is no "sophisticated policyholder" exclusion in standard-form comprehensive general liability policies. This Court should be wary about judicially writing such an exclusion into insurance policies. One insurance company attempted to brand a business school graduate as a "sophisticated policyholder." Brotherhood Mut. Ins. Co. v. Roseth, 177 Ill. App. 3d 443, 532 N.E.2d 354 (1988). By insurance company standards, lawyers and judges would be the first in line to forfeit coverage.

Identical comprehensive general liability policies were sold in Colorado to governmental entities, to major corporations, to

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should honor the reasonable expectations of Colorado policyholders. The insurance companies should be held to what they said when they sold the policies, and what they said when they themselves sought insurance coverage from the courts.

III. THERE IS NO ORDINARY CONSEQUENCES EXCLUSION IN STANDARD FORM COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICIES

The Court of Appeals stated that, because the environmental liabilities now confronting Hecla were "ordinary consequences" of mining, they were expected by Hecla. There is no such thing as an "ordinary consequences" exclusion.

Policies were sold to Hecla to cover mining activities in the State of Colorado, and the insurance companies were (or should have been) aware of the regulations to which the mining industry was subject. The insurance companies cannot rely on vague exclusionary terms to limit liability from risks inherent in mining.[17] Exclusions must be stated in "clear and specific"

16.(...continued)
gas stations, to dry cleaners, to churches and charities, and to "mom and pop" grocery stores. Hecla Mining Company should not get less insurance coverage under the standard-form CGL policy than any of these other Colorado policyholders. "[I]t would be incongruous for the court to apply different rules of construction based on the policyholder because once the court construes the standard form coverage clause as a matter of law, the court's construction will bind policyholders throughout [the state], regardless of the size of their business." Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wash. 2d 869, 784 P.2d 507, 514, pet. for rehearing denied (1990).

17. See, e.g., A-1 Sandblasting & Steamcleaning Co. v. Baiden, 53 Or. App. 890, 894, 632 P.2d 1377, 1379 (1981), aff'd 293 Or. 17, 643 P.2d 1260 (1982) (exclusion could not, as a matter of law, implicitly apply to risks inherent in sandblasting operations); Sincoff v. Liberty Mutual Fire Ins. Co., 11 N.Y.2d
(continued...)

language if they are to be enforced. United Fire and Casualty Co. v. Day, 657 P.2d 981, 984 (Colo. App. 1982). Insurance companies have the heavy burden of proving each and every eleme of any exclusion, exception to the exclusion, or limitation to provision in the insuring agreements. See West v. The Credit Life Ins. Co., 30 Colo. App. 455, 494 P.2d 601 (1972); Couch, 1 Cyclopedia of Insurance Law § 79:384-385 (1983). Here, the Cou of Appeals improperly imposed words of exclusion not present in the policies.

If the insurance companies wished to exclude from coverage parties subject to mining regulations, they surely cou have. If the insurance companies wished to exclude from covera activities which were the normal consequence of mining, they could have done that too. Even if Hecla was aware damage could result from ordinary mining practices, it does not follow that such damage should, as a matter of law, be excluded from coverage.[18] The policyholder should not be "strip[ped of its]

17.(...continued)
386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962) (insurance company of household furnishings presumed to have been acquainted with risks common to homeowners, thus "vague exclusion" in "all risk" policy held not to prevent indemnity).

18. Even the president and chief executive officer of the largest United States-based international insurance company recognized that most environmental damage cases involve people who did not expect or intend harm:

> It is important to stress that [liability for environmental cleanup] is being imposed even when those responsible did not violate any laws when disposing of their wastes. The environmental regulations that we take for granted today simply did not exist then.

(continued..

protection against risks incurred in the normal operation of his business, despite the insurer's awareness of the nature of these normal operations at the time the policy was issued." National Mutual Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488, 496 (W. Va. 1987) (quoting Chemtec Midwest Services, Inc. v. Ins. Co. of N.Am., 279 F. Supp. 539, 547 (W.D. Wis. 1968)).

Virtually all policyholders are aware that damage could occur as a normal consequence of their activities. After all, there would be no reason to buy insurance if one believed one's activities were risk-free. The Court of Appeals stands alone in holding that mere awareness of the "ordinary consequences" of one's activities bars insurance coverage.

IV. THERE IS NO FORESEEABILITY EXCLUSION IN STANDARD FORM COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICIES

Comprehensive general liability policies do not exclude damage simply because a policyholder foresees a potential risk that its activities **could** result in liability for environmental

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18.(...continued)

> [I]n the majority of cases, these companies were not acting in a deliberate or irresponsible way. At the time, they were not aware of the future consequences of their waste disposal practices.

Greenberg, Financing the Cleanup of Hazardous Waste: The National Environmental Trust Fund, 1 Envtl. Cl. J. 421, 423 (Summer 1989). [App. at Tab 13] This statement was made by Maurice R. Greenberg, President and Chief Executive Officer of American Insurance Group, which owns the defendant New Hampshire Insurance Company. This Court should accept this statement by the company that owns a defendant in this case, rather than adopt the Court of Appeals' presumption of wrongdoing on the part of every member of a regulated industry.

damage. The words "foreseeable," "foresee," or "foreseeability" cannot be found anywhere in CGL policies. It is well-settled that the tort standard of foreseeability "does not apply to oust a policyholder from insurance. . . ." Heintz, Gallozzi & Gillis, Interpreting the Scope of Coverage for Unexpected Results, 2 Envtl. Cl. J. 377, 379 (Spring 1990) (citing 7A Appelman, Insurance Law and Practice §4492.02). ("Heintz") [App. at Tab 14]

Long ago, Justice Cardozo, sitting on the New York Court of Appeals, held that "[t]o restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow." Messersmith v. American Fidelity Co., 232 N.Y. 161, 163, 133 N.E. 432 (1921). More recently, in City of Johnstown v. Bankers Standard Ins. Co., the court ruled that, even if a policyholder had been warned that its waste disposal activities **could** cause harm, but had nonetheless decided to take a "calculated risk," coverage was not barred under the expected or intended language. 877 F.2d 1146, 1150 (2d Cir. 1989) (citations omitted).

The CGL policy drafters themselves intended to allow coverage for damage that was foreseeable. Statements of insurance industry spokespersons conclusively establish this. Indeed, Liberty Mutual Insurance Company, actually argued in Appalachian Insurance Co. v. Liberty Mutual Insurance Co., that if the drafters had intended to exclude foreseeable damage, they would have used the word "foreseeable" in the definition of "occurrence." Memorandum of Law in Opposition to Plaintiff's

Motion For Summary Judgment at 127, No. 78-1151A (W.D. Penn.) [App. at Tab 15]

In 1962, the drafters rejected as too broad, just such an exclusion which stated:

> This policy does not apply to bodily injury or property damage resulting from deliberate acts of omissions of the insured which with reasonable certainty may be expected to produce injury or damage.

Heintz, supra, p. 21, at 380 n.19 (quoting Minutes of Joint Forms Committee, May 2-4, 1961 (Trial Exhibit 977 in, Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. Ct.)) (emphasis added). According to one of the three insurance company representatives most intimately involved with drafting the 1966 policy, the drafters expressly rejected this proposed language because it "was too rough to inflict upon our insureds and would lead to the demand of its deletion." Heintz, supra, p. 21, at 381 n.20 (quoting Herbert P. Shoen, Asbestos Trial Transcript at 15901 (Mar. 4, 1986). In short, "[e]xpected means 'expected for a certainty.'" Heintz, at 382 (quoting Letter from Harold Schaffner, Hartford Insurance Group, to Robert F. Bauer, Asst. Secretary, Johnson & Higgins at 5 (Aug. 25, 1966)).[19]

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19. The Court of Appeals rejected the "expected to a certainty" test the CGL drafters intended. In fact, the Court of Appeals took a pro-insurance company decision and carried it yet another step toward rendering insurance a nullity. The Court of Appeals cites to Butler v. Behaeghe, 37 Colo. App. 282, 548 P.2d 934 (1976), for the proposition that "[t]he results of one's intentional acts cannot be unexpected if they are the ordinary consequences of those acts." This statement unfairly characterizes the holding in Butler. The Butler Court did hold that the plaintiff intended the ordinary consequences of his act, but

(continued...)

Not only is there no exclusion in CGL policies for foreseeable acts, there is no exclusion for willful, wrongful, or illegal acts.[20] Recently, the International Insurance Company, another Crum and Forster insurance company along with the defendant Industrial Indemnity, stated in a brief that:

> "ordinary negligence . . ., breach of implied warranty of merchantability . . ., strict liability in tort, or the violation of ordinances and/or statutes . . . would be covered under International's contract of insurance.[21]

The Court should accept the judicial representation of defendant Industrial Indemnity's affiliated company.

The Court of Appeals improperly applied an objective standard in evaluating Hecla's expectation or intent. A subjective standard should apply. This principle has been followed in environmental coverage cases. Recently, in Broderick Investment Co. v. Hartford Accident and Indemnity Co., the Court noted that the plain language of CGL policies is "the standpoint of the insured. So to that extent, it is subjective." No. 86-Z-1033 (D. Colo. October 4, 1989) transcript of bench ruling at 4, appeal pending, Nos. 90-1018, 90-1112 (appeal filed April 13,

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19.(...continued)
only "since some injury was intended." Butler, 37 Colo. App. at 288 (emphasis added).

20. But see, EAD Metallurgical, Inc. v. Aetna Cas. & Sur. Co., No. 89-7954, slip op. (2nd Cir. May 17, 1990) (Court erroneously pointed to the illegal willful and wrongful nature of EAD's acts as bar to coverage). [App. at Tab 16]

21. Brief and Argument of Defendant-Appellee, at 9, Mason v. The Home Ins. Co. of Illinois, (filed June 8, 1988) No. 3-88-0070 (Ill. App. Ct.), (emphasis added). [App. at Tab 17]

1990).[22] [App. at Tab 18] See also Iowa National Mut. Ins. Co. v. C & S Genetics, Inc., ___ F. Supp. ___, 1986 Westlaw 7822 (D. Colo. July 9, 1986). [App. at Tab 19]

Insurance companies often argue that subjective intent is hard to prove. There are two reasons why this argument has no merit. First, insurance companies established the standard and should not be heard to complain. Second, nearly all criminal cases involve a question of intent and this has not proved to be an insurmountable obstacle to prosecutors and courts. If the courts can handle subjective intent in criminal cases where the prosecution has the burden of proof beyond a reasonable doubt, surely the same courts can deal with the same issue in a civil case where the insurance company's burden is much lighter -- a fair preponderance of the evidence.[23]

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22. The highest courts of numerous states have adopted a subjective standard in construing this language. United States Fidelity and Guaranty Co. v. Armstrong, 479 So.2d 1164, 1167 (Ala. 1985); Continental Western Ins. Co. v. Toal, 309 Minn. 169 244 N.W.2d 121, 125-26 (1976); Allstate Ins. Co. v. Freeman, 432 Mich. 656, 443 N.W.2d 734, 758-63, 766-68, reh'g denied sub nom Metropolitan Prop. & Liab. Ins. Co. v. DiCicco, 433 Mich. 1202, 446 N.W.2d 291 (1989); Northwestern Nat. Cas. Co. v. Phalen, 597 P.2d 720, 724 (Mont. 1979); Breland v. Schilling, 550 So.2d 609, 611 (La. 1989); Patrons-Oxford Mutual Ins. Co. v. Dodge, 426 A.2d 888, 892 (Me. 1981); See Nielson v. St. Paul Companies, 283 Ore. 277, 583 P.2d 545, 547-48 (1978); Mohn v. American Casualty Co., 458 Pa. 576, 326 A.2d 346, 348-51 (1974); State Farm Fire & Casualty Co. v. Muth, 190 Neb. 248, 207 N.W.2d 364, 366 (1973). Cf. Allstate Ins. Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990) (Court rejected subjective standard under special child molestation circumstances but noted that, as a general rule, subjective standard would apply).

23. The subjective standard is "dictated" by the language in Hecla's policies. In a brief recently filed in the State of Washington Court of Appeals several insurance companies reasoned (continued...)

Even if a "reasonable person" standard were appropriate, the Court of Appeals failed to consider the entirely reasonable expectation that compliance with applicable regulations would make damage unlikely. The Court of Appeals did not take into account the legislature's own declaration that mining activities and environmental protection are compatible:

> It is declared to be the policy of this state that the extraction of minerals and the reclamation of land affected by such extraction are both necessary and proper activities. It is further declared to be the policy of this state that both such activities should be and are compatible.

Colo. Rev. Stat. § 34-32-102 (1989).

If insurance does not cover policyholders who foresee the possibility their acts could result in damage, there would be no point in purchasing a liability policy. Expectation of loss is one of the principle reasons for buying insurance. This Court should not countenance the creation of a novel exclusion to standard form comprehensive general liability policies.

23.(...continued)
that standard form comprehensive general liability policy language "dictates the use of subjective standard." The Insurance Companies argued that:

> [T]he policy in [the case upon which policyholders relied] dictated the use of a subjective standard: it excluded coverage only for personal injury 'which is expected or intended by the insured.' [citations omitted] The policies here do not contain this language.

Brief I of Respondents at 37, (filed 1990) Queen City Farms, Inc. v. The Central National Insurance Co., No. 22744-1-I (Wash. Ct. App.). [App. 20]

V. LOSS CONTROL SERVICES ARE SOLD TO POLICYHOLDERS AS LIFE PRESERVERS NOT AS MILLSTONES

A central fact which belies the Court of Appeals' reasoning is that insurance companies provide -- and charge for as part of their premium -- loss control services. The purpose of insurance company loss control programs is to identify and assess risks as well as to assist the policyholder in avoiding injury, damage, and liability as a result of those risks. It would be an odd kind of insurance, indeed, that required a policyholder to pay the insurance company for "loss control" services, and then voided coverage when the insurance company failed to control the loss.[24]

Insurance companies have historically and repeatedly lauded the special nature of their business and their special duties to policyholders. In its amicus brief to the Court of Appeals in this case, the Insurance Environmental Litigation Association recognized that "[i]nsurance is an important social mechanism . . . ." IELA Amicus Brief, supra p. 10, at 20.

Jack Mosely, Chairman of the American Insurance Association, an insurance trade association of which Crum and Forster (Industrial Indemnity's parent) is a member, stated that:

> Insurance leaders are fond of saying, without exaggeration, that the insurance industry is imbued with the public interest -- that insurance is essential to commercial activity and necessary to daily living.

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24. "The Court will not tolerate . . . weathervane arguments which shift with the winds of necessity." Georgia-Pacific Plywood Co. v. United States Plywood Corp., 148 F. Supp. 846, 856 (S.D.N.Y. 1956), rev'd, 258 F.2d 124 (2d Cir. 1958), cert. denied, 358 U.S. 884 (1958).

> We focus the spotlight on ourselves. We convince others of the leading role insurance plays in society. We encourage them to expect superior performance from us.[25]

Loss control services are a normal part of the insurance transaction. "Loss control has long been a part of the insurance package . . . From the beginning, insurers recognized that helping policyholders avoid risks was beneficial to 'both the insurer and the policyholder.'" "Common Ground: Loss Control Execs, OSHA Reps, Meet to Find Ways to Create Safer Workplaces," 101 Insurance Advocate at 5 (July 7, 1990). [App. at Tab 22]

Indeed in 1926, G.F. Michelbacher, Secretary of the National Bureau of Casualty and Surety Underwriters, referred to inspections by insurance companies as an "important service" and protection that is offered to the policyholder. Mr. Michelbacher stated that offering such a service and protection:

> serves to prevent the occurrence of the very misfortunes against which the policyholder seeks to indemnify himself, and thus performs a function of great social value.[26]

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25. Mosely, "Report of the Chairman," The Burgeoning of Litigation: Proceedings of American Insurance Association Annual Meeting, 61, 62. [App. at Tab 21]

26. See Michelbacher, "Miscellaneous Public Liability & Property Damage Liability Insurance in the United States", Reprint of Lecture (February 1926) at 21, published by National Bureau of Casualty and Surety Underwriters. [App. at Tab 23] Mr. Michelbacher was recognized as an authority on casualty lines. He was elected secretary of the National Bureau of Casualty and Surety Underwriters in 1921 and served in that capacity until 1926. The National Bureau of Casualty and Surety Underwriters is the entity that drafted many of the liability policies in existence today.

As recent advertisements demonstrate, the insurance industry still heralds the benefits it confers upon policyholders through loss control. For example, Industrial Indemnity, a defendant in this case, states:

> Special Risk Control services apply up-to-the-minute technology in the prevention of injuries and property/liability losses . . . All of Industrial's distinctive programs and services are continually evaluated based on their effectiveness in controlling costs and delivering customer satisfaction.[27]

A recent fervently pro-insurance industry law review article characterizes the services provided to policyholders as a kind of private "surrogate regulation" resembling governmental "command and control regulation":

> The risk assessment and risk management processes can generate several quasi-regulatory effects. First, the prospect that a positive risk assessment will be a prerequisite to insurability is likely to create initial and ongoing safety incentives for any potentially insured enterprise. Second, the risk assessment process informs potential insureds of the insurer's conclusions about the relative risk posed by their operations. Once an application for insurance is accepted, risk management may involve continuing risk assessment and advice to the insured regarding effective safety measures. Simultaneously, the threat of cancellation, nonrenewal, or reclassification upon the expiration of coverage, or the denial of coverage for events caused by the insured's engagement in activities for which coverage is excluded, can create incentives for the insured to follow advice.[28]

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27. Industrial Indemnity Advertisement, Risk Management Magazine, September 1987 at 55. [App. at Tab 24]

28. Abraham, Environmental Liability and the Limits of Insurance, 88 Col. L. Rev. 942, 954-955 (1988) (citations omitted). [App. at Tab 25] Professor Abraham has recently retreated from this anti-policyholder position. See Rulemaking Proceeding Regarding the Appropriate Regulatory Treatment of the Manufacturing Site Cleanup Costs, DPU No. 89-161, Vol. I, 190-

(continued...)

The Court of Appeals turned this risk assessment and loss control concept on its head; an insurance company that accepted a mining risk was ipso facto absolved of covering risks associated with normal mining practices. The focus in this case should be on why the insurance companies' loss control experts failed to foresee what the insurance companies now contend Hecla Mining Company should have foreseen.

28.(...continued)
91, 200 (Feb. 15 and 16, 1990). Relevant excerpts of the transcript containing Professor Abrahams' statements are also included in the Appendix at Tab 25.

CONCLUSION

For all the foregoing reasons, Amicus Curiae Colorado Municipal League respectfully requests that this Court reverse the Court of Appeals' decision as it relates to Hecla Mining Company and reinstate the judgment of the City and County of Denver, Colorado District court.

Dated: Denver, Colorado
August 15, 1990

Respectfully submitted,

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SUPREME COURT OF THE STATE OF COLORADO
CASE NO. 89SC646

CERTIFICATE OF SERVICE

HECLA MINING COMPANY, a Delaware corporation,
Petitioner,

v.

NEW HAMPSHIRE INSURANCE COMPANY and INDUSTRIAL INDEMNITY COMPANY,
Respondents.

I hereby certify that on this 15 day of August, 1990, a true and correct copy of the Colorado Municipal League Brief and Appendix in Support of Hecla Mining Company were mailed, first class postage prepaid, to the following:

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