

STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE

X-----X
HEARING ON THE PROPOSED
EXCLUSION OF SUDDEN AND
ACCIDENTAL POLLUTION
COVERAGE FROM GENERAL
LIABILITY POLICIES
X-----X

Copy
TRANSCRIPT OF
PROCEEDINGS

DECEMBER 18, 1985
10:00 A.M.

STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE
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2 Briefly, and for the record, the present
3 insurance liability policies exclude pollution coverage
4 generally with the exception that sudden and accidental
5 incidents are covered under the liability provisions of the
6 policy. Over the past year or so, probably beginning with
7 the Insurance Service Office's general liability filing
8 program, we have received a number of filings that would
9 delete this exception, the exception that provides for
10 liability coverage for sudden and accidental incidents.

11 For some period of time, some of these
12 became effective under the provisions of the Commercial
13 Deregulation Act because they were not disapproved prior to
14 the time that -- prior to the stated effective date. More
15 recently, because of some problems and some concerns in the
16 Department, those that we have been receiving more recently
17 have been disapproved for a variety of reasons.

18 I think that probably in order to put this
19 in context, it might be worthwhile to review some of the
20 types of problems that we anticipate if these policies --
21 this language is generally included in policy. Since it
22 deletes the coverage of sudden and accidental occurrences,
23 there are risks that are customary to the purchasers of
24 those policies which are then not covered and the risk of
25 loss as a result of them is shifted to the insured.

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2 Because of the history that these items had
3 been -- these particular types of incidents had been
4 previously covered, many insureds, we believe, have a
5 reasonable expectation that these kinds of things are
6 covered.

7 We are further concerned that in situations
8 where they are damaged by some other cause that is covered
9 but some of the damages are caused by what is defined as
10 "pollution" in the exclusions, that some damages would be
11 covered as a result of an incident; some damages would not
12 be covered as a result of an incident. We are concerned
13 of coverage disputes and litigation or problems with
14 coverage between the insured and the insurer as a result of
15 this total absolute exclusion.

16 Also, there is a -- we have some questions
17 concerning what, if any, impact this should have on the
18 rates. Most of the filings that we have received have
19 indicated that there is no rate impact as a result of the
20 exclusion. We would like to explore that.

21 We would like to hear from the insurance
22 industry to review what caused the filings that have been
23 received, what were the causes of that, what essentially
24 was the industry's thought processes in coming up with this
25 as the chosen alternative -- the chosen alternative to

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2 consist of the policy language.

3 If there are other alternatives that were
4 considered and discarded by the industry for one reason or
5 another, we would like to hear them so that we can
6 understand why something short of an absolute exclusion was
7 not used.

8 Finally, we would like to explore the market
9 implications of the exclusion, the present market, the
10 impact of this on the insurance -- re-insurance market, and
11 how this exclusion would affect availability, insurance
12 capacity, and affordability.

13 The hearing notice addresses some of these
14 issues in more detail. I would indicate that the record of
15 this hearing and our examination of this issue, for the
16 purpose of assisting the Commissioner in making policy in
17 this area, will include not only the transcript of the
18 proceedings, but also written comments that have been
19 received from some people who are here and some people who
20 are not here.

21 Additionally, the record, we would be
22 reviewing the filing and the statements of explanation
23 with the many filings that we have gotten on these
24 exclusions. Also, many of the statements that we have
25 received refer to source material, court cases in

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2 particular, that we would also draw upon as part of the
3 record for this hearing.

4 Also, there was recently a draft report of
5 the Environmental Liability Insurance Task Force of the
6 National Association of Insurance Commissioners which was
7 delivered December 10th. That we are going to include in
8 the hearing record also because it does provide a good
9 background on the development of the problems to date.

10 I appreciate you being here this morning.
11 This is shortly before the Holiday. Because of that, I
12 realize it's inconvenient and also that some of the people
13 that would have liked to have been here were not able to be
14 here.

15 The Commissioner decided not to hold this
16 off until after the first of the year because it is a very
17 important issue and needs to be addressed as promptly as
18 possible.

19 We will, however, hold open the record for
20 written comments until after the first of the year. We
21 would like you to have them in by January 7th. They can
22 include any statements on behalf of organizations or any
23 comments as a result of anything that you have heard here
24 today.

25 Having said that, I believe that the first

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2 people to sign up are the Insurance Service Office, and it's
3 kind of appropriate, I guess, that they start off because
4 they -- the first filing we received on this was from the
5 Insurance Services Office, and I believe that there are
6 some people here from there, and also Mr. Sullivan from
7 Crum & Forster who indicated he wanted to participate in
8 that.

9 Thank you. If you would come forward.

10 MICHAEL L. AVERILL: Good morning, I am
11 Michael Averill. I'm a CPCU. I'm the manager of the
12 Commercial Casualty Division of ISO in New York.

13 I have some prepared remarks which I would
14 leave with you at the end of my presentation. I would like
15 to summarize them briefly now, and I would like to take the
16 opportunity to do as you asked, address some of the history
17 of pollution exclusion, at least the ISO pollution
18 exclusion and the need for our new exclusion.

19 With me are Dick Biondi who is our actuary
20 and manager of our Commerical Casualty Actuarial Division
21 and an executive from one of our affiliated insurers, and
22 at the end of our presentations and all the testimony today,
23 we would be happy to answer your questions as they may come
24 up.

25 First, let me tell you about ISO's role in

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2 the property and casualty industry.

3 ISO is a not-for-profit corporation which
4 provides a variety of rating and advisory and statistical
5 services to the PC industry. We are a voluntary organization
6 made up of companies who choose to associate with us to
7 receive any or all of our services. One of the services
8 we do provide is the development of policy forms and
9 endorsements that are made available to our companies.

10 Those companies may adopt those forms or
11 modify those forms as they see fit. Thus, while our
12 standard language represents a general benchmark for the
13 industry, it is not binding in any way upon the companies
14 on whose behalf it has developed or submitted any
15 regulation.

16 The insurance industry has been insuring
17 pollution exposures for quite awhile. Prior to the late
18 1960's, the Comprehensive General Liability Policies were
19 on an accident basis, and accordingly, provided loss from
20 pollution exposure if the pollution act was from an
21 unintended event. There is an intentional injury exclusion
22 within the contracts.

23 The 1966 version of the CGL broadened the
24 definition of the trigger of coverage to an occurrence
25 basis. Thus, you provide a coverage not only for accidents

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2 but for the injurious exposure to conditions; that is, the
3 injury or damage had to occur during the policy period, and,
4 of course, be neither expected nor intended to clarify the
5 intent of coverage, and overcome court cases which, to the
6 contrary, had considered accidents from the standpoint of
7 claimant of insurance.

8 The change in the trigger was not intended,
9 at that time, to deal with the pollution situation since
10 there was little awareness regarding environmental protection
11 at that time.

12 In the late 1960's, a number of accidents
13 took place including the running aground of the tanker
14 Torrey Canyon and its resultant oil spill in '67. The
15 '69 blowout of the Santa Barbara oil platform, and these
16 focused public attention on the general problem of
17 pollution.

18 In 1970, in view of these serious and
19 unpredicted environmental problems, the insurance industry
20 developed clarifying language and a mandatory endorsement
21 specifically excluding coverage from pollution incidents
22 under the standard Comprehensive GL policy unless, as you've
23 pointed out, the incident was both sudden and accidental in
24 nature.

25 I would like to read that exclusion.

"Coverage is not afforded to bodily injury or property damage arising out of discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials, or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any water course or body of water; but, this exclusion does not apply if the discharge, dispersal, release or escape is sudden and accidental."

Now, in 1973, we actually incorporated this exclusion into the policy itself. Now, there were specialty insurers in some of the surplus lines writers through what's called the London market that stepped in to offer the complementary gradual pollution coverage under their own forms. Generically, these are referred to as Environmental Impairment Liability Policies. Generally, they are only on a claims-made basis, and they are limited, and they sometimes pay clean-up expenses as well as the indemnity for bodily injury and property damage.

In 1980 in response to the Resource Conservation and Recovery Act, the RCRA Act, the EPA issued regulations to implement that Act for those involved with generation, transportation, storage, disposal of hazardous wastes. That Act and regulations required minimum liability insurance, initially of \$1 million per

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2 occurrence with a \$2 million aggregate for sudden and
3 accidental occurrences, and for gradual pollution loss,
4 requirements of \$3 million per occurrence and \$6 million
5 per aggregate are being phased in.

6 Now, in response to this Act, more insurers
7 developed environmental liability protection forms, and
8 ISO introduced a pollution liability policy in 1981. Now,
9 that form provides on a claims-made basis both gradual and
10 the sudden and accidental coverage for pollution incidents.
11 It applies to an insured site.

12 Since it is on a claims-made basis, an
13 extended reporting period is available; but, it is a limited
14 extended reporting period, and in order to prevent
15 duplication of coverage between the Comprehensive GL Policy
16 and the Pollution Policy when that policy was written, an
17 exclusion was designed for the Comprehensive GL, the CGL
18 Policy to exclude all pollution coverage under that policy,
19 again to prevent the duplication with the Pollution
20 Liability Policy which provided sudden and accidental and
21 the gradual coverage.

22 When ISO introduced that Pollution Liability
23 Policy, it was without any suggested rates. As you will
24 hear Dick Biondi explain in a little while, we have very
25 little statistics on pollution liability as an exposure by

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2 itself; but, among the other factors that have to be
3 considered in rating pollution liability are the nature of
4 the operations, how is the waste material generated, how is
5 the product generated, how is it treated, stored, the type
6 of material involved, the volume of it. Is the material
7 stored near population centers, near farms. What type of
8 site security does a risk have.

9 Because we had no prior experience when we
10 introduced the Pollution Liability Policy, we could not
11 suggest any rate for it. Part of the problem today,
12 especially with the availability of pollution liability
13 insurance as a separate coverage, is the fact that liabilities
14 against policyholders for clean-up and personal injury and
15 property damage are created by multiple Federal and State
16 statutes as well as by common law.

17 Interacting with this, of course, are court
18 interpretations of prior insurance contracts which expand
19 coverage beyond which the insurers originally intended.

20 So, the availability of insurance for
21 pollution liability is affected by the potential,
22 anticipated past liability under policy forms that have
23 already been issued and have been terminated, the past and
24 future liability for new contracts or contracts that are
25 currently being issued, plus the, what appears to be the

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2 inability for insurers to rely on the use of contract
3 language to limit the insurers' exposure.

4 In addition, under the Superfund legislation,
5 the Comprehensive Environmental Response, Compensation and
6 Liability Act, CERCLA, the application of joint and several
7 liability which makes each defendant liable for all damages
8 rather than each defendant's contribution also creates
9 conditions that can't be evaluated for each insured separately.

10 This joint and several liability creates the
11 likelihood that a policyholder's liability will bear no
12 relationship to the policyholder's conduct.

13 So, if you want to insure a risk for
14 pollution liability exposure which may be subject to this
15 Act, the Superfund Act, that means the risk exposure is not
16 dependent only on its manufactured materials, its conduct,
17 but also on the conduct of all other disposers of material
18 in a toxic waste site.

19 Now, in 1984 and '85, ISO introduced a
20 major re-write of the Comprehensive General Liability
21 contract. That resulted in the Commercial General Liability
22 Policy which we are scheduling to be implemented in 1986.

23 We reviewed the entire coverage of that
24 policy, but specifically in this regard, the pollution
25 coverage, in order to develop the appropriate language for

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2 the new program, looking at the changing legislative,
3 judicial, and insurance environment for pollution, and we
4 first submitted the commercial, the new Commercial General
5 Liability Policy in 1984. We attempted to include a
6 pollution exclusion, though it is rewritten in a new format
7 and new language, that intended to provide the same coverage
8 as was originally intended under the Comprehensive General
9 Liability Policy, that is, retain in some way coverage for
10 the sudden and accidental exposure without using those
11 terms.

12 After a re-evaluation of that provision
13 during 1984, it was changed to the provisions in the
14 current Commercial General Liability program submission,
15 the substance of which has also been submitted for use with
16 the current Comprehensive General Liability contract.

17 That change is to introduce a complete
18 on-site emission and partial off-site exclusion for some
19 operations. For some operations. It is not an absolute
20 exclusion. It does not apply, as it is written, to some
21 off-premises operations, and it does not apply, as written,
22 to products liability exposures.

23 Now, this change was made because after our
24 initial submission, we found out through comments through
25 the industry that there was a complete lack of faith that

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2 the judicial system would interpret the contract language
3 as was originally intended by our insurers, even though we
4 had attempted to rewrite it to maintain that intent, not
5 using the term sudden and accidental.

6 Now, courts have expanded the coverage
7 afforded under the GL contracts in ways not contemplated by
8 the insurers. For example, in New Jersey, several lawsuits
9 filed by Jackson Township relating to seepage from a dump
10 into ground water resulted in a decision which says, in
11 essence, that sudden adds nothing to accidental, and thus,
12 seepage incontestably happening over a long period of time
13 was covered under the Township's Comprehensive GL Policy
14 despite the sudden and accidental intended coverage under
15 the pollution exclusion.

16 From all the indications we have, it's
17 unlikely that courts will change direction to interpret
18 that language as was intended, and it's unlikely that
19 society's interest in the issue of environmental impairment
20 will subside.

21 Since there is no practical way for us to
22 include realistic estimates of what the unsettled and
23 the future pollution liability will be into our rate-making
24 data base, and combined with a realization that pollution
25 liability represents a unique exposure that must be underwritten

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2 liability coverage.

3 The first, again, is a simple buy-back
4 endorsement which deletes the exclusion of bodily injury
5 and property damage arising out of the emission or
6 escape of pollutants. It does not delete the clean-up
7 costs exception. It's attached to either version of our
8 new contract, and whatever policy conditions and trigger
9 mechanisms within that contract including its limits apply.

10 The second means is a self-contained
11 pollution liability coverage form on a claims-made basis
12 which provides a separate trigger limits and conditions to
13 provide bodily injury and property damage liability coverage
14 and clean-up cost coverage.

15 The third is an additional limited pollution
16 liability coverage form. It's similar to the other self-
17 contained form in that it's on a claims-made basis, has its
18 own limits and conditions; but, under that form, clean-up
19 costs will not be afforded.

20 All of these modes of providing coverage
21 will be (a) rated from an ISO standpoint.

22 Now, this approach enables an underwriter to
23 make a deliberate decision and an analysis of each insured
24 pollution exposure to determine the coverage that is best
25 provided. The insurers can make the pollution coverage

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2 decision based on underwriting and marketing philosophies
3 in response to their own capacity and re-insurance situations
4 without affecting the other liability coverage required by
5 an insured for the operations and products exposures.

6 Now, while I've talked a lot about the
7 Commercial General Liability Exposure and Environmental
8 Impairment Policies and Pollution Liability Policies, any
9 Liability Policy is potentially subject to pollution claims.

10 In our commercial auto line, a Garage Policy
11 endorsement that parallels the endorsement for Commercial
12 General Liability or Comprehensive GL Policies is being
13 introduced for garage operations other than the ownership
14 or maintenance or use of the covered autos.

15 A total pollution exclusion for BI and PD
16 arising from the discharge of pollutants will apply unless
17 they are not excluded for certain off-premises discharges
18 or pollutants including those in the so-called products
19 and completed operations hazard. Clean-up costs coverage
20 are specifically excluded as a clarification of the policy
21 intent.

22 The exclusion which we have submitted is an
23 optional exclusion, country-wide, and is also being submitted
24 to become mandatory in 1986.

25 Policy language has been developed for the

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2 Business Auto Policy and for the Truckers Policy and the
3 Vehicular Exposure under the Garage Policy that will make
4 the pollution exclusion apply to cargo carried in a vehicle;
5 not to the fuels, the lubricants or fluids that are needed
6 or result from the normal operation of the vehicle or its
7 parts. An optional, buy-back endorsement that deletes the
8 exclusion will be available, again priced on a refer-to-
9 company basis, and that exclusion for the Business and
10 Truckers Policy is being submitted as a mandatory exclusion
11 in all policies in 1986 on a country-wide basis by ISO.

12 That ends my initial remarks. I would like
13 to ask Bob Sullivan of the Crum & Forster Insurance Companies
14 to provide his testimony now.

15 MR. BRYAN: You and Mr. Biondi and Mr.
16 Sullivan will be available together for some questions at
17 the conclusion of all your statements; is that correct?

18 MR. AVERILL: Yes.

19 MR. BRYAN: I might also, if you have
20 written prepared statements, if you can give a copy to the
21 court reporter when you hand it in, it will assist the
22 clarity of the record.

23 MR. ROBERT J. SULLIVAN: Good morning. My
24 name is Robert J. Sullivan. I am Vice President of
25 Government Affairs for Crum & Forster in Morristown, New

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2 Jersey. We very much appreciate the opportunity to express
3 our views before this hearing this morning, and we compliment
4 the Department on holding such a timely hearing on a matter
5 which we, as the second largest commercial general liability
6 writer in the State, as a major corporate citizen of the
7 State, are vitally interested in.

8 What I would like to do is we have a lengthy
9 document which touches upon a lot of our concerns over both
10 the judicial decisions that have taken place in the State
11 over the last five or six years, as well as our view of the
12 liability schemes created not only by State Hazardous Waste
13 statutes, but also by Federal Hazardous Waste statutes that
14 we will submit for the record.

15 I will highlight a number of those, the
16 points made in that memorandum this morning, and then go
17 on to specifically address the questions which the
18 Commissioner Gluck has raised in her news release, notice
19 for this hearing.

20 Some have argued that the current problem
21 in environmental liability insurance is one of availability,
22 and that will pass as rate adequacy is restored and
23 industry surplus is rebuilt and improved profitability
24 attracts new capital to the business.

25 I am here to tell you that from Crum &

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2 Forster's perspective, the current crisis in New Jersey
3 relating to environmental liability coverage is one of
4 insurability.

5 No amount of capacity will persuade insurers
6 to risk capital in a line of business in which the New Jersey
7 Courts feel free to torture both logic in the English
8 language to define coverage where none existed nor was none
9 intended and to create simply out of whole cloth new theories
10 of liability which affect both our insureds and ourselves
11 and new categories of damages, and that insurance rates can
12 never be adequate under statutory schemes that impose waste
13 clean-up liability vicariously and without any showing of
14 harms to person or property.

15 Simply put, factors beyond the control of
16 the insurance industry and factors beyond the control of our
17 insureds argue poorly for the long-term insurability of
18 most businesses with any industry of using or handling
19 hazardous substances.

20 Quite frankly, both primary and re-insurance
21 underwriters no longer trust the New Jersey Judiciary. They
22 have lost confidence that either their contract terms or
23 traditional tort rules of liability and damages will be
24 respected. Until that confidence is restored, insurers are
25 likely to commit their resources to less volatile lines of

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insurance which we simply believe are insurable.

Neither underwriters nor actuaries can deal adequately with the risk exposure presented by most businesses subject to the environmental liabilities imposed by State and Federal environment statutes. These legal regimes, at least in our perspective, are collectivist perversions of traditional concepts of strict joint and several liability that imposes huge costs on any business with even the remotest connection to a facility from which there has been a "release of a hazardous substance."

While the scheme may be effective in bringing the resources of large numbers of firms to the clean-up process, it completely frustrates the ability of insurers to measure and the ability of our actuaries to price the loss exposure of firms whose activities may give rise to bodily injury, property damage, or clean-up costs arising out of environmental incidents.

Mike Averill briefly touched upon some of the judicial trends affecting State environmental liability. Unfortunately, the nationwide trends seem to be emanating out of the State of New Jersey.

I might also say that emanation in that process is, from our perspective, still in the gestation stages. A lot of the court decision which we, as insurers,

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2 are concerned about and which our insureds are concerned
3 about are really now winding themselves through the New
4 Jersey Courts.

5 The judicial climate in New Jersey on
6 environmental liability and related insurance coverage issues
7 has become so unpredictable as to make the environmental
8 liability exposure of many New Jersey risks open-ended, both
9 as to causation and damage, and potentially difficult to
10 insure.

11 Judicial construction of State and Federal
12 Hazardous Waste statutes and of past contracts that were not
13 designed to respond to clean-up liabilities threatens to
14 undermine the financial foundation of Commercial General
15 Liability insurers.

16 The worst of the precedence which everyone
17 has heard cited which is really a litany of precedence
18 arising out of the contamination of wells serving 97
19 families in Jackson Township in combination, and I think
20 this is extremely important to recognize the impact of the
21 Jackson Township cases and derivative cases from the original
22 adversus Jackson Township case, the citations and
23 the elaborations and our concerns are listed in our more
24 formal submission. These decisions, number one, destroy
25 the efficacy of the CGL pollution exclusion, simply writing

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2 the word "sudden" out of the exclusion and looking at the
3 word "occurrence" and saying so long as the pollution was
4 not expected by the insured, it was covered by the policy.

5 Number two, it converted the Commercial
6 General Liability per occurrence policy limit into a per
7 claim policy limit. The Theodore Beckman case (phonetic)
8 stands for the proposition that we will find as many number
9 of occurrences as there were families affected as there were
10 errors or omissions, negligent acts involved, and as there
11 were days involved in which all of those happenings occurred,
12 and also, thirdly, overturned centuries of common law and
13 insurance contract law by awarding damages for the mere
14 possibility of future harm.

15 On the insurance coverage issue, the
16 magnitude that these judicial decisions have permitted and
17 will permit has caused New Jersey Courts simply to seek
18 insurance coverage when none was intended. Enormous
19 speculative damages that have been awarded has resulted in
20 making the environmental liability exposure of most New
21 Jersey risks very difficult to insure. A final aspect of
22 what the New Jersey Courts have been doing to dismantle the
23 integral policy provisions of our standard CGL Policy is
24 the growing number of court decisions finding coverage under
25 our policies, CGL Policies for on-site clean-up costs.

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2 Over the last twelve months, courts in New
3 Jersey and several other states have found that the industry's
4 Commercial General Liability Policies, notwithstanding their
5 limitation to bodily injury and property damage arising out
6 of "sudden and accidental pollution incidents" found that
7 they provide coverage for clean-up of hazardous waste on our
8 policyholders' premises regardless of whether or not there
9 has been any off-site migration of these wastes and
10 regardless of whether or not the incident giving rise to the
11 clean-up was sudden or accidental.

12 In the end analysis, we believe somehow must
13 be found to convince the New Jersey Courts that they can
14 simply not ignore the terms of insurance contracts without
15 doing irreparable harm as they have already done to the
16 ability of insurers to service and provide coverage to
17 environmental liability risks.

18 Unfortunately, even if the State was to
19 correct the damage judicially inflicted on the State's tort
20 liability system and integrity of what we consider to be
21 essential policy provisions in our Commercial General
22 Liability Policy, a number of the same coverage and
23 insurability problems exist as a direct result of the
24 liability for clean-up and liability schemes which have
25 been imposed upon our insureds both at the Federal level

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2 through the Resource Conservation and Recovery Act and
3 Superfund law as well as at least six and certainly more
4 environmental liability statutes at the State level.

5 The six environmental statutes that New Jersey
6 has which are cited in our paper establish varying degrees
7 of liability for New Jersey risks for environmental incidents.

8 The net effect of these laws, and that's
9 really what I want to highlight, is that whenever there is a
10 discharge, any owner or operator of a facility, or any
11 person who is responsible for the discharge of the hazardous
12 substances, is held under all these statutes to be strictly
13 jointly and severally liable without regard to fault for
14 damages.

15 Simply put, the State of New Jersey, *insured*
16 Congress, enacted liability schemes without giving any
17 consideration whatsoever to whether or not such schemes were
18 insurable.

19 Where we are at this point in time is that we
20 have had, admittedly in the gestation stage, a number of
21 New Jersey Court decisions in the environmental liability
22 area which have established national precedence. We also
23 have a very detailed scheme, although not intermingled
24 scheme, of State and environmental liability statutes,
25 which impose upon our insured strict joint and several

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2 liability without regard to fault for damages arising out
3 of environmental incidents.

4 All of that has happened in the last ten
5 years simply without regard to whether or not those schemes
6 are insurable. We are now at the point where we are being
7 asked, "Why are they not insurable?"

8 The answer is simply that when the schemes --
9 the schemes were not put together so that they interrelated,
10 nor was there any consideration when all of these
11 developments occur whether or not insurance would be
12 available. In fact, it was in total disregard to whether
13 or not the risk would be insurable.

14 The sole focus was on providing marshalling
15 whatever assets could possibly be available for pay for
16 clean-up and to pay for bodily injury and property damage
17 arising out of those clean -- arising out of any
18 environmental incidents.

19 The New Jersey Spill Fund Act goes so far
20 as to suggest that the State is jointly and severally liable
21 and may bring action against "responsible parties" on the
22 same basis, for not only clean-up costs, not only bodily
23 injury and property damage, but also damage to natural
24 resources, also loss of revenue, also loss of taxation.

25 No one, in my opinion, has suggested, in any

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2 way, shape, or form, that you can measure the cost of
3 damages to natural resources in advance. You may want to
4 look at just one little piece of Spill Fund statute and
5 which we think gives an insight into both the problem of
6 our insured in evaluating their exposure, and that is really
7 where the problem exists.

8 The risk of exposure or environmental
9 liability of our insured and businesses in New Jersey is
10 simply unmanageable and therefore uninsurable. In 1983, the
11 Spill Fund Act was amended to simply provide the words
12 "discharges on to the land." Prior to that, the Spill Fund
13 Act had only applied to discharges on the waterways.

14 The question arises, what is the net effect
15 of that amendment on New Jersey businesses and their
16 Commercial General Liability insurance? We are simply not
17 in the position to assess that.

18 We would submit for your consideration that
19 if you go back to the sponsors of some of that legislation
20 and you ask them what was your estimate of the damages and
21 costs resulting from those programs, they could not tell
22 you.

23 So, it is a little difficult for us, having
24 seen what has happened, then, to be able to tell you what
25 our projected losses are going to be from these programs

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2 which were enacted without any estimates or guesstimates of
3 what the resulting costs and losses and damages arising out
4 of those programs will be. That is simply the dilemma that
5 we are in.

6 I would like, now, to, with your permission,
7 to go to a number of the questions which the Department has
8 raised and give you some quick -- and quickly conclude with
9 some of our comments.

10 The first question, what is the intended
11 scope of coverage in policy forms that presently include
12 liability coverage for "sudden and accidental" pollution?

13 Simply put, our CGL Policies that were
14 issued without a pollution exclusion were designed to
15 provide coverage, liability coverage for off-site bodily
16 injury and property damage liability arising out of
17 unintentional acts by our insureds.

18 It was not intended to cover intentional
19 acts, whether sudden or gradual. It was not intended to
20 cover any gradual pollution, the temporal test being the
21 test that we applied, and it was simply not intended to
22 cover on-site clean-up costs.

23 Why do the filers of such policy forms find
24 it necessary to exclude pollution liability coverage
25 absolutely?

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2 I think the answer to that is that -- I think
3 it's important to emphasize a point that was made earlier
4 and that is these are not total, absolute pollution
5 exclusions. It does have significant coverage for completed
6 operations and product liability in certain off-site
7 discharges.

8 While that may seem narrow, when you talk to
9 a manufacturer or an underground storage tank, it provides,
10 even with the exclusion, significant pollution coverages
11 provided to that manufacturer for pollution liability
12 coverages arising out of product liability claim for his
13 underground storage tank. So, there is still a considerable
14 amount, admittedly for certain classes of risk, of pollution
15 liability coverage, even under the almost total pollution
16 exclusion that the current forms provide. I don't know if
17 I mentioned before, but we use the ISO pollution exclusion.

18 Upon what supporting data or documentation
19 do they rely?

20 I've tried to highlight the trends that we
21 see and the simple evaluation of the liability exposure
22 which the State and Federal Hazardous Waste statutes provide
23 as well as the judicial decisions in determining common law
24 theories, strict liability theories, and new speculative
25 damages.

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2 To what extent did the actions and demands
3 of re-insurers affect the filers' decisions to exclude
4 pollution liability absolutely?

5 While the re-insurers have made their
6 position well-publicized, primary insurers, we as the
7 primary insurers have made the decision ourselves after
8 evaluating simply the scope of the liability schemes that
9 we would be asked to insure by providing some pollution
10 liability exposure. We have not seen any significant
11 pressure on behalf of our re-insurers to exclude pollution
12 in the primary coverages. We are already a large umbrella
13 writer, and discussions there have been a little different,
14 not altogether different, but a little different.

15 What is the demonstrated and projected loss
16 experience as a result of the alleged expansion in scope
17 of coverage by recent court decisions construing the present
18 and sudden accidental policy form language?

19 I would sort of like to expand that question
20 a little bit to include not only the present sudden and
21 accidental judicial decision construing the sudden and
22 accidental language, but also the decisions construing
23 whether or not our policies provide on-site clean-up costs
24 which is a major, major consideration, also those decisions
25 implementing a multiple occurrence rule, and also those

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decisions awarding speculative damages.

A lot of people have taken some relief in the fact that the Ayres case (phonetic) was reversed in part on appeal. If you take a close look at that appeal where they reduce the judgment in that case from \$15.3 million to some \$5 million and you are a private entity that simply doesn't have the protection cited in the Tort Claims Act which was part of the reason why the decision -- part of this decision was reversed, you get pretty damn nervous that the original Jackson Township case against a private entity would have been upheld on appeal, and lastly, What is the demonstrated and projected loss experience?

Because what the courts have done and because of the liability schemes that existed, we perceive ourselves and our insureds as having simply unlimited exposure. It's clear, and therefore, we can't provide you, today, what the projected loss experiences would be if we issued an environmental impairment liability insurance contract to our risk with significant liability exposure, and that's the heart of the insurability issue.

What constitutes adequate notice to an insured of reductions in coverage represented by such absolute exclusions?

We have, and as part of the discussions over

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2 the emergency regulation, now permanent regulation, on
3 cancellation and non-renewals suggested that it makes a
4 hell of a lot of sense that an insured be provided thirty
5 days advanced notice of any changes in coverage, significant
6 changes in coverage which a pollution exclusion would
7 represent, and we are willing to provide our insureds with
8 thirty days' notice of any significant change in coverage,
9 and specifically any addition of exclusionary endorsements
10 to our policy, both so that the insured has the ability to
11 recognize and understand that coverage is being provided,
12 as well as to shop in other markets to get any necessary
13 coverages he may need, additional coverages he may need.

14 Do filers of these exclusions intend to offer
15 pollution liability insurance as a singular coverage? If
16 so, under what conditions and at what rates?

17 We were a charter member of the Pollution
18 Liability Insurance Association and continue as an active
19 member of it. We do -- we will be offering under what they
20 call the PLIA's form which is very similar to the ISO
21 environmental impairment liability form separate coverage
22 from the CGL Policy for environmental incidents both sudden
23 and gradual.

24 Admittedly, we are selective in the writing
25 of that. Basically, we write it on other policies, and then

1 re-insure it with PLIA of which we are a member.

2 To date, approximately 70 percent of risks
3 placed in PLIA have, in essence, been the service station,
4 underground storage tank variety.
5

6 The remaining 30 percent have been the
7 manufacturers, certain manufacturers and apartment houses,
8 for instance an apartment house with their own sewer system.

9 Interestingly enough, we have found with a
10 minimum premium of \$600 or \$1,000 that we don't have many
11 takers for the coverage. We don't offer it to all our
12 risks; but, for those risks we find that too many of them,
13 the \$600 to \$1,000 is -- they simply are not willing to
14 spend. So, it's important to emphasize the fact that to
15 some risks, environmental liability, we are making
16 environmental impairment liability insurance available under
17 a separate coverage for both sudden and gradual.

18 Obviously, PLIA is not walking into and
19 writing landfills at this point in time. They have a scale
20 of one to five where they grade the severity of the risk in
21 terms of its pollution liability exposure.

22 We individually can write and evaluate the
23 first three after we get extensive loss control reports,
24 environmental impact reports. When it gets to a four or
25 five stage, that goes directly to the Pollution Liability

Insurance Association for their own underwriting.

That concludes my formal remarks. I would like to end them with a plea, though, for serious consideration to be given for the continued -- one question I did miss was, To what extent should such exclusions be standardized in various policy forms?

We are willing -- Crum & Forster is willing, although we may see some instances where we otherwise would use a true, absolute exclusion, to use, in New Jersey, a standardized pollution liability exclusionary endorsement. We have no objections to that. We think it probably makes a lot of sense in terms of the marketplace, knowledge of what exclusions are being utilized.

The plea which I referred to earlier was related to the regulations on cancellation and non-renewal. We believe there now exists and understand why it exists an artificial distinction between the use of exclusion endorsement on new and renewed business. We would just like to offer the comment that as a large Commercial General Liability writer, it makes it simpler for us to be a factor, an aggressive factor in the Commercial General Liability market if those exclusion endorsements including the pollution liability exclusion, the standard pollution liability exclusion can be used for renewal as well as new

1 business.

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3 MR. BRYAN: Thank you. I believe also as
4 part of this first group, Mr. Biondi from ISO is going to
5 give us some actuarial information.

6 MR. RICHARD S. BIONDI: Good morning. My
7 name is Richard S. Biondi. I'm manager and actuary of the
8 Commercial Casualty Actuarial Division at ISO. I'm here
9 to explain to you some of the rating considerations pertinent
10 to the ISO pollution exclusion in the general liability
11 policy.

12 First, I would like to tell you a little bit,
13 but not too much detail, about my own background. I've been
14 manager and actuary of the Commercial Casualty Actuarial
15 Division at ISO for the past ten years. My responsibilities
16 include the production of general liability rate reviews and
17 rate filings in almost all states.

18 I've also testified as an expert witness at
19 rate hearings in approximately twenty states including New
20 Jersey. I'm a Fellow of the Casualty Actuarial Society by
21 examination, and I'm also a member of the American Academy
22 of Actuaries.

23 My testimony this morning will be directed
24 at the questions included in the letter from the Insurance
25 Department of November 20th.

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2 Actually, I'll only address those questions
3 which pertain to rates. The first question that pertains
4 to rates is No. 2.

5 Just to quote it again, it asks, Why do the
6 filers of such policy forms find it necessary to exclude
7 pollution liability coverage absolutely including those
8 risks with only incidental exposure, and upon what supporting
9 data or documentation do they rely?

10 The first part of that question was really
11 addressed already by Mr. Averill and Mr. Sullivan. As I
12 understand it, pollution has been excluded because the
13 original intent of the coverage to cover only sudden or
14 accidental claims has been eroded by recent court decisions,
15 specifically court decisions in New Jersey.

16 The Jackson Township decision was mentioned.
17 It's my understanding that that decision took effect during
18 1982. It's really quite a recent decision. Because that
19 was so recent, losses that would result from that claim
20 would not yet be included in the ISO rate-making data base.

21 However, when those losses are resolved and
22 when that data does flow in, it seems to me that that case
23 could set a precedent and could result in similar situations
24 in the future with tremendous losses.

25 It makes sense to me, therefore, that the

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2 only way to avoid this tremendous trend which was never
3 really anticipated and it was never intended to cover these
4 types of claims would be to exclude coverage from the GL
5 Policy.

6 I understand, also, that the Jackson Township
7 case is not the only case that seems to be setting terrible
8 precedence and seems to be expanding the degree of liability
9 of the insurers. This concept of joint and several damages
10 also fits into that category, and I believe this was mentioned
11 as well by two previous speakers. Again, this is a recent
12 change. All of these things seem to have taken place since
13 the Superfund legislation in 1981, and given the fact that
14 we consider general liability a long tail line, that means
15 that it takes a very long time before you really know what
16 the losses are, even after a claim is incurred.

17 The initial estimate is only that, just a
18 rough estimate of the ultimate liability. We may not know
19 for ten years what the ultimate liability really is, and
20 these types of claims, these pollution claims seem to be
21 quite a bit different from normal general liability claims
22 which we have a great deal of prior experience with.

23 I don't think we will know for at least ten
24 years after 1981 what the effect of some of these -- what
25 the magnitude of some of these losses are.

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2 The next question in your letter which
3 applies to rates is No. 4. What is the demonstrated and
4 projected loss experience as a result of the alleged
5 expansion and scope of coverage by recent court decisions
6 construing the present sudden and accidental policy form
7 language?

8 My answer to that is that we have no
9 projection of future loss experience yet. The pollution
10 policy is (a) rated. That means that ISO does not calculate
11 any rates for that policy. The rates or the premiums must
12 be determined by each insurer that sells pollution policies.

13 The premiums for the policy depend, as I
14 understand it, on a variety of technical factors resulting
15 from engineering inspection of risks. Given the tremendous
16 magnitude of the pollution problem in the United States,
17 and given the changing technology of pollution clean-up and
18 the changing state of knowledge of the effects of pollution
19 on the environment, we have no way to project future loss
20 experience for this coverage.

21 The next question relating to rates is No. 5.
22 What is the demonstrated and projected loss experience for
23 pollution liability by industry, business, or type of
24 operation?

25 We don't have data yet for the pollution

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2 liability policy. The ISO pollution policy went into
3 effect -- was filed during 1981, and we will begin to see
4 premium and loss data shortly.

5 However, again, that loss data will be very
6 immature because of the long time that it takes for losses
7 to mature for a long tail subline such as pollution liability
8 insurance, and as a result, I don't think that we will be
9 able to reach any conclusion on the magnitude of these
10 losses for many years.

11 The last question relating to rates was No. 8.
12 What is the anticipated rate impact of reduction in
13 coverage represented by an absolute pollution exclusion?
14 Upon what data and calculations is this based?

15 The data that we do have for general
16 liability insurance indicates that before Policy Year 1983,
17 the effect of pollution claims was virtually negligible.
18 As you know, only sudden and accidental claims were covered
19 under those general liability policies.

20 Until very recently, pollution was not in
21 the spotlight as a major problem in America, and the number
22 of pollution claims against insurers was insignificant.
23 Furthermore, to the extent that there were pollution
24 claims, these extended to apply to the large industrial
25 concerns which were not rated based upon the ISO manual rates.

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2 Consequently, the experience in these
3 situations was not used to calculate ISO rates. We've done
4 a number of tests to our rate-making data base, and we have
5 no significant number of pollution claims in our past data.
6 Therefore, present rates don't reflect any charge resulting
7 from pollution liability claims.

8 Therefore, while pollution will be excluded
9 in the future, no decrease in rates for that reason is
10 warranted.

11 One last factor that is, to some degree,
12 related to this point is that general liability losses have
13 been increasing at a rather astounding rate for a lot of
14 reasons if not for pollution. I think we are all familiar
15 with the fact that general liability experience has been
16 deteriorating rapidly.

17 I have with me quite a bit of data on this,
18 and I have data showing how the ISO rates **have** increased over
19 the past several years for general liability insurance,
20 and also, I have data showing what the industry results have
21 been, those in New Jersey and country-wide, and I would be
22 happy to answer any questions that you have about that.

23 MR. BRYAN: Thank you. One of the things,
24 Mr. Biondi, before you go, you had indicated that at the
25 present time, the data is immature, and you haven't got the

1 results back.

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3 We understand from some other sources that a
4 lot of these claims are in process. They have been filed
5 recently, but there really hasn't been any losses paid and
6 this sort of thing, so that the data is immature, as you said.

7 How and what kinds of data are you gathering
8 now on pollution, and how are you keeping it? Are you
9 keeping it by industry, by trying to segregate those from
10 what would be a sudden and accidental under the traditional
11 interpretation from that which would be gradual and this
12 sort of thing?

13 I would really like to focus on that and
14 find out what kind of information is being developed at this
15 point.

16 MR. BIONDI: I guess there are two answers
17 to that question. The first is what we are capturing on
18 general liability policies since 1981. I believe that's
19 when we first established statistical codes to capture data
20 for the pollution policy. I believe that's when the
21 pollution policy actually was drawn up and filed by ISO,
22 and for that policy, we have established a class code whereby
23 we capture premiums and losses on a policy year basis for
24 each year since 1981, and we will be seeing that data shortly.

25 Of course, I don't think it will tell us very

1 much because the data, the loss data will still be immature.

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3 Typically for general liability, it takes
4 around ten years before we really have a firm idea of the
5 ultimate value of losses, and if this were normal general
6 liability policy, we would be able to extrapolate the effect
7 of future development and come up with an estimate of the
8 ultimate losses at an earlier date, maybe this year, maybe
9 next year; but, pollution liability is something new and
10 different, and I don't think we can extrapolate the results
11 from general liability to pollution liability.

12 So, I would say that it would have to take
13 at least another five, six, or seven years before we really
14 have any kind of a decent idea of what the experience really
15 is for that pollution liability policy that went into effect
16 in 1981.

17 Now, the second part of the answer to your
18 question concerns the new CGL Policy, and there, as Mike
19 Averill pointed out, we have several different options for
20 pollution. We have a pollution policy which is very
21 comprehensive, includes clean-up, and we have a pollution
22 policy which does not include clean-up, and then, third, we
23 have an endorsement on the CGL Policy to include pollution.

24 We've established more detailed coding for
25 those policies. We have a subline code for the pollution

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2 policy, and we also have three class codes for each of those
3 three choices that I just mentioned.

4 So, we will know what kind of policy was
5 purchased by the risk.

6 In addition to those codes, we have type of
7 loss codes on each loss record. Any time there is a loss --
8 let's say that the loss corresponded to the broadest
9 pollution policy -- the one that includes clean-up -- we
10 will have a type of loss code on any loss on that policy
11 which will tell us whether, indeed, it's a clean-up loss or
12 a BI loss or -- bodily injury loss or property damage loss.

13 So, we will get that additional detail on
14 the individual losses.

15 MR. BRYAN: Will you be keeping -- will you
16 be keeping data or keeping information, developing data on
17 risks by type of business, size of business, chemical
18 manufacturers as opposed to grocery stores, that sort of
19 thing?

20 Will they be broken down further than what
21 you have already mentioned?

22 MR. BIONDI: Yes, to a degree, and just
23 bear with me one second. I'll take a look at the exact
24 statistical coding that applies.

25 The coding that we have set up includes these

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three class codes for the three pollution forms. Now, what that means is that we will just know that it's one of the three pollution forms.

Normally, the class code for general liability tells us what the -- what the type of industry, type of business of the risk is; but, in this particular case, the class code will tell us that it's pollution, one of the three pollution forms.

So, we will not know what the -- what the business is of the risk, what the type of industry is. We also don't normally find out the size of the risk because that's not reported to us at ISO for any data.

What we normally get would be a unit transaction record which would give the number of exposures, and these transactions are all totalled up, and we review that data in aggregate. We really don't get a good measure of the size of each individual risk. That information is not typically used for rate making.

MR. BRYAN: Thank you. Yes, Mr. Sullivan?

MR. SULLIVAN: It may be helpful, just from a company's perspective, to describe how we handle our environmental claims and how we break them down.

We have a totally separate, fully-staffed environmental claims unit that breaks down their claims,

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2 number one, on site clean-up cost claims versus BI and PD
3 and other claims, that category, and then in each of those
4 categories by type of environmental incident or environmental
5 pollutant so that we have a separate class on hydrocarbons
6 and BI and bodily injury and property damage. So that while
7 we don't break it down by class of risk, we simply -- we
8 have a very, very good handle on how we have by type, in
9 essence, type of pollutant incident, on-site clean-up costs,
10 bodily injury, and property damage.

11 Your earlier question, and, you know -- you
12 know, I would caution you not to be misled by the facts that
13 there are no losses nor statistics for you to look at
14 because the number of claims coming in on environmental
15 incidents are significant. They have not translated
16 themselves to losses simply because the claim has been made
17 and it may be used before the litigation over those claims,
18 either State or Federal EPA against the responsible party,
19 and then subsequently the issue of whether or not there is
20 coverage in the insurance contract takes place.

21 We have done it -- we classify our claims
22 on environmental claims also on a nationwide basis. We
23 are a large writer in New Jersey, but not necessarily large
24 in all of the other states, and our environmental claims
25 taken as a whole in New Jersey are greater than any other

1 state in the United States.

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3 Now, that doesn't tell you -- it's an average
4 type of thing without respect to mix of business, without
5 respect to premium volume; but, there is that base level of
6 claims that are simply beginning to come in the door of all
7 Commercial General Liability writers.

8 One other point, I mentioned earlier that we
9 are really in a gestation period, and as you know, under the
10 Federal Superfund law as well as under the State Spill Fund
11 law, there is a procedure whereby either the Federal
12 Government and/or the State pay for the on-site clean-up
13 costs, and in the State's case, bodily injury and property
14 damage and other damages arising as a result of
15 environmental incidents, either they pay them directly and
16 then go against "responsible parties" in order to replenish
17 their revolving funds, whether it's in the Spill Fund or
18 it's in the Superfund.

19 The Federal EPA, and as you also know, on
20 publicly owned sites, the Federal Superfund sites of which
21 New Jersey has 93, largest in the country, in addition to
22 having a thousand, at least 1900 other State sites that it
23 wants to clean up, the Federal Government pays 50 percent
24 on municipal sites, publicly-owned sites. The State pays
25 the other 50 percent for clean-up. On the publicly-owned sites;

1 the Federal Government pays 90; the State pays 10.

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3 The Federal Government is just embarking
4 upon 300 lawsuits just in 1936 on the liability for the
5 clean-up costs of those sites and not 300 with respect to
6 New Jersey, but since New Jersey has one-tenth, you can
7 assume that at least 30 of those lawsuits are going to be
8 in New Jersey.

9 We know those lawsuits are going to be there
10 because the claims on the basis of them are there. So that,
11 you know, I just wanted to make the distinction between
12 the loss picture and claim picture because there is a
13 significant difference.

14 MR. BRYAN: I appreciate that. In keeping
15 your statistics or in keeping the ISO statistics, are they,
16 in any way, segregated by State? For example, would you be
17 able to, at some point, compare losses in New Jersey with
18 losses in other jurisdictions?

19 MR. BIONDI: Yes. We will get the State
20 detail.

21 MR. BRYAN: Okay. Are you doing that also
22 in yours, or do you just report to ISO?

23 MR. SULLIVAN: We keep our claims -- we
24 know what our claims are by State and by type of
25 environmental incident.

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2 MR. BRYAN: And I appreciate what you say
3 about the claims just beginning to come in. We received
4 some information by another company that indicated 1982 they
5 had something like 20 to 30 environmental or pollution-type
6 claims pending, and they now have over a thousand, and they
7 are getting them in at the rate of 900 a year or so, and
8 that was explained as a reason, that loss statistics have
9 not yet been developed, and we understand that, and the
10 thrust of some of these questions are are we now developing
11 loss statistics based on these claims that are coming in in
12 such a way as that over a period of time, they will be
13 meaningful, meaningful loss statistics developed particularly
14 with regard to New Jersey.

15 One of the things, and it kind of touches
16 on all your testimony, Mr. Biondi had mentioned that prior
17 to '83 or so, that there was -- everyone knew what sudden
18 and accidental meant, the language that was in the policy,
19 and you did receive some claims, but it was a negligible
20 amount of claims.

21 I think in another statement that we received,
22 there was an indication that it didn't have any impact on
23 rates because it was an infinitesimal amount, the sudden
24 and accidental coverage.

25 One of the things that is kind of puzzling

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2 from our perspective is if this sudden and accidental
3 coverage -- or these sudden and accidental incidents, those
4 traditionally covered in what you testify that you intended
5 in developing the policy language and perhaps what the court
6 has expanded beyond what you intended, if that were -- if
7 that coverage were afforded and limited to your intent,
8 would that still be insurable, and that really is a bottom
9 line question that we really would like to explore and have
10 your comments on.

11 If, for example -- I understand that
12 Jackson Township is on appeal. If, for example, the court
13 reversed the Jackson Township case, would, then, this
14 exclusion not be necessary because this would again be
15 insurable?

16 MR. SULLIVAN: I would like to take the
17 opportunity to address that first.

18 As I previously mentioned in my testimony
19 in taking the license to expand upon one of the questions
20 that you've raised, if we had a reasonable interpretation
21 of our sudden and accidental pollution grant of coverage in
22 our policies, it would simply not solve the insurability
23 problem, and let me tell you why. It does nothing on the
24 outside clean-up cost issue.

25 We are looking at -- I look at it really as

two separate types of liabilities; the on-site clean-up costs and the bodily injury and property damage costs. The Spill Fund goes on in New Jersey and says you have damage to natural resources and other damages which the risk may be liable for. We are not convinced that without a change in the liability schemes, not just the judicial interpretations of insurance contracts and common law liabilities, but now you have six environmental statutes in New Jersey. Superimposed upon that is two Federal environmental statutes. You still have liabilities even under a sudden and accidental occurrence which are not measurable. They are not readily measurable either from our insureds' standpoint or from an insurance standpoint.

So, the problem is just not limited to sudden and accidental, and I would say that from Crum & Forster's perspective, that is a good reason why, underpins our reason why we use the ISO pollution exclusion risk for those reasons that we can use them for and separately underwriting it in a separate policy for those risks that we believe through PLIA that we can measure their exposure.

I think that we are very, very much concerned about municipal exposure to environmental incidents, and that's a perfect example. You have a municipality who has purportedly the protection of the Tort Claims Act in defining

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2 its liabilities for all liabilities. The State then enacts
3 a rash of environmental liability statutes, I think, in
4 concept, which we agree with their thrust, but whose funds
5 need money in order to generate the clean-up process and
6 everything else, which overrule the Tort Claims Act.

7 The question is, well, if you had the Tort
8 Claims Act, all the protection built into the Tort Claims Act
9 built in for municipalities, does it apply in environmental
10 incidents because their liabilities now are determined by
11 these various State Hazardous Waste statutes, not the Tort
12 Claims Act. You superimpose upon that an additional Federal
13 scheme from RCRA and Superfund, and municipalities are
14 simply in the position of not being able to measure their
15 exposure, and if we limited our coverage to sudden and
16 accidental, under that type of scheme, you know, the
17 concern is and what has played out in practice is that there
18 is every incentive for the courts to find it to be sudden
19 and accidental in order to find insurance coverage, in order
20 to avoid the disastrous financial results on municipalities
21 if, in fact, when they are found liable under these Federal
22 and State Hazardous Waste statutes, they have the wherewithall
23 to respond and not as in Jackson Township suggesting that if,
24 in fact, we do not have insurance coverage for this loss,
25 then your property taxes are going up a thousand percent for

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2 the next hundred years. You know that's the implication.

3 There are other problems besides the sudden
4 and accidental interpretation of our policies. Those
5 relate to finding that our policies pay for on-site clean-up
6 cost, pay for retroactive liabilities of statutes which were
7 enacted after our policies were issued but have retroactive
8 implications, that provide for speculative damages such as
9 medical surveillance costs and other pain and suffering
10 awards and cancerphobia in the Jackson Township case and
11 others, and to the seemingly endless web of liability schemes
12 such as the Spill Fund which would, conceivably, if we offer
13 a sudden and accidental coverage, make us liable for damage
14 to natural resources as a result of a sudden and accidental
15 spill.

16 You know, the classic example, and again,
17 we are using extremes, but extremes help, in the Rocky
18 Mountain arsenal site, clean-up costs alone for the water
19 aquifer out in Colorado is about \$2 billion. The costs are
20 astronomical.

21 The clean-up costs of Federal EPA costs are
22 about 10 million a site. Now, if you take the 93 sites in
23 New Jersey, that is \$93 million that has to be funded
24 somewhere, and it's not going to be out of the Federal
25 Superfund. It may initially be out of the Federal Superfund

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2 and the State Spill Fund; but, it may also, for those
3 revolving funds to work, it has to go somewhere else. Some
4 "responsible party" who insured would have to pick up the
5 losses.

6 So, it's a combination of problems brought
7 on by a number of statutory and judicial decisions and new
8 liability exposures since we began issuing a Commercial
9 General Liability Policy with the limited grant of coverage
10 for sudden and accidental pollution.

11 MR. BRYAN: Okay.

12 MR. AVERILL: One further comment on that.

13 MR. BRYAN: Sure.

14 MR. AVERILL: If you could guarantee that
15 the State Court in New Jersey would interpret the contract
16 as originally intended, there is still an additional problem
17 in that there is no guarantee that the suit will be brought
18 in New Jersey. You are still subject, because injury may
19 occur elsewhere, exposure may occur in New Jersey, injury
20 elsewhere, the suit does not necessarily have to be mandated
21 to be brought in New Jersey, and of course, an insured's
22 operations and products or whatever may go out of state
23 subject to the court interpretations of other states,
24 compounded by Federal interpretations versus State
25 interpretations. So, that's only a small modification of

1
2 the problem rather than a large-scale resolution of it.

3 MR. BRYAN: Focusing on specifically the
4 absolute exclusion or the exclusion and some of the
5 Commissioner's concerns, we talked about the sudden and
6 accidental language expansion and statutory liability,
7 particularly clean-up cost expansion and those sorts of
8 things.

9 What I would like you to tell me now is what
10 kinds of incidents were anticipated to be covered under the
11 prior language that won't be covered under the new language?

12 For example, we have had given us examples
13 of a situation where there is a fire on the premises and
14 smoke drifts across the road and it's a business premises
15 and smoke drifts across the road. There is an automobile
16 accident. Under the existing exclusion, that would be
17 covered. Liability from that incident would be covered.
18 It's not under the present.

19 A situation where a grocer or someone in
20 retail has a substance on his shelf in a glass jar and it
21 falls and breaks and someone is injured because of the
22 nature of the substance that was in that, are these the
23 kinds of things that would not be covered that used to be
24 covered, and if you can, I would like to have as many kinds
25 of examples of those things that you can think of or

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2 situations because that is one of the Commissioner's main
3 concerns, is that these normal types of incidents that were
4 previously intended to be covered but now may not be
5 covered, and am I correct, first of all, am I correct in
6 saying these kinds of liability would not be covered under
7 the proposed language?

8 MR. AVERILL: Let me try to start answering
9 that. The prior exclusion, of course, excluded all
10 pollution unless the discharge, emission, et cetera was
11 sudden and accidental. Sudden and accidental were not
12 defined by the contract.

13 To take a literal meaning, you can go into
14 a dictionary, whatever, it means not intended by the insured.
15 So, it's accidental, and it was definable in time and place,
16 it's sudden.

17 Answering the auto question, for example,
18 which is not in the GL Policy, rather, it's under the
19 Commercial Auto Policy --

20 MR. BRYAN: Exclusions have been filed for
21 those policies, too.

22 MR. AVERILL: Oh, yes. Under the exclusion
23 we filed for the Auto Policy, if a trucker were carrying
24 hazardous wastes in drums and there was an accident, the
25 emission comes from the cargo, the hazardous waste. Under

1 the exclusion that we have developed, that would not be
2 covered.

3
4 Under the GL Policy, assuming an insured
5 had a storage tank for gasoline aboveground on the premises,
6 and suddenly, the tank opened up and the gasoline leaked
7 into the water supply through a river or through underground
8 supplies, whatever, if we can say that was not intended by
9 the insured, and if it was, in fact, an immediate accident,
10 immediate in time and place, then, there would possibly,
11 given the assumption of no other circumstances taking place
12 in an actual claims situation, have been covered under that
13 prior policy.

14 Under the new exclusion, in that situation,
15 when that tank emits the pollutant and the emission is on
16 the insured's premises, there is no coverage intended for
17 the insured under the new exclusion because with respect to
18 emissions from premises which the insured owns or rents or
19 occupies, there is a specific exclusion of coverage. Now,
20 you can go on with other claim examples; but, in that
21 situation, yes, we do exclude coverage because we could not
22 find language that would -- to the belief of ISO and our
23 company attorneys representing not just corporate lawyers
24 but also claims people, find language that we could use that
25 they would believe would be upheld in the courts.

1
2 So that if, in fact, that tank had a gradual
3 just rusted out and it started -- gasoline started dropping
4 down, what the courts have done is ruled that the first
5 drop was sudden; therefore, there is coverage under the
6 policy.

7 MR. BRYAN: I'm not so much interested in the
8 gradual section but the sudden and accidental. If the
9 leak happened because someone backed a forklift into it or
10 something like that and that kind of a traumatic type,
11 specific time-place type of event that is certainly not
12 intended, and that would not be covered under the new
13 exclusion; but, it would have been covered under the previous
14 policy?

15 MR. AVERILL: Well, in that situation with
16 the forklift operator, assuming it's a contractor who is
17 working on off-site premises and the contractor has not
18 brought the pollutants onto the site, and one of the
19 employees accidentally backs a forklift into the tank and
20 the pollutants come out, the contractor has coverage under
21 our exclusion.

22 MR. BRYAN: The contractor does, but if it
23 were an employee of the owner of the site?

24 MR. AVERILL: It would not be covered.

25 MR. BRYAN: What about the situation for, as

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2 I said, a retailer with damage with a substance, hazardous
3 substance that's sold but can cause some damage if improperly
4 used, that sort of thing; do you agree that there would have
5 been coverage under the old policy but there would not under
6 the new?

7 MR. AVERILL: Given the circumstance where
8 there would have been a sudden and accidental injury or
9 emission from the insured's premises --

10 MR. BRYAN: Yes.

11 MR. AVERILL: There probably will be no
12 coverage under the new exclusion, yes.

13 MR. BRYAN: Okay. One of the problems, and
14 you testified about the development of the pollution
15 exclusion language, and I was particularly interested in
16 the reason the exception was included in the first place
17 seems to be to cover these kinds of things, and if you agree
18 or disagree or have any comments on that, was that the
19 reason it appears that this was included in the first place,
20 that exception from the --

21 MR. AVERILL: To answer the question, we
22 originally intended to do sudden, fortuitous events to be
23 covered because that's what general liability coverage is
24 meant to be.

25 I had the experience of working with the

1
2 line of insurance committees at ISO in developing the
3 coverage concept and reviewing the coverage concept for our
4 new policy. When we went over this situation and this
5 subject very carefully, we initially attempted to continue
6 that same intent under the contract, spent hours and hours
7 of discussing the concepts, and many, many more hours
8 actually trying to develop policy language, and thought,
9 at least initially, we came up with policy language that
10 would still provide that same coverage as we had originally
11 intended, and that would work out in reality, in a court
12 system, and in claims handling.

13 The language was difficult, to say the least;
14 but, the problem was there was enough people, more than
15 enough people who didn't think the language would work, and
16 as you mentioned where the environmental claims are
17 increasing substantially, every day, the more that that
18 exclusionary language is brought into the court system for
19 interpretation, the more likelihood, as we have seen in the
20 past under these court decisions, the more likelihood it's
21 going to be misinterpreted.

22 MR. BRYAN: You indicated work and language
23 that was submitted out to the industry for their comments
24 and ultimately you chose the absolute exclusion or to
25 proceed with the language that was submitted. Is that,

perhaps, your best effort, or that sort of information the suggested language available?

The reason I ask is this, because the Department has been requested by the legislature to assist in the drafting of or suggestion of statutes and that sort of thing, and anything that has been developed with a lot of thought, we would appreciate taking a look at. Would that be available?

MR. AVERILL: Yes.

MR. BRYAN: Okay. Thank you. This exclusion is in existence in some states and existing in some policies and perhaps some in New Jersey.

One of the other questions was would it result in any misunderstanding by the insured about what is covered by the policy in, for example, the situation where this smoke from the fire goes across the road or if the grocer's shelf substance, that sort of thing. Have there been, to your knowledge, or perhaps Mr. Sullivan might be more aware of this as a representative of a specific company, have there been, to your knowledge, any disputes or problems as a result of coverage, any complaints, any litigation over policy coverage that you are aware of based on the new exclusion language?

MR. SULLIVAN: Not that I'm aware of, but that's

1 not a barometer of whether or not we -- I'm not responsible
2 for Crum & Forster's claims. So, I wouldn't necessarily
3 have that information; but, I would say that by far and
4 away those would be a very, very, very small number of
5 the total environmental claims that we are seeing, because,
6 as I said, we break them down by type, and it would also seem
7 to me that in those instances where, obviously, the
8 pollutant risk, the exclusion is tied to the pollutants and
9 to waste, discharge, on-site premises of pollutants or
10 waste, that that would be the type of risk certainly that
11 insurers would be willing to let them buy back the coverage
12 or obtain coverage through entities like the Pollution
13 Liability Insurance Association.
14

15 That, admittedly, is one of the purposes of
16 the Pollution Liability Insurance Association. We've had,
17 you know, there is that -- go ahead, sorry.

18 MR. BRYAN: I was going to ask would this
19 sort of coverage be available? You indicated a buy-back
20 and a Pollution Liability Policy and this sort of thing.

21 Would it be available, do you believe, for
22 risks, insureds with negligible risk potential by your
23 company or by other companies, just in your estimation?

24 MR. SULLIVAN: We are going beyond that. We
25 are issuing from the Pollution Liability Insurance

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2 Association environmental impairment policies for both
3 sudden and gradual for risks that we believe such as
4 service stations and owners of underground storage tanks,
5 manufacturers, apartment houses, with an exposure that we
6 think is measurable, and in the instance that you've given,
7 that exposure certainly is measurable. It's also very
8 incidental.

9 So that, you know, we are in the business of
10 writing liability insurance policies. We are not in the
11 business of avoiding it. It's just when we cannot measure
12 the risk that we simply are not providing the coverage.

13 MR. AVERILL: Let me make one further comment
14 on that. I think the answer is dependent upon the type of
15 policy which governs the trigger of coverage. If you are
16 talking of providing a buy-back endorsement under today's
17 occurrence Comprehensive GL Policy without any aggregate
18 limit on operations or premises exposure, with the problems
19 that we have existing under the current policies today, no,
20 I don't believe you will find many companies even willing
21 to write a negligible risk on a buy-back endorsement. If
22 you are talking about claims with an aggregate limit or an
23 occurrence contract with an aggregate limit, you may find
24 more companies willing to write the coverage.

25 MR. BRYAN: That kind of anticipates one of

1 my questions because you already have those other forms
2 pending and was interested in your estimate of how that
3 would work.

4 MR. SULLIVAN: May I make one other comment?

5 The whole evaluation, risk evaluation of what is a negligible
6 exposure, what is moderate exposure, what is significant
7 exposure changes over time, and Mike's point is very well
8 taken; that is, within the context of an occurrence policy,
9 we could have written dry cleaners fifteen years ago never
10 realizing that the whole process that they were employing
11 created a significant environmental liability exposure, you
12 know, and that is, as much as anything, is behind the
13 movement to take it out of the CGL Policy so that a market
14 can be made for the basic general liability coverages, and
15 then, if the risk assesses that it needs the coverage and
16 the coverage is available separately, he can purchase it.

17 It's very much like product recall coverage.
18 When, obviously, there's been a number of cases right here
19 in New Jersey which a lot of us are familiar with where a
20 particular insured is offered product recall coverage. He
21 declines it, and when a claim comes in that suggests that the
22 product recall coverage really should be -- the cost of
23 recall really should be provided under a CGL, because but
24 for then recalling the product, there would be substantial
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2 liabilities which exist. It is that type of evaluation that
3 has to occur. The risk and their insurer has to look at
4 what exposure it has, may have in the future.

5 The dry cleaners is a perfect example. On an
6 occurrence policy, sudden and accidental, as a result of
7 developments fifteen years hence, we found out there are
8 significant environmental liability exposures that we never
9 contemplated. Fifteen years ago, we may have thought it was
10 negligible. The risk may have thought it was negligible.
11 Twenty years later, it's rather significant.

12 So, it changes in context. The claims made
13 form is designed to address some of that.

14 MR. BRYAN: In some of the filings that we
15 received, the ISO, I believe commercial auto and some other
16 commercial autos, yours is a little bit different than some
17 of those others that we had received in that, as you
18 indicated earlier, it provides for coverage from gasoline,
19 oil, battery fluid, these sorts of things that are normally
20 part of the automobile, the vehicle, but not the cargo or
21 what's carried in it and this sort of thing.

22 Do you have any loss statistics or anything
23 that supports that that portion of the risk is writable and
24 while the cargo isn't or is this just something that's in
25 there to cover reasonable expectations?

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2 MR. AVERILL: Dick can correct me if we are
3 wrong, we did not look at any loss statistics separately
4 cargo versus the operational features of a vehicle in
5 determining the extent of that exclusion for commercial
6 automobile for the vehicular exposure.

7 It was the consensus of our insurer
8 representatives and our committees that the vehicular
9 exposure which is normally and possibly maybe subject to
10 financial responsibility requirements should continue to
11 provide coverage for the ownership, maintenance, or use of
12 an auto as an auto.

13 The cargo is not specifically subject to
14 financial responsibility requirements to our knowledge,
15 and as such, and because of the exposure which may or may
16 not be known to the hauler, for example, and which presents
17 possibly a very catastrophic exposure, that was the
18 exposure that they were concerned about, and that was
19 excluded under our final.

20 MR. SULLIVAN: I was just going to make a
21 comment that I think it's important to recognize that these
22 affect -- these liability schemes, these judicial decisions
23 affect generators, transporters, storers and handlers of
24 hazardous wastes. It exposes those including the
25 transporters to a joint and several liability scheme, okay.

1 So, a transporter takes the cargo and he puts it in a
2 landfill. He is jointly and strictly liable for all
3 pollutants arising out of that landfill.
4

5 Go back to our policy. Suit is brought
6 against the commercial auto carrier, joint, strictly liable
7 without regard to fault. He then turns back to his carrier,
8 and let's say it's a gradual pollution incident like Jackson
9 Township.

10 What Jackson Township says is that to the
11 extent that the pollution was neither intended nor expected
12 by the insured, in this case the commercial auto carrier,
13 it's covered under the policy.

14 For commercial auto carriers who simply
15 either did not know what type of cargo they were carrying
16 and relied upon what they perceived to be a reliable,
17 certified landfill, Jackson Township says even though the
18 pollution is gradual, it was neither anticipated nor should
19 it have been expected by this auto carrier, and therefore,
20 covered under the policy.

21 It's important that you focus in on the fact
22 that Jackson Township applies to not only landfills but
23 also generators and transporters.

24 So that a generator, a municipality who, as
25 part of it's municipal services, generates waste that it has

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2 to dispose in a landfill, even though it doesn't own the
3 landfill, is jointly and severally liable.

4 You could make an excellent case under
5 Jackson Township even though we are talking about gradual
6 pollution incident that it relied upon a reputable carrier
7 to transport the waste to the site. It relied upon the
8 fact that the site had been certified for the State for the --
9 for placing the waste there, and therefore, the coverage for
10 that gradual pollution will attach, and from the generator
11 side to the transporter side to the disposer side, it's
12 a very complex, you know, and this goes -- it's a very,
13 very complex system of interrelated liabilities between all
14 of those individuals within the chain, and part of that
15 underlines the need to not include the waste under the
16 commercial auto policy because it simply is not -- it goes
17 back to the joint and several liability scheme.

18 How do we measure if a transporter takes one
19 piece of waste and puts it in a dump with one barrel with
20 a thousand other barrels, that one transporter, if, in fact,
21 a pollution incident occurs, is liable for all of the damages
22 arising out of that particular site under the Federal and
23 Hazardous Waste statutes which exist.

24 What would otherwise seem to be an incidental
25 exposure within the scheme of judicial decisions and

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2 liability statutes in New Jersey becomes very, very
3 significant.

4 MR. BRYAN: The reason I ask is specifically
5 in the commercial auto exposure, some incidental exposure
6 as a result of these fluids or items that are connected
7 with the vehicle are covered and are specifically provided
8 in there, and I wanted to explore whether other types of
9 specific businesses or specific risks with negligible
10 exposure, if there could be some more limited exception or
11 something industry or business specific that could be carved
12 out from the absolute exclusion. That's really what I wanted
13 to look into. Yes.

14 MR. AVERILL: While the exclusion that we
15 filed does provide some limited coverage for the vehicular
16 exposure, and that is based on the consensus of our company
17 committee in that area, ISO does not represent every
18 insurer in every state, obviously, and we do have non-
19 adherence requirements, and an individual insurer may
20 decide in a given situation to develop their own policy
21 language because, quite honestly, they may not believe that
22 ISO's policy language is sufficient based on their own
23 experience or claims handling.

24 MR. BRYAN: Just one kind of a final question
25 that I had on this is dealing with the -- if this absolute

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2 exclusion were allowed in all policies, how can the
3 information, the things that used to be covered, the ones
4 in the negligible exposure, how can that be conveyed to an
5 insured? Is that the agent's responsibility? Is the
6 insured responsible to understand when you talk about
7 pollution damage you are talking about if a can of lye falls
8 off the shelf and a child plays in it and gets burned, it's
9 not covered?

10 How is that going to get conveyed to the
11 people who buy the insurance?

12 MR. AVERILL: There are a couple of ways that
13 it can be handled, and I'll just give you facts rather than
14 suggesting any one way. Obviously, I'm not in a position
15 to do that.

16 There are companies who will voluntarily
17 provide an explanation of any substantive coverage changes
18 involved with either going to a new program or with changes
19 in existing coverage. There are a few states which have
20 regulated that in a substantial -- with a substantial
21 reduction in coverage, that a notice must be provided along
22 with a renewal policy, and some states have regulated that
23 on a new policy program, a notice must be provided to
24 insureds.

25 Now, I don't think, in any event, you can get

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2 into specific examples, necessarily, on what a change in
3 coverage may be for a specific accident situation because
4 there may be extenuating circumstances.

5 The change can be generally explained,
6 possibly through the use of some simple examples; but, that
7 has to be viewed as not all-exclusive, obviously, and, of
8 course, there is a legal exposure.

9 Once you provide out some type of notice to
10 a policy holder, there may be a tendency of the courts to
11 rely on that and not the policy language. So, while there
12 is an exposure to companies in not advising the insureds of
13 a change, obviously, there is an opposite side of that.

14 MR. BRYAN: Okay. Yes.

15 MR. SULLIVAN: I was just going to offer the
16 comment that the insurer and the insured's agent has every
17 incentive to, as completely as possible and reasonably,
18 explain the coverage to the insured. The business we are in,
19 we are not looking for short term relationships with our
20 insureds, and neither are our agents.

21 So that the best relationship is one which,
22 up front, everyone recognizes the extent and breadth of
23 coverage being provided; but, when you stand back from
24 that, your question is a good one. Well, you can't possibly
25 explain every single claim scenario to an insured, and that's

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true today whether or not you have the pollution exclusion or not, because of the wide variety of liabilities covered under our commercial general liability policies, and for us specifically under our umbrella policies because we have umbrella policies that we provide ourselves. Where there is an unknown exposure, unknown to either us or the insureds, we will drop down and pick up from dollar one of his liability coverage.

So that there is also in the insurance, in the complex commercial insurance relationship that gray area of coverage, and it's always going to exist because of the complexity of the coverage; but, in New Jersey, the insured is, by and large, protected.

Why is it protected? Because about three or four months ago, the New Jersey Supreme Court came down with the Sparks decision, and basically what the Sparks decision says with respect to the use of claims made forms is that to the extent that the insured did not -- was not told and did not recognize the difference in coverages being provided under a new claims made policy from an occurrence policy, we, as a court, are going to deem that policy to be an occurrence policy as opposed to a claims made policy, and that's exactly what happened with respect to a professional liability policy in the Sparks decision.

Narrowly read

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2 Now, is it directly on point to the pollution
3 exclusion? No, but what it does show you is that there is a
4 judicial temperment to say that to the extent the insured
5 expected the coverage and had every right to expect the
6 coverage, that when the coverage issue is litigated, the
7 insurer is going to have the burden of showing that there was
8 some explanation to the insured that the coverage simply did
9 not exist.

10 Now, is that going to protect every insured
11 in every instance? No, but I think it's pretty damn good
12 protection in terms of those issues which are in the gray
13 area and for which there may be some legitimate coverage
14 issues, both on behalf of the insurer and its insured.

15 MR. BRYAN: Okay. I don't have any further
16 questions. If you had anything that you wanted to say as
17 a result of any of the questions, feel free. Nothing?
18 Thank you.

19 I understand that -- I'm going to take a
20 couple of minutes here, let the court reporter rest her
21 fingers. I understand that the Public Advocate's office,
22 there was an individual here from the Public Advocate's
23 office or coming from the Public Advocate's office that
24 apparently had a time difficulty. Is that individual here
25 or present? I'm going to take a short break and come back

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and take you right away.

(Thereupon, a short recess was held from
12:00 noon to 12:15 p.m.)

MR. BRYAN: If we can get started again, Mr. Shapiro and Ms. Rudolph are here from the Public Advocate's office, and Mr. Shapiro, if you would indicate your name and et cetera for the reporter so we've got a complete record.

MR. RICHARD E. SHAPIRO: My name is Richard Shapiro, and I am the Director of the Public Interest Advocacy at the New Jersey Department of the Public Advocate.

We appreciate the opportunity to present the views of the Public Advocate to the Department of Insurance today on the applications of certain insurance companies for permission to exclude coverage for incidents of sudden and accidental pollution from their general liability policies.

For several months, in response to the asserted crisis in the insurance industry, we've been investigating the causes of and possible solutions to the current problems in the commercial liability area and in other areas of insurance coverage.

From our investigation and analysis, we've come up with a number of major themes or findings, if you

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will, in response to the current situation.

First, because the specific causes and magnitude of many of the current problems in the commercial liability area can still not be fully determined or evaluated, we have repeatedly called on public officials and responsible government agencies to entertain serious reservations about any solutions that would limit the legal remedies available to victims of pollution incidents or that would restrict coverage.

Second, many of the current problems relating to the cost and availability of insurance coverage appear, from a careful study, to have their roots in the economic cycles of the insurance industry as much as anything else, and this suggests that if we are going to do anything more than apply Band-aids to what may be a wound in the insurance industry, that realistic, long-term solutions might be better found by addressing factors underlying the cycles and looking into what's causing these problems in the insurance industry rather than by diminishing present protections for potential victims of pollution incidents.

Third, the requests presented to this Department today and presented to legislators and other public officials in New Jersey have a familiar ring. They are similar to requests that are made in the bottom-out

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2 periods of the cycles of the insurance industry, and from
3 our study of the past experience, we feel strongly that
4 we should not repeat the mistakes of the past and respond
5 precipitously to what is the cyclical nature of the insurance
6 business, and in this case, the specific cyclical nature of
7 the problems of the property casualty insurance business.

8 For example, one widely-noted and reknowned
9 commentator on insurance, Robert Hunter, who is a former
10 Federal Insurance administrator and President of the
11 National Insurance Consumer Organization has suggested that
12 1984 was a typical bottom of the cycle year for the
13 insurance industry.

14 He observed that the last time a similar
15 phenomenon occurred was in the mid-seventies when the
16 country was faced with the twin crises of medical malpractice
17 and product liability insurance unavailability and
18 skyrocketing premiums.

19 He worked closely with the Federal
20 Interagency group which, in evaluating carefully this
21 purported crisis, insured that the insurers had panicked
22 from a lack of data.

23 However, before some degree of order was
24 restored and before these findings were made, over half the
25 states had acted to reduce victims' rights in the wake of a

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2 panic, and in the words of Mr. Hunter, and I think these
3 words are particularly appropriate in light of some of the
4 claims in the newspapers recently from the insurance
5 industry and some of the assertions made by the earlier
6 testimony, Mr. Hunter stated, "Insurers blame this crisis
7 on the courts and the tort law and say the only way to fix
8 it is to take away as many victims' rights as possible.
9 Instead, the crisis is within the insurance industry, not
10 the courts", and I repeat that this is a person who is a
11 former Federal Insurance administrator and now is President
12 of the National Insurance Consumer Organization, and
13 someone intimately familiar with the insurance industry.

14 Other assessments of the insurance industry's
15 current problems tend to confirm the need for a healthy
16 exercise of skepticism in considering that industry's
17 own evaluation of what is presently broken and what needs
18 to be fixed.

19 Fourth, we have repeatedly found that while
20 New Jersey and the rest of the country have been barraged
21 over the past few months with lamentations from the
22 insurance industry, press releases about the crisis in the
23 courts and a cataclysmic reaction to coverage in general
24 and pollution coverage in particular, we have been very
25 troubled by the lack of hard, empirical data to back up the

1 industry's reactions.
2

3 Instead, we have been repeatedly assailed
4 with anecdotes, some of which are apocryphal, gross
5 exaggerations of the actual, substantiated risks in
6 particular areas, and shocking overreactions to isolated
7 verdicts such as the Jackson Township case.

8 These have been employed by the industry to
9 support its call for radical changes in coverage in a wide
10 range of areas, and I note with respect to the Jackson
11 Township case which is always presented as the reason for
12 everything that's occurring now, that case is on appeal,
13 that certainly the insurance industry has an ample
14 opportunity to present its claims with respect to the scope
15 of the language in that clause to the courts and should do
16 so before it seeks other redress in administrative agencies
17 or the legislature because that is not a final decision of
18 the courts.

19 Secondly, with respect to Jackson Township,
20 I heard today for the first time that even if the decision
21 was more limiting, it would not really resolve many of the
22 current problems. It would not result in insurance being
23 written, and my concern in this area as in other areas that
24 Jackson Township is being used as a means of establishing a
25 lot of changes when, in fact, if the specific changes that

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2 are a product of Jackson Township were reversed in the
3 courts, the insurance industry would not change its present
4 course, and that leads us to be even more skeptical of the
5 relationship of the Jackson Township decision or any of
6 these isolated verdicts to what the insurance industry is
7 concerned about which is and which has been in the past a
8 dramatic change in the manner in which tort law liability
9 is structured and in the protection for victims in this
10 State.

11 In the present climate, the industry need
12 is often premised on conjecture, subjective assumptions,
13 speculations, and at some times, wholesale threats.

14 All too often, requests for significant
15 policy changes are made without the industry ever providing
16 the actuarial information, not the anecdotal information,
17 not the speculative information, not the subjective
18 assumptions, but the actuarial information to verify
19 statistically and objectively the actual extent of losses
20 and actual risk involved in providing the particular
21 coverage.

22 Of equal importance, the industry has not
23 demonstrated that substantial changes in coverage or withdrawal
24 from a particular market are necessary to alleviate the
25 currently perceived problems.

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2 Surely, as you've already heard this
3 morning, there are less drastic alternatives which can
4 address the industry's legitimate concerns while still
5 providing the citizens of our State with appropriate
6 coverage from pollution incidents.

7 Against this backdrop of these general
8 themes which have resulted from our own exploration of the
9 insurance, current insurance situation, I would like to
10 address the current applications by the property liability
11 insurance companies to exclude sudden and accidental
12 pollution from their general liability policies.

13 First, it should be beyond dispute, and I
14 think others will testify, that the availability of
15 insurance for sudden pollution incidents is vital for the
16 protection of small businesses and members of the public
17 in New Jersey.

18 Certainly, there is a compelling need for
19 this protection in New Jersey which is the most industrialized
20 state in the nation.

21 According to the Department of Environmental
22 Protection, in the six-month period this year, there have
23 been 64 major incidents involving sudden air releases of
24 toxic chemicals in New Jersey. Of those 64 incidents, nine
25 resulted in injuries to third parties. One chemical fire at

1 the J.C. Curtis Company in Dover Township caused the release
2 of methyl ethyl ketone into the surrounding atmosphere.
3

4 As a result, 40 firefighters and community
5 residents were hospitalized.

6 In addition, there have been a number of
7 similar incidents reported in New Jersey and other states
8 which involve serious chemical accidents or sudden and
9 accidental pollution incidents. All of those people risk
10 losing the ability to recover for their injuries if sudden
11 and accidental coverage is removed from CGL Policies.

12 Consequently, we think it is indisputable
13 to say the need for this coverage to protect small
14 businesses and any potential victims of pollution incidents
15 cannot be overstated.

16 The potential increased risks to victims of
17 pollution incidents is even more troublesome in the present
18 insurance environment. If sudden pollution coverage is
19 excluded from general liability policies, we believe that
20 there will be few, if any, insurance companies willing to
21 pick it up.

22 According to staff at the Department of
23 Insurance, no insurance company has come forward to offer
24 comprehensive pollution coverage, gradual or sudden. In
25 addition, the Department has informed us that EIL carriers

1
2 are not accepting new business at this time, and even if
3 they decided to cover sudden pollution, we seriously doubt
4 that the few EIL carriers could handle the flood of new
5 submissions.

6 If no one is willing or able to pick up this
7 coverage, the inevitable result of the proposed solution
8 will be less protection for the public in New Jersey.

9 Second, the Public Advocate strongly submits
10 that additional time is needed to evaluate the precise
11 causes and magnitude of the current problems in the
12 commercial insurance industry.

13 Past experiences demonstrate that many of
14 these problems are cyclical in nature and that government
15 does a disservice to the public when it responds
16 precipitously to these problems. Instead, we must not
17 respond in a stopgap fashion, but must seek to address the
18 systemic concerns in the insurance industry.

19 For these reasons, we've supported the
20 Governor's moratorium and the Department of Insurance's
21 emergency regulations to prevent the cancellation or
22 non-renewals of commercial liability insurance policies
23 without State approval, and we certainly encourage the
24 Department to take other single steps to insure the
25 affordability and availability of these policies.

1
2 The ever-shifting commercial insurance
3 situation is plagued with a degree of uncertainty and in
4 such a state of flux, there is a need for proper reflection
5 and a careful study of the alleged crisis in order to avoid
6 overestimating the current situation and reacting in a
7 manner that is contrary to the overall public interest of
8 New Jersey residents.

9 Third, and closely related to the above
10 concern, is the compelling need for empirical data to
11 justify the industry's need to pull out of the pollution
12 market by excluding coverage for sudden and accidental
13 pollution incidents.

14 We trust that the Department of Insurance
15 will critically evaluate the information submitted by the
16 insurance industry in support of their applications.
17 Careful and independent scrutiny of available actuarial
18 information is essential to verify the actual extent of
19 pollution losses and actual risk involved in writing
20 pollution coverage.

21 Along these lines, it is critical that the
22 companies provide and that the Department assess all
23 pertinent information relating to the industry's profits
24 and losses. Certainly, we cannot permit the industry's
25 conclusory and self-interested assertions to be a substitute

1
2 for an audited financial statement.

3 Similarly, we cannot accept the industry's
4 subjective assumptions or conjecture about the evolution
5 of the law to be a substitute for careful, actuarial data
6 on the nature of the risk involved.

7 The insurance industry must make a case that
8 would stand rigorous analysis and rational inquiry.

9 Changes in coverage or restrictions in
10 remedies should not be allowed in response to undocumented,
11 conclusory, speculative, or unverified projections or
12 conjectures presented by the industry.

13 Finally, we recognize that Commissioner
14 Gluck has testified previously before the EIL Study
15 Commission, that among the options the State should consider
16 to address the environmental impairment liability problem
17 are several that would limit the protection available to
18 potential victims of pollution incidents.

19 Thus, she has suggested limitation on such
20 conventional tort doctrines as joint and several liability,
21 binding restrictive definitions of essential terms or
22 conditions contained in liability insurance contracts, and
23 expanded sovereign immunity.

24 However, assuming that a careful and
25 comprehensive study of the data does support the need for

1
2 change in the current practices of the insurance industry,
3 the Public Advocate strongly submits that there are less
4 drastic alternatives than those outlined above in dealing
5 with the present situation. We submit that before limiting
6 policies in a manner that favors insurance companies,
7 especially when the industry is largely responsible because
8 of prior investment practices for the present so-called
9 crisis, these alternatives should be closely studied and
10 pursued -- a series of less drastic alternatives should be
11 closely studied and pursued by the Department of Insurance.

12 For example, in order to monitor pollution
13 risks more carefully and reduce the risk of exposure,
14 insurance companies should be required to hire qualified
15 consultants to perform environmental risk assessments at
16 insureds' facilities where pollution incidents could occur.
17 The insurance industry could then focus on prevention of
18 pollution accidents by requiring insureds to utilize
19 effective risk management as a condition of coverage. If
20 the company needs the insurance, they will comply with the
21 insurance standard. According to information we collected,
22 one insurance company, American Home Assurance Company which
23 is part of AIG, has successfully used this approach for
24 some time and has strict insurance standards. This company
25 has been writing pollution coverage under these circumstances

1
2 profitably for five years.

3 In short, the Department of Insurance should
4 encourage and even require insurance companies to focus on
5 increased engineering of insured facilities and better risk
6 management strategies to assess and reduce risk exposure.
7 These approaches should be pursued before considering
8 restrictions on remedies or the complete withdrawal of
9 insurance companies from the pollution market. These
10 approaches which are directed at addressing the operation
11 of the insurance industry are far preferable to the
12 substantial changes sought by the industry's present
13 applications.

14 The Public Advocate believes that insurance
15 companies have a responsibility to provide pollution
16 coverage because adequate funds must be available to
17 compensate victims when environmental pollution incidents
18 occur.

19 Our Department, therefore, opposes the
20 GL carriers' request for sudden and accidental pollution
21 exclusion at the expense of the very people this insurance
22 is ultimately designed to protect.

23 Instead of withdrawing from the pollution
24 markets, insurance companies should require their insureds
25 to upgrade facilities, improve pollution equipment, switch

1
2 to less hazardous materials, and generally focus on the
3 prevention of pollution incidents.

4 We believe a measured approach to this
5 problem such as those we outlined today would respond to
6 the real rather than the conjectured, speculative, or
7 subjective problems of the insurance industry, and would
8 insure that there is proper protection for New Jersey
9 citizens from pollution incidents.

10 Thank you for the opportunity to testify.

11 MR. BRYAN: Thank you, Mr. Shapiro. Just
12 one thing. Because of the nature of what we do in reviewing
13 policy language, it's important that -- your point is very
14 well taken. It's important that any policy language
15 approved be applicable for -- throughout the market cycles
16 to the extent that they exist, and that point is very well
17 taken.

18 The second thing, I had kind of a question.
19 Does your office, in the Public Interest Advocacy -- have
20 you participated basically in any insurance coverage
21 legislation to date, or do you have anything on insurance
22 coverage legislation?

23 MR. SHAPIRO: No, no. We primarily
24 participated before the legislature in testifying about some
25 of the bills and trying to present some of the ideas to the

1 legislature as we did today to the Department of Insurance,
2 but not any specific --
3

4 MR. BRYAN: I just asked whether it was one
5 of the things that you had going at the present time or had
6 participated in the past. One other thing was the point
7 particularly that you made at the end concerning loss
8 control and loss prevention. Do you believe that the
9 insurance companies can, through such things as the
10 American Home Assurance-type of program where they require
11 loss control methods be instituted as a condition of writing
12 coverage, do you think that's a reasonable thing for the
13 insurance companies to do and to institute?

14 MR. SHAPIRO: Yes.

15 MR. BRYAN: Okay. I really don't have any
16 further specific questions for you. I thank you very much
17 for your participation, and I realize you had to get out of
18 here early, and this is not early right at the moment, and
19 I thank you for your patience.

20 MR. SHAPIRO: Thank you for your courtesy.

21 MR. BRYAN: Mr. Dressel from the League of
22 Municipalities, and I believe Mayor Grubb is also with him.

23 MR. WILLIAM G. DRESSEL, JR.: Thank you,
24 Mr. Bryan. My name is Bill Dressel. I'm Assistant Executive
25 Director of the New Jersey State League of Municipalities.

1
2 I am joined by Mayor David Grubb of Park
3 Ridge. The Mayor's testimony will supplement the League's
4 testimony. We thought it would be beneficial to have a
5 local official here today to present that perspective.

6 I have formal testimony that I would like to
7 read into the record. Following Mayor Grubb's testimony,
8 we would both be available for questions.

9 MR. BRYAN: Thank you.

10 MR. DRESSEL: On behalf of the League, I
11 would like to thank you for the opportunity to appear before
12 you today to testify on the insurance industry's proposal
13 to absolutely exclude liability for damages caused by
14 pollution.

15 Over the past several months, the League of
16 Municipalities has been actively involved in seeking a
17 legislative solution to the municipal liability insurance
18 crisis. A copy of our statement of October 2nd presented
19 before the Environmental Liability Impairment Study
20 Commission chaired by Senator Raymond Lesniak is attached
21 to our formal testimony.

22 It provides some background on what impact
23 the insurance dilemma is having on local governments.

24 The problems municipalities are having, as
25 we see it, involve not only the affordability issue, but

1
2 most importantly, the lack of an adequate market for
3 environmental liability and pollution insurance. It appears
4 that the industry has literally closed the door on insurance
5 coverage of this nature. We are, therefore, concerned as
6 to what the implications a directive from your office to
7 allow an environmental liability exclusion, either exclusive
8 or partial, would have on the ability of municipalities to
9 obtain this kind of insurance.

10 Also, we would be interested in knowing what
11 impact this policy directive would have on the cost of
12 insurance. If a pollution exclusion is granted, will it
13 significantly reduce premium coverages in other liability
14 insurance lines?

15 Our paramount concern is if companies are
16 allowed to exclude liability coverage from their
17 municipal liability insurance policies, will there be a
18 market available to place this kind of insurance?

19 Although this is not the forum to discuss
20 possible solutions in this area, we have suggested in the
21 attached testimony that one possibility for establishing
22 such a market may be the creation of a voluntary, statewide
23 self-insurance pool.

24 Another concern we have has to do with the
25 extent or definition of what is to be excluded from the

1
2 traditional umbrella liability insurance policies. For
3 example, in the area of fire damage that you alluded to
4 earlier, it has always been our impression that damage due
5 to smoke has been covered under the traditional liability
6 insurance policy, the same way that property damage as the
7 result of flames would be covered.

8 There appears to be some confusion as to
9 whether or not this understanding is still correct under a
10 pollution exclusion. It would be helpful to local officials
11 that whatever is considered as far as a pollution exclusion
12 is concerned that it be set forth in specific language as
13 to what are the types of coverages or instances that will
14 or will not be insured.

15 I would also suggest that there be an
16 opportunity for local officials to testify, since there are
17 many examples of those kinds of liability instances which
18 I am sure local governments have taken for granted as being
19 covered.

20 Based on your comments, it appears that the
21 Department also has a concern in definition. The municipal
22 liability insurance crisis is the League's highest
23 legislative priority, and we are hopeful that the State
24 Department of Insurance, the administration and the
25 legislature will resolve this problem in the near future.

1
2 We thank you for the opportunity to express
3 our concerns, and our door is always open to the Department
4 to help in any way that we can in providing data at the
5 local level.

6 I would like to now have Mayor Grubb --

7 MR. BRYAN: Thank you, Mr. Dressel. Yes.

8 MAYOR DAVID GRUBB: The current situation
9 with respect to insurance in municipalities is very serious
10 and totally unacceptable. There are at least four major
11 concerns. First of all, the fact that there are some
12 number of municipalities around this State who have been
13 unable to get liability coverage at all. The League of
14 Municipalities did a survey back in August, at which time,
15 approximately 50 municipalities were indicated as being
16 without liability insurance. That's ten percent of the
17 municipalities in this State.

18 I understand the League is currently updating
19 that survey. I personally know of one municipality that has
20 gone through August 1st without liability coverage, and I
21 heard of a number of others. That situation is extremely
22 serious, and I have reason to believe that it may be getting
23 worse for various reasons.

24 Second of all, there are numerous
25 municipalities, far more than just the 50 or whatever the

1
2 number is that are totally bare, that have been unable to
3 get adequate excess liability policies, and this is
4 umbrellas. In other words, they have been able to get a
5 renewal on their primary policy but have not been able to
6 get adequate excess coverage, and this also exposes the
7 taxpayers in those municipalities to devastating bond issues
8 in order to pay for an uninsured claim.

9 Our third concern is the fact that apparently
10 there are some municipalities that are being forced into
11 accepting claims made coverage forms. Despite the fact that
12 the form has not been approved, to our knowledge, and despite
13 the fact that no one really knows what claims made is really
14 all about including people in the insurance companies
15 themselves and the brokers, much less the municipalities,
16 and yet, as of January 1, there will be probably a
17 significant number of municipalities in this State whose
18 coverage, for one reason or another, will strictly be on a
19 claims made basis, and finally, we have a very great concern
20 over the cost of the insurance.

21 I was with the officials of one municipality
22 this morning whose coverages for property and liability,
23 both auto and general have gone from \$335,000 in 1985 to
24 approximately \$1.3 million in 1986. Needless to say,
25 those kinds of increases are very difficult to plug into a

1
2 five percent cap, and have, again, a crippling effect on
3 the delivery of services.

4 So, what do we do about it? Well, first of
5 all, I think we need to start recognizing some realities,
6 and one of the realities that we need to recognize is the
7 relationship to pollution coverage. The problem with
8 pollution, environmental liability or its lack of
9 availability has nothing to do with insurance company
10 cycles or cash flow underwriting. It really gets down to
11 a fundamental principle of insurance, and that's this:
12 Commercial insurance has just, historically, been unable to
13 adequately handle large, unpredictable, catastrophic risk,
14 and that's apparently exactly what pollution has become.

15 The situation in Jackson Township apparently
16 is the tip of the iceberg as to what this thing could become
17 that's apparently scaring away the industry.

18 The reality is this: Whether there is
19 actuarial data or there isn't actuarial data and there
20 probably isn't going to be actuarial data for some time
21 because of the very unpredictability of this problem, the
22 fact of the matter is the domestic insurance market is not
23 going to write new business so long as there is pollution
24 coverage in there.

25 So, by insisting that they include pollution

1
2 coverage as a part of the general liability policy form,
3 effectively what we are doing is we are shutting off the
4 insurance market from municipalities and other insureds
5 which may have a pollution exposure.

6 It really doesn't do a municipality any good
7 for there to be a pollution coverage in a general liability
8 form if nobody is going to write that coverage, and yet,
9 that is exactly the situation today.

10 What we are effectively doing by insisting
11 that the insurance companies cover pollution is we are
12 driving the liability market into the unregulated and
13 surplus lines area, and the surplus lines market, I can
14 tell you from personal experience, is just simply
15 incapable of even beginning to handle the magnitude of the
16 current demands.

17 So, we've got to do something to open up
18 that domestic market if we are going to realistically begin
19 to cover the kinds of problems what we have out there, and
20 I'm reading the situation loud and clear that without a
21 pollution exclusion, assuming that we can hammer out some
22 of these fine points that are coming out here, but without
23 a pollution exclusion, the domestic market is going to
24 effectively remain closed for New Jersey municipalities and
25 everyone else.

1 We had some discussion about things like
2 engineering and loss control and things of that nature.
3 In the final analysis, the insurance industry is just
4 incapable of solving social problems for us, and I think
5 that's exactly what we are dealing with here. I think there
6 are other mechanisms that we can utilize to handle the
7 financing of pollution claims, and obviously, I have spoken
8 about that at some length, and it's not appropriate to get
9 into it here; but, I think if we are going to open up the
10 general liability market, we have to recognize basic
11 realities, and that's I think where we are now.

12
13 There are a number of other questions, but
14 there is one other issue that I think needs to be raised
15 here. Even assuming a pollution exclusion, does the
16 insurance industry really want municipal business? Are
17 they really willing to work with us to resolve the general
18 liability crisis? I think that's very much an open question
19 at this point.

20 There are a number of municipalities in the
21 State with excellent records who have gone into the surplus
22 lines market in the last few weeks since the surplus lines
23 market was removed from the Governor's regulations, and the
24 reality is that, even willing to agree to claims made on a
25 yet to be defined form, and even willing to agree to an

1 absolute pollution exclusion, the surplus lines market is
2 still effectively closed to municipalities.

3
4 It raises some fundamental questions here
5 as to whether the insurance industry really wants to do
6 business with the municipalities in this State.

7 Are they really willing to work with us?
8 If they are, we are certainly willing to work with them,
9 and we've got a very powerful lobbying group in this town,
10 and we can work with them on tort reform and regulatory
11 reform and whatever else is necessary to resolve certain
12 problems; but, we can't allow the situation to continue
13 where substantial numbers of municipalities are left as
14 orphans in the current crisis.

15 If the insurance industry really wants
16 municipal business in the future, I think they need to
17 step forward and help the municipalities in the State
18 cover these holes so that the taxpayers are not exposed to
19 huge, uninsured exposures; but, you know, so far, even from
20 the, you know, the removal of the surplus lines market which
21 is over a month ago, there still isn't any evidence yet of
22 that willingness on the part of the insurance market and
23 insurance industry to work with municipalities.

24 If the insurance industry really doesn't want
25 the business -- and I think, historically, the insurance

1 industry has been very reluctant to deal with municipalities --
2 the agents certainly have wanted municipal business, but in
3 many instances the insurance companies haven't -- then I
4 think the municipalities and other governmental units have
5 alternatives, alternatives which may be rather attractive,
6 alternatives that can be put together very quickly; but, one way
7 or another, we are at a decision point.

8
9 I mean, there are a substantial number of
10 municipalities in the State whose renewals are effective
11 January 1 or shortly thereafter.

12 We can't allow this situation to continue
13 where numerous municipalities have no coverage or have no
14 umbrellas and huge problems.

15 I think we are at a decision point. I think
16 the events, one way or another, of the next couple weeks
17 will determine which way this thing is ultimately going to
18 go. Thank you.

19 MR. BRYAN: Thank you, Mayor Grubb, and your
20 remarks are very sobering, particularly from the point of
21 view of someone who is an insurance purchaser, your concern
22 for the existence of the market and impact of these types
23 of decisions on the market. I appreciate that very much.
24 I have no real specific questions for you.

25 One thing that I did want to leave with Mr.

1
2 Dressel, if you are aware or through your membership are
3 aware of any particular coverage problems or pollution
4 claims that either are existing or have existed in the past,
5 if you become aware of that or can become aware of that, if
6 you would send it in, we would be very happy to -- we would
7 like very much to look at some specific incidents and to get
8 a feel for some of the problems and interpretation.

9 MR. DRESSEL: How about in dealing with the
10 orphans? We are inundated with requests of municipalities
11 looking for insurance also, you know, not only just the
12 availability, but the affordability issue.

13 Local officials, as you know, are presently
14 putting together their budgets, and we are getting inundated
15 with those types of tales of woe. Would you be in contact?

16 MR. BRYAN: If you submit them to me, I
17 would be happy to get them to the appropriate people.

18 MR. DRESSEL: Okay.

19 MR. BRYAN: Very good. Thank you. I
20 appreciate it.

21 We have Mr. Roemmele from the New Jersey
22 Motor Truck Association who is here.

23 MR. RUSSEL ROEMMELE: I represent New Jersey
24 Motor Truck Association which was organized in 1914, has
25 1350 trucking companies as members, corporate members, and

1
2 this present insurance crisis is the most severe crisis
3 ever faced by the trucking industry in the State of New
4 Jersey.

5 It is more severe than the gasoline crunch
6 or the diesel crunch of the 1970's which almost crippled
7 truck transport in this State, if you will recall.

8 I just want to bring to your attention --
9 I have a prepared statement which will be sent to you from
10 our office. I just have some comments.

11 I am astonished, sitting in the back and
12 hearing the representative of our State, the Public
13 Advocate, no less, speak here and say that he had had no
14 data concerning this crisis or the need for legislative
15 action or action by the Governor. Those were his words,
16 as I put it down here.

17 This crisis has been going on in our
18 industry for eighteen months at least. We not only have
19 been victimized by increases ranging from 200 to 1,000
20 percent in commercial liability, and I have figures here --
21 questionnaires were sent to our members, and I could support
22 that data.

23 I am astounded with all the lawyers working
24 for the Public Advocate that no one has sought any
25 information from our office or from me or from our national

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2 representative, Mr. Rocque Dameo, the Vice President of
3 ATA, American Trucking Association, concerning this problem
4 in our industry.

5 He said we need more time to look into it.
6 We have victims. We have hundreds of trucking companies
7 that cannot purchase pollution insurance or environmental
8 restoration insurance. We are obligated under the Motor
9 Carrier Act and under Superfund 1 or under Superfund
10 whatever they call them down there to have certain coverage,
11 \$750,000 minimum, \$1 million for certain forms of hazardous
12 materials, and up to \$5 million for hazardous material, and
13 we can't get some of this insurance, in plain English.

14 There is a lot of legal jargon and insurance
15 jargon has been thrown around this morning. I've heard it
16 described ultimately as a great, heavyweight championship
17 battle going on in the world between Lloyds of London and
18 the American Court System; but, we are the victims.

19 We are the ones, our industry, and I'm sure
20 there are many others. I read of them; but, we have
21 trucking companies that have closed down because they were
22 unable to get insurance before the emergency proclamation
23 for which we can commend the Governor and Mrs. Gluck and
24 your Department, but also because of these astonishing
25 increases which we can verify. Companies increased from

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2 \$800,000 to a million and a half.

3 It's not only our big carriers, those who
4 represent anywhere from 200 to 500 tractors, power units,
5 but I have stories here, and I suppose if I were a good
6 newspaperman, I could make your heart bleed because we read
7 about this type of thing in the paper every day, but here's
8 a guy, an ordinary trucker, owns just two trucks. His
9 insurance has increased from \$6,000 to \$54,000. He lives in
10 Clifton, and he called me up and he said, "What should I
11 do?"

12 I ask you, what should he do? How can with
13 two trucks a man be asked to increase his insurance by that
14 amount? He can't do it. He's out of business. Does anyone
15 care?

16 Now, in the economic restoration or pollution
17 insurance, our national association, ATA, has issued a
18 statement, and I would like to read it. It will take a few
19 minutes of your time.

20 Changes in the environmental restoration
21 coverage required by Section 30 of the Motor Carrier Act
22 of 1980. Unlike the situation with general liability
23 coverage which is available at significant higher costs to
24 motor carriers, the environmental restoration coverage will
25 very shortly be unavailable.

1
2 Well, I can parenthesize and say it is
3 unavailable. I have carriers call me every day with a
4 credible record, no accidents, no hazardous material
5 accidents, and cannot get pollution insurance.

6 Insurance companies have informed many
7 hazardous material carriers that they will not be able to
8 provide this required coverage after January 1, 1986.

9 We must have insurance. We are obligated
10 by the Motor Carrier Act of 1980 and by the Federal Highway
11 Administration, rules and regulations pertaining to highway
12 safety, and I pointed out the amounts we must have.

13 It's very likely some carriers will not be
14 able to carry hazardous materials after January 1, 1986,
15 unless they do it running "naked." I just hope that doesn't
16 happen.

17 Responsible carriers will not transport
18 hazardous materials including hazardous wastes without
19 insurance protection.

20 As a result, Congress will be faced with a
21 crisis comparable to the energy crisis in 1974 and '79.
22 The economy may come to a standstill because gasoline,
23 diesel, and other hazardous materials will no longer be
24 delivered.

25 The unwillingness of insurance companies to

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2 underwrite this liability is attributable to recent court
3 decisions holding them responsible for the Superfund
4 liability of their insurance, and it goes on and on.

5 Now, for whatever the reasons, and we are
6 sympathetic to the marketplace, we are sympathetic to the
7 insurance conditions, we know the conditions under which
8 they must work; but, I urge the insurance industry on behalf
9 of the 1350 trucking companies, members of our association,
10 as well as any trucking company in this State, that the
11 insurance industry had ought to look at the marketplace.

12 You can't have it both ways, and they ought
13 to provide this protection because we are obligated to have
14 it, and if we can't get it, we have to do something about
15 it, and we don't want to invite government into the market-
16 place. We don't want to invite government to intervene in
17 writing insurance policies; but, what is a legitimate
18 motor carrier with a wonderful, safe record to do?

19 Now, there is a danger here which has not
20 been brought up today, a most dangerous situation and which
21 our association has tried to bring to the attention of the
22 media which the media is only worried about these social
23 issues today, it seems.

24 Thirty-four hundred authorities of trucking
25 companies have been revoked in two years. This is by the

1
2 ICC, the Interstate Commerce Commission.

3 Now, I can assure you if there are carriers
4 out there running naked without liability insurance, without
5 economic restoration insurance or pollution insurance,
6 whatever you want to call it, what happens, God forbid, if
7 a tank carrier hits a loaded school bus? Who is liable?
8 And this is the problem we are talking about.

9 You can't throw motor carriers out in the
10 street. If a guy has a choice, he may decide to run a few
11 trucks if he can't get insurance. Who's to say?

12 I think in our Association, no one would do
13 it; but, I can't speak for every Tom, Dick, and Harry in
14 the trucking industry, not only in our State but in every
15 state in the union.

16 I think the State of New Jersey has taken the
17 lead in this issue. I commend, again, the Governor and
18 your Department. I recommend that you, somehow, retain
19 economic restoration or pollution insurance for industries
20 that certainly must have it, and I refer, again, to the
21 obligation we have under the Motor Carrier Act and the
22 Federal Highway Administration regulations.

23 A few years ago on Route 18 where our office
24 is many protests were made about putting a traffic light and
25 an overhead, and nobody paid any attention, as usual. There

1
2 was a serious accident when a group of girls were killed
3 when somebody ran the light and hit a school bus. Two weeks
4 later, they started the overpass, the lighting system, a
5 whole new traffic pattern.

6 I just hope for the sake of the State of New
7 Jersey and for each and every person in the State that we
8 don't have to have this type of situation in New Jersey,
9 that we don't have this before the insurance industry
10 recognizes its obligation in the marketplace without
11 government intervention, and, if necessary, the State of
12 New Jersey take whatever action necessary in the liability
13 area.

14 I heard a lot of comments today, and I don't
15 want to sound too upset; but, when you are dealing with
16 phone calls every day which, in some cases, you are hearing
17 the last will and testament for trucking companies that were
18 built with their bare hands, sometimes with what you got
19 from the government after you got out of the service after
20 World War II, they were like with Rocque's father, Mr.
21 Dameo who built a trucking company with his bare hands and
22 worked 20 hours a day to keep it struggling, and then,
23 because of this type of thing, see that company being
24 threatened and people working for him for many years being
25 thrown out of work.

1
2 That subject hasn't come up here today, how
3 many people will lose their jobs and how many people will
4 suffer directly and indirectly because of this. So, I urge
5 you to continue somehow pollution insurance or whatever you
6 people want to call it for our industry, and I suppose in
7 fairness to whoever really needs it.

8 I thank you, and I would be very happy to
9 answer any questions or Mr. Dameo who is here.

10 As a matter of fact, Mr. Dameo is the
11 National Chairman of our Insurance Study Commission of the
12 American Trucking Association which covers the entire nation.

13 MR. BRYAN: Thank you very much. I appreciate
14 your very forceful remarks and the special problems of the
15 trucking industry because of the Federal requirements. One
16 thing that I just kind of want to ask you, you obviously
17 have contact with other motor vehicle trucking associations
18 in other states, and do you find that this particular
19 problem is particularly bad in New Jersey, or is it worse --

20 MR. ROEMMELE: It's bad in New Jersey; but
21 I'll let Mr. Dameo comment on the national.

22 MR. ROCQUE DAMEO: We find it's particularly
23 keying in New Jersey because I think New Jersey is more on
24 top of it than other states.

25 We do have other states; California, Illinois, -

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2 Iowa that are also in a serious problem, but New Jersey is
3 keying on it better than anyone else is and keeping more
4 up to date.

5 MR. BRYAN: Thank you.

6 MR. DAMEO: Our information is being fed
7 through Washington on a daily basis.

8 MR. BRYAN: Thank you. I was concerned on it
9 because we have some particular case law in New Jersey that
10 may not be applicable all over the country and specifically
11 regarding the sudden and accidental type of coverage, and
12 I was concerned with whether this was, in your experience,
13 whether it was a New Jersey problem or whether it was a
14 broader problem than that.

15 MR. DAMEO: Oh, it's definitely a national
16 problem, and as states surface, as the problem develops in
17 each state, it's coming to the top. Our case history is
18 different, of course, but so is California's.

19 MR. ROEMMELE: There have been trucking
20 companies in other states that have had the same percentage
21 increases and have decided it isn't worth running a trucking
22 company between the epidemic of taxitis afflicting the
23 nation and every state, they decide to increase the taxation
24 on the trucking industry to make up for cuts from the
25 Federal Government or otherwise; but, with that plus the

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2 liability problem now, and of course, you get the trucking
3 company has to decide whether it's profitable to even run,
4 and if you are dealing with hazardous -- with all the
5 problems with hazardous material, hazardous waste, and a
6 fellow running a trucking company today that carries
7 hazardous material is frightened to death that he doesn't
8 get arrested just for walking down the street after you
9 pick up the daily media.

10 I mean, the way they present everything as a
11 bomb rolling down the Turnpike, if the guy would be rolling
12 down the Turnpike with milk and it's toxic if you drink too
13 much of it. So, I think that the problem is that it's very
14 serious -- I don't mean to joke on something so serious;
15 but, we are carriers that are threatened with extinction
16 because of this particular issue.

17 I don't mean to indict and certainly I'm not
18 here to do that representing our association. We want the
19 marketplace rather than government intervention if at all
20 possible; but, that's a decision the insurance industry
21 should be making. It's an insurance industry crisis, and if
22 they have a problem with the court system, that is their
23 problem, and they should seek out LI's any way they can just
24 as when we have a tax problem we seek out LI's any way we
25 can; but, to inflict pain upon an industry by denying, then,

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2 essential required, required, Federal required, Federally-
3 mandated insurance, to me, that's not the way to operate in
4 the marketplace.

5 MR. BRYAN: Thank you. As I indicated with
6 Mr. Dressel, if you have any or any of your members have
7 any particular coverage problems, not so much availability
8 problems but policy language problems dealing with pollution,
9 we would like to hear from them or if you become aware of
10 any in the near future, if you would relate them to us so
11 that we can -- because we are looking specifically at some
12 language and we want to get as much data on that as we can.

13 MR. ROEMMELE: Just one other comment. I
14 would like to thank the Commissioner, again, you and your
15 assistant or friend here -- whatever role he has -- he may
16 be your boss for all I know -- but also Mr. Cole and
17 Maurice Mason (phonetic) for their cooperation in helping
18 our members who have called your office, and I know we have
19 bombarded you with phone calls; but, it's necessary in our
20 operation because it's been the most severe crisis we ever
21 faced. I just had to emphasize that. Thank you very much.

22 MR. BRYAN: I thank you very much. That
23 exhausts my list of individuals who had previously indicated
24 that they wanted to speak.

25 Is there anyone else who would like to speak

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2 at this time? I see Mr. Walker standing.

3 MR. WALKER: Yes, just one matter in
4 closing. I know that you indicated that we would have an
5 opportunity to submit materials at the close. I note that
6 the Public Advocate had asked during the course of his
7 presentation for hard data.

8 Well, we have hard data that the cycle is not
9 typical. We have hard data that the current problems in
10 the liability field are not part of the cycle as a whole,
11 and we have also information that the Jackson Township
12 decision is not an isolated case, and we will submit that
13 information as part of our closing statements in this matter.

14 MR. BRYAN: Thank you very much. Is there
15 anyone else who would like to speak at this time?

16 Hearing none, I would remind everyone here
17 that we would be very happy to receive any written comments
18 or statements from anyone.

19 I understand that a representative of the
20 Department of Environmental Protection has been here, and
21 they will be submitting a statement in the near future.
22 Anyone else may choose to do so, either a comment or
23 specifically a comment on anything that was mentioned here
24 today by anyone.

25 I want to thank you all for attending and

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2 appreciate it, and we hope that we can resolve this fairly
3 promptly. Thank you very much.

4 (Thereupon, the hearing was concluded at
5 1:10 p.m.)

C E R T I F I C A T E

I, AUDREY TATKO WENDOLOWSKI, a Certified
Shorthand Reporter, Certificate No. 890, do hereby certify
the foregoing to be a true and accurate transcript of the
proceedings taken by and before me stenographically, at the
time and place hereinbefore set forth.

Audrey Tatko Wendolowski
Audrey Tatko Wendolowski, C.S.R.

Dated: 1/7/80