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COURT OF APPEALS NO. 71951-3-I

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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ZHAOYUN XIA, *et al.*,

Appellant,

v.

PROBUILDERS SPECIALTY INSURANCE COMPANY RRG, *et al.*,

Respondent.

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BRIEF OF RESPONDENT PROBUILDERS SPECIALTY INSURANCE  
COMPANY RRG IN RESPONSE TO AMICI CURIAE BRIEFS

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ORIGINAL

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## I. INTRODUCTION

In accordance with RAP 10.1(e), Respondent ProBuilders Specialty Insurance Company RRG (“PBSIC”) submits this brief in response to the amicus curiae briefs submitted by the Washington State Association for Justice Foundation and the Property Casualty Insurers Association of America.

## II. RESPONSE TO AMICUS CURIAE BRIEFS

This appeal continues to be about the enforcement of an unambiguous insurance policy exclusion to a claim that clearly comes within the terms of the exclusion. Under the rules of insurance policy construction promulgated by this Court, the absolute pollution exclusion contained in the PBSIC policy at issue in this lawsuit bars coverage for Ms. Xia’s bodily injury claim. It necessarily follows that there clearly was no coverage for Ms. Xia’s claim by application of absolute pollution exclusion. Not only did the insurer’s application of the absolute pollution exclusion to Ms. Xia’s claim comport with this Court’s decisions on the duty to defend, but it complied with specific case authority from this Court on the interpretation of the absolute pollution exclusion, notably *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 110 P.3d 733 (2005).

Two amicus curiae submitted briefs with regard to the issues before this Court. PBSIC will address the points raised in the amicus curiae briefs separately below.

**A. Property Casualty Insurers Association of America**

The Property Casualty Insurers Association of America (“PCIA”) submitted an amicus curiae brief that raised three main points: (1) the plain and unambiguous language of the absolute pollution exclusion precludes coverage for Ms. Xia’s claim; (2) Washington does not follow and should not adopt the so-called “reasonable expectations” test; and (3) an insurer’s reliance on an unambiguous absolute pollution exclusion to deny a defense for a claim that fits within the exclusion, without first retaining coverage counsel to research the local law, does not support applying the severe remedy of coverage by estoppel. PBSIC specifically adopts all of the arguments and points raised in the PCIA amicus curiae brief.

In particular regard to the coverage by estoppel argument, if this Court overrules its prior holding in *Quadrant* regarding the application of the absolute pollution exclusion to toxic fume claims, Ms. Xia requests a determination that PBSIC acted in bad faith as a matter of law when it declined the defense of its named insured. Ms. Xia undoubtedly will take the position that PBSIC is estopped from contesting coverage for her bodily injury claim. As set forth in the PCIA amicus curiae brief, such a remedy

would represent a departure from the already stringent rules for insurers in the State of Washington.

Since 2005, this Court's holding in *Quadrant* represents the final word on this Court's treatment of the absolute pollution exclusion for toxic fume claims. *Quadrant* affirmed the applicability of the absolute pollution exclusion to bodily injuries sustained as a result of hazardous airborne toxins, holding that the exclusion barred coverage for personal injuries sustained by a tenant resulting from fumes from waterproofing material. *Quadrant*, 154 Wn.2d at 182.

PBSIC's application of the absolute pollution exclusion to Ms. Xia's bodily injury claim in 2008 was consistent with *Quadrant* and was correct. PBSIC's declination of the defense of Ms. Xia's claim was appropriate as there clearly was no coverage under the absolute pollution exclusion. It would be patently unfair to penalize an insurer who otherwise acted reasonably and consistently with Washington law, for failing to predict that the Washington Supreme Court would reverse the holding in *Quadrant* nearly nine years after the insurer issued its coverage determination.

As discussed below, there is no basis to overrule the holding in *Quadrant* or to carve out an exception to that holding in this case. Regardless, an insurer that acts in accordance with the controlling

Washington law, should not be subjected to the draconian remedy of coverage by estoppel simply because the law changes.

**B. Washington State Association for Justice Foundation**

In its amicus curiae brief, the Washington State Association for Justice Foundation (“the Foundation”) argues that there is legal uncertainty in the interpretation and application of PBSIC’s absolute pollution exclusion because the claim may not involve use of a pollutant as intended. It is noteworthy that the Foundation does not advocate the wholesale reversal of this Court’s holding in *Quadrant*. In other words, the Foundation does not seek the adoption of the “environmental pollution” rule, which was rejected in the majority opinion in *Quadrant*.

The Foundation’s unwillingness to take on *Quadrant* is understandable. Since 2005, *Quadrant* has provided insurers and policyholders alike with a consistent rule for the application of the absolute pollution exclusion to claims involving toxic fumes causing bodily injury and/or property damage. It confirmed that the absolute pollution exclusion is not ambiguous and should be enforced as written. It also has encouraged the development of alternative insurance products that could address specialized risks involving pollutants, which could be purchased by Washington policyholders for a premium that properly reflected the specialized risks. There is no evidence that the holding in *Quadrant* has

made it difficult for policyholders, insurers or courts in Washington to apply the absolute pollution exclusion. *Quadrant* remains viable authority, frequently cited by Washington courts in insurance and contract cases.<sup>1</sup> Simply put, there is no legal uncertainty surrounding this Court's holding in *Quadrant* that would require either its reversal or a significant carve out for this case.

**1. The PBSIC Absolute Pollution Exclusion Unambiguously Precludes Coverage for the Xia Claim.**

Citing potential “legal uncertainty” between this Court’s holding in *Quadrant* and the earlier holding in *Kent Farms, Inc. v. Zurich Insurance Co.*, 140 Wn.2d 396, 998 P.2d 292 (2000), the Foundation asserts that PBSIC should have defended its named insured from the Xia claim. Notably absent from the Foundation’s discussion is any analysis of the PBSIC absolute pollution exclusion, which unambiguously precludes coverage for the Xia claim.

At its core, this dispute begins and ends with the interpretation of the PBSIC insurance policy. In *Quadrant*, this Court articulated the rules for interpreting insurance contracts:

The criteria for interpreting insurance contracts in Washington are well settled. We construe insurance policies as contracts.

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<sup>1</sup> See e.g., *Lui v. Essex Ins. Co.* 185 Wn.2d 703, 712, 375 P.3d 596 (2016); *Kroeber v. GEICO Ins. Co.*, 184 Wn.2d 925, 930, 366 P.3d 1237 (2016); *Queen Anne Park Homeowners Ass’n v. State Farm Fire & Cas. Co.*, 183 Wn.2d 485, 489, 352 P.3d 790 (2015).

*Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000). We consider the policy as a whole, and we give it a ““fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.”” *Id.* at 666 (quoting *Am. Nat’l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998) (quoting *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201 (1994))). Most importantly, if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists. *See id.*

*Quadrant*, 154 Wn.2d at 171. *See also Liu v. Essex Insurance Co.*, 185 Wn.2d 703, 712, 375 P.3d 596 (June 9, 2016) (citing *Quadrant* in the interpretation of a Vacant Property Endorsement).

Turning to the facts of this case, the Xia claim is clearly not covered under the policy based on the language of the PBSIC absolute pollution exclusion, which provides:

Bodily injury, property damage, or personal injury caused by, resulting from, attributable to, contributed to, or aggravated by the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants, or from the presence of, or exposure to, pollution of any form whatsoever, and regardless of the cause of the pollution or pollutants.

This Exclusion applies regardless of the cause of the pollution and whether any other cause of said bodily injury, property damage, or personal injury acted jointly, concurrently or in any sequence with said pollutants or pollution. This Exclusion applies whether any other cause of the bodily injury, property damage, or personal injury would otherwise be covered under this insurance.

Notwithstanding the provisions of this policy regarding the obligation to defend you, where a suit is based in whole or in part upon bodily injury, personal injury or property damage, liability for

which is excluded by this Exclusion, we shall have the right, but not the obligation, to defend said suit. When we do not elect to defend you in such suit, we shall reimburse you for the reasonable attorneys' fees and litigation expenses incurred by you, in accordance with paragraph 15 of Section IV, COMMERCIAL GENERAL LIABILITY CONDITIONS.

CP at 334 (boldface omitted, highlighting added).

The PBSIC policy defines "pollutant" as:

Any solid, liquid, gaseous or thermal irritants or contaminants, which include but are not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste, biological elements and agents, and intangibles such as noise, light and visual esthetics, the presence of any or all of which adversely affects human health or welfare, unfavorably alters ecological balances or degrades the vitality of the environment for esthetic, cultural or historical purposes, whether such substances would be or are deemed or thought to be toxic, and whether such substances are naturally occurring or otherwise.

Waste includes but is not limited to any material or substances to be recycled, reconditioned or reclaimed, and any substance or material produced as a by-product or side effect of any process.

Pollution as used herein means any form of pollutant which forms the basis for liability, whether the pollution is said to cause physical injury or not, which by volume or timing or any other factor is said to give rise to liability.

CP at 335 (boldface omitted; highlighting added).

In her June 26, 2007 tender letter, Ms. Xia specifically alleged that she was "exposed to carbon monoxide" which caused her "fatigue, lack of concentration, dull aching headaches, dizziness, irritation, chest pain and tightness etc." CP at 64. Her subsequent Complaint against the developer and others contained repeated allegations that "Ms. Xia's cognitive

deterioration, resulting from her continuous inhalation of Carbon Monoxide....” CP at 84 and 404.

Putting these allegations into the context of the PBSIC absolute pollution exclusion demonstrates coverage and a defense were properly declined for this claim. First, carbon monoxide constitutes a “pollutant” as that term is defined by the PBSIC policy. It is a “gaseous...contaminant” taking the form of “smoke”, “vapor” or “fume.” It is the exhaust or “waste” of the combustion process that occurs when natural gas is burned in an appliance such as a water heater. Based on Ms. Xia’s allegations, carbon monoxide “adversely affects human health or welfare.” Under the definition of the “pollutant”, it does not matter whether carbon monoxide would be “deemed or thought to be toxic” or “naturally occurring or otherwise.” For the purposes of this exclusion, carbon monoxide is a “pollutant.”

Ms. Xia specifically alleged that she sustained bodily injuries as a result of her exposure to a pollutant (carbon monoxide). Although Ms. Xia alleges that her exposure was caused by a disconnected vent to the water heater in her townhouse, the source or cause of the pollutant is irrelevant under the unambiguous policy language. The PBSIC absolute pollution

exclusion expressly states that the exclusion applies “regardless of the cause of the pollution or pollutants.”<sup>2</sup>

Under the criteria articulated by this Court in *Quadrant*, the PBSIC absolute pollution exclusion precludes coverage for the Xia claim. Since the exclusion is clear and unambiguous, it must be enforced as written. Therefore, there clearly was no coverage for Ms. Xia’s claim under the PBSIC policy.

**2. There is no legal uncertainty regarding the treatment of the PBSIC absolute pollution exclusion that would trigger a duty to defend the Xia claim.**

Unable to identify any ambiguity in the PBSIC absolute pollution exclusion, the Foundation instead suggests that there is ambiguity in this Court’s holding in *Quadrant*, which constitutes legal uncertainty as to whether the PBSIC absolute pollution exclusion applied to the Xia claim. However, with respect to the application of the absolute pollution exclusion to bodily injury claims arising out of exposure to toxic fumes, there is no legal uncertainty after *Quadrant*.

In support of its legal uncertainty argument, the Foundation points to the earlier *Kent Farms* case. *Kent Farms* involved a situation where the

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<sup>2</sup> This causation language makes the PBSIC exclusion even more restrictive than the absolute pollution exclusion at issue in *Quadrant*, which did not contain any causation language.

claimant was choked by diesel fuel. In determining that the absolute pollution exclusion did not apply to the subsequent bodily injury claim, this Court stated “Most importantly, the fuel was not acting as a ‘pollutant’ when it struck him.” *Kent Farms*, 140 Wn.2d at 401. In other words, this Court declined to apply the absolute pollution exclusion in *Kent Farms*, because the case did not involve harm caused by a pollutant. The *Kent Farms* opinion went on to summarize: “The exclusion, when viewed in the context of its purpose, does not apply merely because a potential pollutant was involved in the causal chain. Instead, the exclusion applies to ‘occurrences’ involving the pollutant as a pollutant.” *Id.* at 402.

Five years later, this Court was asked to specifically address the application of the absolute pollution exclusion to a toxic fumes claim, which was not at issue in *Kent Farms*. In *Quadrant, supra*, a contractor was hired to make repairs and improvements to an apartment building. As a part of those repairs, the contractor applied waterproofing sealants to a deck. Fumes from the sealant infiltrated an adjacent apartment, making a resident ill. When the resident made a claim against the contractor for her personal injuries, the contractor tendered the claim to its liability insurer. Citing the absolute pollution exclusion, the liability insurer declined coverage for the claim. 154 Wn.2d at 168-169.

After the trial court ruled in favor of the liability insurer and the Court of Appeals affirmed, this Court accepted review to address the application of the absolute pollution exclusion to cases involving exposure to toxic fumes. In analyzing this issue, this Court addressed its prior holding in *Kent Farms*. Over eight pages, this Court highlighted the factual dissimilarities of *Kent Farms* and how those dissimilarities led to the Court's conclusion that the absolute pollution exclusion did not apply to the claimant's dousing with diesel fuel. In distinguishing *Kent Farms*, the *Quadrant* court rejected arguments that Washington fumes cases had been overruled and that the absolute pollution exclusion must be applied only in cases of traditional environmental pollution. *Id.* at 182-183. The *Quadrant* court then noted that the *Kent Farms* court was:

...careful to explain that the exclusion applies to "occurrences' involving the pollutant as a pollutant." *Id.* at 402. In other words, the *Kent Farms* court distinguished between cases in which the substance at issue was polluting at the time of the injury and cases in which the offending substance's toxic character was not central to the injury.

*Id.* at 182.

In its holding, the *Quadrant* court resolved any issue that it is at odds with *Kent Farms*:

Therefore, we conclude that the *Kent Farms* discussion of traditional environmental harms is limited by the facts of that case. Here, we adopt the reasoning of the *Cook* [*Cook v. Evanson*, 83 Wn.App. 149, 157, 83 Wn.App. 149 (1996)] court; TDI meets the policy's

definition of a pollutant, and Kaczor's injuries fall squarely within the plain language of the pollution exclusion clause. *See Cook*, 83 Wn. App. at 154. Where the exclusion specifically includes releases or discharges occurring on the owner's property or as the result of materials brought onto the property at the behest of the insured, and a reasonable person would recognize the offending substance as a pollutant, the policy is subject to only one reasonable interpretation and the exclusion must not be limited. *Id.*

In sum, because *Cook* follows the clear and longstanding rules for insurance contract interpretation adopted by this court, we apply the *Cook* reasoning in this case. We note that *Kent Farms* is distinguishable on its facts. *See Kent Farms*, 140 Wn.2d at 401. Given Washington's clear rules for insurance contract interpretation, we reject the reasoning of other states that have declined to apply the pollution exclusion in fumes cases. The pollution exclusion at issue here unambiguously precludes coverage for the Kaczor claim, and we decline to find ambiguity where none exists. Therefore, we affirm the Court of Appeals' holding that the absolute pollution exclusion applies to these facts, distinguishing *Kent Farms* and adopting the reasoning in *Cook*.

*Id.* at 183-184.

In light of the *Quadrant* court's comprehensive distinction of *Kent Farms*, the Foundation attempts to interject a subtle "legal uncertainty" into this case. But the *Quadrant* court, far from creating "legal uncertainty," meticulously distinguished the holding in *Kent Farms*, and made it clear that the absolute pollution exclusion applies to toxic fume claims such as the claim presented in *Quadrant* and in this case.

Finally, the Foundation, again ignoring the causation language of the PBSIC absolute pollution exclusion, cites the *Quadrant* court's reference to a Court of Appeals' comment that because the tenant was

injured by fumes emanating from waterproofing material that was being used as intended, the air in her apartment was “polluted.” *Id.* at 179. Based on this language, the Foundation asserts that this discussion suggests a “used as intended” requirement before a pollution exclusion can be applied to a toxic fume claim. The Foundation then asserts that there is uncertainty whether the carbon monoxide that allegedly harmed Ms. Xia met the “used as intended” requirement. This argument is not supported by the law or the facts at issue here.

First of all, notwithstanding this single reference to the Court of Appeals decision, the *Quadrant* court did not impose a “used as intended” requirement in toxic fume cases. The *Quadrant* court’s summary of its holding, which is quoted above, contains no reference to such a requirement. Rather, the summary indicates that absent an ambiguity, the absolute pollution exclusion will be enforced in toxic fume cases.<sup>3</sup>

Second, carbon monoxide is created in the combustion of natural gas in an appliance such as a water heater. Because the natural gas was used as intended at Ms. Xia’s townhouse (as fuel for the water heater) the generation of carbon monoxide inside the townhouse where the water heater was located was the expected result. Thus, even if the Court were to adopt

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<sup>3</sup> The *Quadrant* court expressly adopted the reasoning of *Cook*. *Quadrant*, 154 Wn.2d at 183. *Cook* does not discuss an “intended use” requirement or even use these words. *Cook*, 83 Wn.App. at 154.

a “used as intended” requirement, the circumstances of this claim would still satisfy such requirement.

Third, in light of the language of the PBSIC absolute pollution exclusion, a “used as intended” requirement would never be relevant to this claim. As discussed above, carbon monoxide constitutes a “pollutant” as that term is defined by the PBSIC policy. It cannot be disputed that Ms. Xia’s alleged injuries were the result of this pollutant acting as a pollutant. The PBSIC absolute pollution exclusion precludes coverage for claims arising from exposure to a “pollutant” regardless (1) of the cause of the pollution; (2) whether any other cause of the bodily injury acted jointly, concurrently or in any sequence with said pollutants or pollution; and (3) whether any other cause of the bodily injury would otherwise be covered under this insurance. Consequently, as long as the carbon monoxide is a pollutant and Ms. Xia’s bodily injuries are allegedly related to her exposure to that pollutant, the cause of the pollution or existence of other potential causes of the bodily injury would not affect the application the PBSIC absolute pollution exclusion to this claim.

Based on the unambiguous language of the PBSIC absolute pollution exclusion, there is no legal uncertainty with respect to the Xia claim. The sole question is whether Ms. Xia alleges that she sustained bodily injuries as a result of her exposure to a pollutant. Since the answer

to that question is a resounding yes, the PBSIC absolute pollution exclusion precludes coverage for this claim. Therefore, because there clearly was no coverage for Ms. Xia's claim, PBSIC properly declined to defend under the standards set forth by this Court in *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 64, 164 P.3d 454 (2007) and *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010).

### III. CONCLUSION

Following this Court's discussion in *Quadrant*, carbon monoxide meets the PBSIC policy's definition of a pollutant, and Ms. Xia's injuries fall squarely within the plain language of the PBSIC absolute pollution exclusion. Under these circumstances, where the policy language is clear and unambiguous, it must be enforced as written and the Court should not modify it or create ambiguity where none exists.

The PCIA amicus brief supports the enforcement of unambiguous contract terms, such as the PBSIC absolute pollution exclusion. For this reason, PBSIC expressly adopts the arguments and issues contained in the PCIA amicus brief.

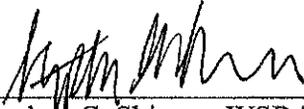
Conversely, the Foundation's amicus brief ignores the language of PBSIC exclusion, and instead invites this Court to impose a new requirement for application of the absolute pollution exclusion, which would support its argument that there was legal uncertainty in 2008, when

PBSIC declined coverage for the Xia claim. However, the holding in *Quadrant* makes it clear that the starting point for the assessment of the application of the absolute pollution exclusion to a toxic fume claim is the policy language. Here, there is no question that the PBSIC absolute pollution exclusion precludes coverage for the Xia claim.

For the reasons stated above and in PBSIC's prior briefing, the Court should affirm the decision of the Court of Appeals holding that there clearly was no coverage for Ms. Xia's claim by application of the PBSIC absolute pollution exclusion.

DATED this 28<sup>th</sup> day of September, 2016.

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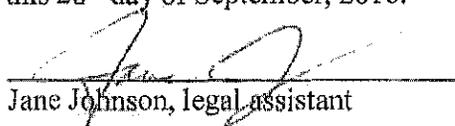
The undersigned certifies under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

That on September 28, 2016, I served the foregoing Brief of Respondent ProBuilders Specialty Insurance Company RRG in Response to Amici Curiae Briefs, to the court and to the parties to this action as follows:

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Jane Johnson, legal assistant

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Re: Xia v. Probuilders, et al.; Supreme Court No. 92436-8

Attached please find the **Brief of Respondent Probuilders Specialty Insurance Company RRG in Response to Amici Curiae Briefs** to be filed in the above matter. The parties are also copied on this email. Thank you.

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