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What Does "Contamination" Mean? The Second Circuit's Approach to an Insurance Policy's Contamination Exclusion. Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.

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WHAT DOES "CONTAMINATION" MEAN? THE SECOND CIRCUIT'S APPROACH TO AN INSURANCE POLICY'S CONTAMINATION EXCLUSION

Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.[1]

I. INTRODUCTION

In *Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.*, the Second Circuit Court of Appeals subsided to one side of a debate fought in courtrooms throughout the country.[2] The circuit court decided in order to define "contamination" within the meaning of an insurance policy's contamination exclusion, it is important to consider the rest of the contract and define "contamination" contextually.[3] The Second Circuit remanded the case to the trial court to resolve the question of whether the damage was "contamination" within the meaning of the Policy because coverage would depend upon how [subject] resolved that issue.[4] By taking a contextual approach, the Second Circuit allowed the trial court to best determine the intention of the parties and force the contract to fall within the reasonable expectations of the insured.[5]

II. FACTS AND HOLDING

On September 11, 2001, the World Trade Center Twin Towers became the site of a terrorist attack that killed thousands of Americans. The collapse of the World Trade Center Towers caused a massive cloud of particulate matter (*i.e.* the pulverized and corrosive contents of the fallen towers) to form and spread throughout the downtown Manhattan area.[6]

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[1] 472 F.3d 33 (2d. Cir. 2006).

[2] Hi-G, Inc. v. St. Paul Fire and Marine Ins. Co., 391 F.2d 924 (1st Cir. 1968); Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526 (9th Cir. 1997). .

[3] Parks, 472 F.3d at 48.

[4] *Id.* at 49.

[5] *Id.* at 42.

[6] Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 36 (2d. Cir. 2006). The pulverized contents included "hydroxyls (high pH), chlorides, sulfates, organics, asbestos, lead, mercury, cadmium, quartz, beryllium, and mineral wood." *Id.* at 37.

The impact of the towers' collapse drove the cloud into a building the plaintiff owned and the defendant insured [7]

At the time of the attack, the plaintiff, Parks Real Estate Purchasing Group ("Parks"), had an insurance policy agreement ("the Policy") with the defendant, St. Paul Fire and Marine Insurance Company ("St. Paul").[8] The Policy included several express exclusion clauses including a contamination exclusion.[9]

On September 18, 2001, Parks filed a Proof of Loss with St. Paul claiming property damage to the insured building.[10] Parks contended that the damages and losses resulted from the collapse of the World Trade Center Twin Towers.[11] Parks claimed the damage from the particulate cloud came from "corrosion, destruction, excessive wear, increased maintenance and repair of the architectural façade, mechanical, electrical, structural and Heat Ventilation and Air Conditioning ('HVAC') systems and other equipment and machinery including computers and related hardware pertaining to and compromising the...[p]roperty and its

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[7] *Id.* Plaintiffs own the property at 90-100 John Street, New York, New York. Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 2005 WL 2414771 (S.D.N.Y.).

[8] Parks, 472 F.3d at 37. The policy stated that St. Paul would "protect covered property against risks of direct physical loss or damage except as indicated in the Exclusions-Losses We Won't Cover section." *Id.* The policy further stated that St. Paul would cover Parks' "financial interest in the covered building or structure," and, more specifically, "machinery and equipment that are a permanent part of a building and are used to provide building services such as elevators and heating equipment." *Id.* "Also covered were 'fixtures or yard fixtures,' property owned 'to service or maintain' the insured building, and 'construction materials, supplies, and equipment' intended to be used for maintaining, repairing, modifying, updating, or expanding the insured building." *Id.*

[9] Parks Real Estate, 2005 WL 2414771, at *1. The exclusion section specifically stated that:

> (1) Defendant will not cover any loss or damage caused by or made worse by any kind of contamination (the 'Contamination Exclusion');
> (2) Defendant will not cover damage caused by mechanical breakdown (the 'Mechanical Breakdown Exclusion'); and
> (3) Defendant will not cover any damage caused by wear and tear (the 'Wear and Tear Exclusion').

Id.

[10] Parks, 472 F.3d at 37. The Proof of Loss notified St. Paul that the losses amounted to $16, 594,118.00 in damages and a business interruption loss of $1,791,002.34. *Id.*

[11] *Id.*

surrounding environs."[12] After receiving this notice, St. Paul launched a claim investigation and advanced $1,915,914.00 to Parks.[13] Parks realized this payment did not fully cover its losses and believed St. Paul had, therefore, breached the Policy.[14]

On January 15, 2004, Parks filed its complaint in the Supreme Court of the State of New York, County of New York, seeking to recover the balance of its loss.[15] After filing an answer to the complaint, St. Paul filed a Notice of Removal, which succeeded in removing the case to the United States District Court for the Southern District of New York.[16] Following discovery, St. Paul moved for summary judgment on December 15, 2004, arguing that the alleged damage was "contamination," and, therefore, excluded under the Contamination Exclusion of the Policy.[17]

Parks, in order to defend its lawsuit, argued that two factors precluded entry of summary judgment: (1) the Contamination Exclusion was ambiguous, and the damage was not properly considered caused by contamination; and (2) the "efficient cause"[18] of the damage was the collapse of the World Trade Center Twin Towers which the Policy covered.[19] Parks referred to a written report prepared by its expert, the RJ Lee Group ("RJ Lee"), which described the causes of damage to the

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[12] *Id.*
[13] *Id.*
[14] *Id.* at 37.
[15] Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 37 (2d. Cir. 2006). Parks' complaint alleged that the "particulate matter from the [World Trade Center] infiltrated much of the ...[p]roperty causing damage in the form of erosion, corrosion, destruction, excessive wear, increased maintenance, and repair of the architectural façade, mechanical, electrical, structural, and Hear Ventilation and Air Conditioning ('HVAC') systems and other equipment and machinery including computers and related hardware pertaining to and comprising the...[p]roperty and its surrounding environs." *Id.* at 37-38. Parks stated that "the elevators, electrical and mechanical systems of its property...have been damaged and will continue to be damaged." *Id.* at 38.
[16] *Id.* at 37.
[17] *Id.* at 38. St. Paul's motion for summary judgment also argued that the alleged damages also fell under the "Mechanical Breakdown" and "Wear and Tear" exclusions which also bar recovery. *Id.*
[18] *Id.* at 48. "Efficient cause" means the "predominant cause of the loss or damage." *Id.*
[19] Parks Real Estate, 2005 WL 2414771, at *1.

building.[20] The RJ Lee report stated that the "functionality of building systems has been damaged by the infiltration of corrosive, abrasive, and hazardous [World Trade Center] [p]articulate forced into the building by the collapse of the [World Trade Center]."[21]

On September 28, 2005, the Southern District of New York granted St. Paul's motion for summary judgment, holding that the Policy's Contamination Exclusion barring coverage was applicable.[22] The district court stated that "contamination" is generally defined as "the introduction of a foreign substance that injures the usefulness of the object,"[23] or "a condition of impurity resulting from the mixture or contact with a foreign substance."[24] The district court went on to state that using either definition leads to the same conclusion -- that the issue at hand could be classified as contamination because "[t]he airborne particulate matter created as a result of the [World Trade Center] collapse [was] properly considered either a foreign substance that came into contact with the

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[20] Parks, 472 F.3d at 38. RJ Lee concluded that the particulate matter found in the cloud had an "unprecedented complexity and [was] pervasively found in all building systems and components, and present[ed] an ongoing source of re-entrainment and thus damage to cleaned or newly installed mechanical systems." *Id.* The Report went on:

> The corrosive, abrasive, and hazardous material includes[,] but is not limited to, hydroxyls (high pH), chlorides, sulfates, organics, asbestos, lead, mercury, cadmium, quartz, beryllium, and mineral wool, and was found on all floors and in all building systems sampled, in concentrations substantially in excess of those found in non-impacted buildings. Many of these substances are known toxins or carcinogens individually: little is known about the magnitude of the collective threat to human health, except that it will be greater than the threat from the individual substances. In the building's current condition, accelerated cleaning programs will need to be employed to ensure that long-term risk to occupants is minimized.

Id.

[21] *Id.* The report went more in-depth and pointed out specific damage to building systems, components, and equipment, such as: "[T]he [World Trade Center] Particulate will also chemically and/or electronically corrode the metallic conductors on electronic devices and cause component failures." *Id.*

[22] Parks Real Estate, 2005 WL 2414771 at *7.

[23] *Id.* at *3 (citing Hi-G, Inc. v. St. Paul Fire and Marine Ins. Co., 391 F.2d 924, 925 (1st Cir. 1968)).

[24] *Id.* (citing Am. Cas. Co. of Reading, Penn. V. Myrick, 304 F.2d 179, 183 (5th Cir. 1962)).

[p]roperty creating a condition of impurity or a foreign substance that, when introduced to the property, injured the property's usefulness."[25]

The district court focused on the effect of the particulate matter, writing that "[w]hether the airborne substance at issue [was] considered pulverized, abrasive, corrosive, erosive, particulate or contaminant, the effect on the property was contamination."[26] The court found that the Contamination Exclusion made the actual cause irrelevant because the exclusion barred coverage on damages "caused by or made worse by any kind of contamination."[27] Next, the court determined that the collapse of the World Trade Center was not the cause of the loss but rather the contamination that affected the property in the wake of the collapse.[28] The court also concluded that the "proper efficient cause" analysis did not involve a "look at the efficient cause of the contamination," but a look into the "efficient cause of the loss" which was the contamination itself.[29] The trial court also found that neither the Mechanical Exclusion nor the Wear and Tear Exclusion were applicable.[30]

On appeal, the Second Circuit reviewed the district court's order to grant summary judgment for the defendant, St. Paul. The Second Circuit ultimately vacated the summary judgment that the trial court granted, and it remanded the case.[31] The appellate court found that the term "contamination" was ambiguous in context of the St. Paul Policy and that the two definitions that the district court used in its determination would allow the Contamination Exclusion to be applied to an endless amount of situations.[32] The Second Circuit remanded the case back to the trial court because the determination of whether the damage was "contamination" was a question yet to be resolved, and coverage would depend upon

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[25] *Id.*
[26] *Id.* at *4.
[27] *Id.* at *5.
[28] Parks Real Estate, 2005 WL 2414771, at *5.
[29] Parks, 472 F.3d at 40.
[30] *Id.*
[31] *Id.* at 49.
[32] *Id.* at 45.

whether the damage was "contamination" within the meaning of the Policy.[33]

III. LEGAL BACKGROUND

A. Insurance Contracts Interpretation Under New York Law

In the world of commercial property insurance policies there are generally two types of policies: "all-risk" policies and "named perils" policies.[34] An all-risk policy typically covers "losses caused by any fortuitous peril not specifically excluded under the policy."[35] A named perils policy, on the other hand, merely covers the losses that were suffered from a peril enumerated in the policy.[36]

Common law has provided that when there is a dispute involving certain terms of an insurance contract, the "insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract."[37] Interpretation of a contract is a matter of law that the court must determine.[38] The ambiguity of a contract is, however, a "threshold question of law to be determined by the court."[39] According to the court:

> [A]n ambiguity exists where the terms of an insurance contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the

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[33] *Id.* at 49. The Second Circuit agreed with the district court that "the actual contact of the airborne particulate matter with the property was the efficient cause of damage to the insured building." *Id.*

[34] Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 41 (2d. Cir. 2006).

[35] *Id.* (citing Ostrager & Newman, *Insurance Coverage Disputes*, § 21.02[a], at 1306 (13th ed. 2006)).

[36] *Id.* (citing J. Draper, *Coverage under all-risk insurance*, 30 A.L.R. 5th 170, 1995 WL 900253 (1995)).

[37] *Id.* at 42. Courts must enforce contracts as written when the provisions are unambiguous and understandable. *Id.*

[38] *Id.*

[39] *Id.* (citing Duane Reade Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384, 390 (2d Cir. 2005)).

> customs, practices, usages and terminology as generally understood in the particular trade or business.[40]

New York insurance law places a significant burden on the insurer to make certain that "the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and that its. . . exclusion is the only construction that [could] be fairly placed thereon."[41] If the court finds the contract's language to be doubtful or uncertain, then the court will resolve the ambiguity against the insurer.[42] Courts may review extrinsic evidence to determine what the parties intended any insurance provision to mean when the court finds the provision ambiguous.[43] However, the law remains clear in placing the burden on the insurer to prove that its interpretation of the contract is correct.[44]

B. Contamination Exclusion

When looking at all-risk insurance policies that include contamination exclusions, it is extremely important to determine the definition of "contamination."[45] It would be helpful if the insurance policy explicitly defined "contamination", but when a definition is not available, the courts have to define the term.[46] Some courts have used the

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[40] Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 42 (2d. Cir. 2006). (citing Morgan Stanley Group Inc. v. New England Ins. Co., 225 F.3d 270, 275 (2d Cir. 2000)). "An insurance policy should be read in light of common speech and the reasonable expectations of a businessperson." *Id.* (citing Pepsico, Inc. v. Winterhur Int'l Am. Ins. Co., 13 A.D.3d 599, 788 N.Y.S.2d 142, 144 (N.Y.App.Div. 2004)).

[41] *Id.* (citing Throgs Neck Bagels, Inc., v. GA Ins. Co. of N.Y., 241 A.D.2d 66, 68-69 (N.Y.App.Div. 1998)).

[42] *Id.* Policy exclusions "are not to be extended by interpretation or implication but are to be accorded a strict and narrow construction" and any ambiguity will be found in favor of coverage. *Id.* at 43 (citing Seaboard Sur. Co. v. Gillette Co., 486 N.Y.S.2d 873, 876 (1984)).

[43] *Id.* (citing Morgan Stanley Group Inc., 225 F.3d at 275-276).

[44] *Id.*

[45] *Id.*

[46] Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 42 (2d. Cir. 2006).

definition of contamination as being "the introduction of a foreign substance that injures the usefulness of the object"[47] or "a condition of impurity resulting from the mixture or contact with a foreign substance."[48] In *Hi-G, Inc. v. St. Paul Fire and Ins. Co.*,[49] the First Circuit denied the plaintiff's claim that if a word has more than one common meaning, then the policy should automatically be construed against the insurance company.[50] The First Circuit did not want to embrace this rule, because it meant that the insurance company would always lose since the insured would insist on the inapplicable meaning.[51] The First Circuit then concluded that contamination was understood to mean "the introduction of a foreign substance that injures the usefulness of the object."[52]

Other courts, however, have opted to define contamination contextually.[53] The Ninth Circuit addressed the issue of defining contamination contextually in an insurance policy in *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*[54] and rejected the insurer's approach to defining "contamination" in order to find the definition through the context of the relevant exclusion.[55] The Ninth Circuit's reasoning for construing the word within the context of the exclusion was that the insurer's approach to defining "contamination" would include a wide array of situations that would reach well beyond the reasonable

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[47] Parks, 2005 WL 2414771 at *3 (citing Hi-G, Inc. v. St. Paul Fire and Marine Ins. Co., 391 F.2d 924, 925 (1st *Cir.* 1968)).

[48] *Id.* at *3 (citing Am. Cas. Co. of Reading, Penn. v. Myrick, 304 F.2d 179, 183 (5th Cir. 1962)). The Fifth Circuit based its definition of "contamination" as being "a condition of impurity resulting from the mixture or contact with a foreign substance" from Webster's New International Dictionary. Am. Cas. Co. of Reading, Penn. v. Myrick, 304 F.2d at 183.

[49] Hi-G, Inc., 391 F.2d 924.

[50] *Id.* at 925.

[51] *Id.*

[52] *Id.*

[53] Parks, 472 F.3d at 44. The Ninth Circuit ultimately agreed with the district court that "although contamination is not defined in the policy, it must be construed with the context of the pollution exclusion." *Id.* (citing Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526 (9th Cir. 1997)).

[54] 132 F.3d 526 (9th Cir. 1997).

[55] Enron Oil, 132 F.3d at 530.

expectations of the insured.[56] In *Enron Oil*, the Ninth Circuit determined that the exclusion's use of the phrase "seepage, pollution, and contamination," signaled that a reasonable reader would infer that the contamination exclusion dealt with environmental harms.[57]

The Seventh Circuit has also used an approach that considers the context of an exclusion clause in order to determine the meaning of a relevant word.[58] In *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*,[59] the Seventh Circuit concluded that the insurer's desired use of the terms "irritant" and "contaminant" were virtually boundless because "there is virtually no substance or chemical in existence that would not irritate or damage some person or property."[60] By considering context in determining a term's meaning, courts attempt to avoid the danger of sweeping into the exclusion's net a wide array of situations that a sensible reader would not infer through a reading of the exclusion clause.[61]

C. Efficient Causation

"In order to obtain coverage under a first-party [insurance] policy, the insured must suffer a loss caused by a covered peril (in a named perils policy) or suffer a loss not caused by an excluded peril (in an all risk

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[56] *Id.* The Ninth Circuit claimed that, under the insurer's interpretation, the contamination exclusion would be "virtually limitless, extending to claims for product liability...or for negligence...that arguably involved an impurity resulting from contact with a foreign substance." *Id.*

[57] *Id.*

[58] Parks, 472 F.3d at 44.

[59] 976 F.2d 1037 (7th Cir. 1992).

[60] *Id.* at 1043. The court further stated that:

> [W]ithout some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.

Id.

[61] Parks, 472 F.3d at 45.

policy)."[62] "A covered peril and an excluded peril can combine to cause a covered loss."[63] "In a case where a covered and excluded peril combine to cause a covered loss, courts typically apply the efficient proximate cause rule, meaning that the insured is entitled to coverage only if the covered peril is the 'predominant cause of the loss or damage.'"[64]

"The efficient proximate cause of a loss is the cause that originally sets other events in motion."[65] "Only the most direct and obvious [efficient] cause should be looked to for purposes of the exclusionary clause."[66] "When the court interprets an insurance policy excluding from coverage any injuries 'caused by' a certain class of conditions, the causation inquiry stops at the efficient physical cause of the loss."[67] Once a court is able to establish the "efficient cause" of a loss, the court can determine if it falls under any applicable exclusion clauses contained in the insurance policy, which is what the Second Circuit was forced to do in its decision in *Parks*.[68]

IV. INSTANT DECISION

The Second Circuit amply pointed out the fact that parties entering into a contract should provide clear, understandable, and unambiguous terms in the contract in order to avoid confusion and allow the courts to enforce the terms of the contract as they were written.[69] The Second

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[62] *Id.* at 48 (citing Ostrager & Newman, *Insurance Coverage Disputes*, § 21.02[c], at 1313).

[63] *Id. See* Shelter Mutual Ins. Co. v. Maples, 309 F. 3d 1068, 1070-1071 (8th Cir. 2002) (where frozen pipes, a covered peril, caused mold, an excluded peril, that resulted in the loss).

[64] Parks, 472 F.3d at 48; *See also* Lynch v. Travelers Indem. Co., 452 F.2d 1065, 1067 (8th Cir. 1972); 10 Lee R. Russ & Thomas F. Segalla, Couch on Insurance §§ 148:60, 148:61 (3d ed. 1998).

[65] Parks, 472 F.3d at 48 (citing Kula v. State Farm Fire & Cas. Co., 628 N.Y.S.2d 988, 991 (N.Y.App.Div. 1995)).

[66] *Id.*

[67] *Id.* (citing Kimmins Indus. Serv. Corp. v. Reliance Ins. Co., 19 F.3d 78, 81 (2d Cir. 1994)). "It does not trace events back to their metaphysical beginnings." *Id.*

[68] Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 49 (2d. Cir. 2006).

[69] *Id.* at 42.

Circuit found that the term "contamination" was ambiguous as used in the Policy because the common definition, which St. Paul convinced the district court to use, was limitless in situations in which it could apply.[70]

The Second Circuit recognized that courts other than the district court had taken the same approach in attempting to define contamination exclusions as a foreign substance affecting usefulness or creating an impurity.[71] However, the Second Circuit did not find this authority very persuasive due to its "virtually boundless" applications.[72] The court reached this conclusion after applying the district court's definition of "contamination" to several examples.[73] The first hypothetical the court contemplated slightly changed the fact pattern of the present case and involved the World Trade Center Twin Towers collapsing directly upon the Property and, subsequently, causing damage.[74] The Second Circuit realized that this loss would undoubtedly be covered under the all-risk insurance Policy between the plaintiff and defendant, but St. Paul could still argue that the loss in the example was a result of "contamination" when using the definition of the district court.[75]

The Second Circuit then considered the example of a fire, which would also be an insurable event or peril.[76] *Cantrell v. Farm Bureau Town & Country Ins. Co. of Missouri*[77] specifically addressed this example with an all-risk insurance policy that excluded coverage under

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[70] *Id.* at 45. Once again, the definition that the district court employed was that "contamination" was "the introduction of a foreign substance that injures the usefulness of the object" or "a condition of impurity resulting from the mixture or contact with a foreign substance." *Id.*

[71] *Id.* at 43. Cases that use the same definition of "contamination" as the district court are *Hi-G, Inc. v. St. Paul Fire & Marine Ins. Co.*, 391 F.2d 924, 925 (1st Cir. 1968); *J.S. French Auto. Castings, Inc. v. Factory Mut. Ins. Co.*, 2003 WL 21730127 (N.D.Ill. July 23, 2003); *American Cas. Co. of Reading, Pa. v. Myrick*, 304 F.2d 179, 184 (5th Cir. 1962); *Auten v. Employers Nat. Ins. Co.*, 722 S.W.2d 468, 469 (Tex.App. 1986).

[72] Parks, 472 F.3d at 45.

[73] *Id.*

[74] Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 45 (2d. Cir. 2006).

[75] *Id.* The Twin Towers collapse on the building could be argued as the "introduction of a foreign substance that injure[d] the usefulness of the object." *Id.*

[76] *Id.* Ash and soot, which result from a fire, could be argued to be a foreign substance introduced to the house that damaged its usefulness. *Id.*

[77] 876 S.W.2d 660 (Mo.Ct.App. 1994).

"contamination," but expressly covered any losses resulting from "fire" and "smoke."[78] After a fire on the insured property, the insurance company denied a plaintiff's claim, reasoning that the event fell under the contamination exclusion's meaning of "to make inferior or impure by admixture."[79] The court in *Cantrell* found the word "contamination" ambiguous and concluded that "a reasonable person would not determine that smoke damage caused by a covered fire, would be excluded from coverage."[80] After reviewing *Cantrell*, the Second Circuit noted that using a broad definition of "contamination" casts a broad net across situations that directly conflict with other sections of an insurance policy when taking the definition of "contamination" into consideration contextually.[81]

Next, the Second Circuit considered an example of a soft drink company using faulty ingredients in its products, which would also be a covered peril.[82] In *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*,[83] this exact situation occurred with the insured possessing an all-risk insurance policy that contained a contamination exclusion.[84] The insurance company in *Pepsico* also attempted to deny coverage by citing the contamination exclusion to mean "to make inferior or impure by mixture."[85] In *Pepsico*, the New York State Supreme Court preferred a commonsense approach over a literal approach in order to reach a conclusion that fell in line with the "reasonable expectations of a businessperson who has come to understand standard pollution exclusions as exclusions addressing environmental-type harms."[86] The court in *Pepsico* realized that there needed to be limits placed upon the definition

[78] *Id.* at 662. In *Cantrell*, the plaintiff's home suffered from a fire, which caused toxic fumes and chemicals to spread throughout the house, and consequently, the house was uninhabitable. *Id.*
[79] *Id.* at 664.
[80] *Id.* at 664-665.
[81] Parks, 472 F.3d at 48.
[82] *Id.* at 47.
[83] 13 A.D.3d 599, 788 N.Y.S.2d 142, 144 (N.Y.App.Div. 2004).
[84] *Id.* at 143. The faulty ingredients that the plaintiff used caused the soft drinks to have an unintended taste and the plaintiff was, consequently, forced to destroy the spoiled drinks. *Id.*
[85] *Id.* at 144.
[86] *Id.*

of "contamination" or there would be virtually no limit to its application in excluding coverage. The Second Circuit found this logic very persuasive.[87]

In determining the present case, the Second Circuit found that these examples, along with numerous other applicable situations, would allow any unintended damages to fall under a contamination exclusion if the court followed the broad terms used by the district court.[88] The court reasoned that a construction using such broad terms would allow the all-risk policy to "insure against virtually nothing."[89] The court determined that because the broad application of the insurer's definition of "contamination" was limitless, both parties should be permitted to submit evidence of the intended use of the ambiguous term.[90] The Second Circuit stated that, upon remand, the district court should opt for a contextual approach when determining the meaning of the term "contamination" as it is used in the all-risk insurance policy between the two parties.[91]

The Second Circuit then made a determination concerning the efficient cause of the damage to the building.[92] The Circuit court agreed with the antecedent court's finding that "the actual contact of the airborne particulate matter with the [p]roperty was the efficient cause of damage to the insured Building."[93] The court then stated that the contamination was not the cause of the damage but was the resulting damage itself.[94] The Second Circuit concluded that whether the aforementioned damage was "contamination" was a question that still needed to be determined by both parties' evidence in the present case.[95]

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[87] Parks, 472 F.3d at 48.
[88] *Id.*
[89] *Id.*
[90] *Id.* The Second Circuit stated that they were "not so sure that the damage caused by the settling of the airborne matter into Parks' building, machinery, and equipment was intended by the parties to constitute contamination." *Id.*
[91] Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 48 (2d. Cir. 2006).
[92] *Id.* at 49.
[93] *Id.*
[94] *Id.*
[95] *Id.* The court stated that :

> [s]aid differently, while the cloud of particulate matter caused damage to the insured [p]roperty, coverage will depend upon whether that damage was

Based on the preceding reasoning, the Second Circuit concluded that the district court's grant of summary judgment should be vacated, and the case should be remanded in order for the district court to take a contextual approach to the definition of "contamination" and allow both parties to introduce evidence of what was intended by the use of this ambiguous term.[96]

V. COMMENT

It is sometimes difficult for a court to come into a dispute and enforce a contract the exact way in which both parties believed the contract dealt with a particular issue.[97] This is exactly why courts enforce unambiguous and understandable provisions exactly as they are written.[98] However, when parties to a contract cannot agree about a provision's meaning, then the court should read the policy in light of common speech and the reasonable expectations of a businessperson.[99]

If a court should read a policy in light of the reasonable expectations of a businessperson, it would be a direct conflict for the court to allow a broad definition of "contamination" that the insurer wishes to use.[100] By opting for a contextual definition of contamination,[101] the Second Circuit was in the best position to read the policy in light of the reasonable expectations of a businessperson. There is plentiful rationale behind taking a contextual approach. Insurance companies create and enter into multiple contracts daily that cover the same provisions and exclusions. Therefore, insurance companies have reason to know of

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> "contamination" within the meaning of this Policy. Insofar as the damage constituted contamination, it is excluded from coverage. Insofar as the damage was not contamination, however, it is covered.

Id.

[96] *Id.*

[97] Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co., 472 F.3d 33, 42 (2d. Cir. 2006).

[98] *Id. See also* Prange v. Int'l Life Ins. Co. of St. Louis, 46 S.W.2d 523 (Mo. 1932).

[99] Parks, 472 F.3d at 42 (citing Pepsico v. Winterhur Int'l Am. Ins. Co., 788 N.Y.S.2d 142, 144 (N.Y.App.Div. 2004). *See also* Krombach v. Mayflower Ins. Co., Ltd., 785 S.W.2d 728 (Mo.Ct.App. 1990).

[100] Parks, 472 F.3d at 43.

[101] *Id.* at 49.

uncertainties of meaning within its policies and, as a consequence, the policies should be read in a light most favorable to the insured.[102] The Second Restatement of Contracts explicitly addresses situations similar to the case at hand.[103] It states that in some instances, a company may leave the definition of a term or provision deliberately obscure so that at a later point in time, typically when it is the issue of litigation, the company can choose which definition best suits its needs at the time.[104] The Second Circuit correctly identified the problem with allowing the insurer to use the definition of "contamination" to include virtually any circumstances or situations in the contamination exclusion.[105] If the court allowed a broad definition of "contamination" to be used in determining the coverage of the policy, then the court would have gone directly against the rule of reading the policy in light of the reasonable expectations of a businessperson.[106]

Additionally, if the court is striving to fulfill the reasonable expectations of a businessperson, then the most logical approach is one that takes into consideration the contract in its totality. Insurance companies are inconsistent in representing to consumers that there is comprehensive coverage in their contracts, while at the same time they limit their liability by placing exceptions or exclusions in so-called omnibus policies.[107] Therefore, it is not surprising that courts should disfavor this quasi-consumer fraud by using several judicial interpretation tools.[108] In order to counteract the insurance companies' least desirable acts, courts need to construe the exclusions narrowly. The courts can do this by using policies of interpretation and construction, in addition to public policy, to define "contamination" contextually rather than permitting the all-

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[102] Rest. 2d Contracts § 206 (comment a).

[103]

[104] *Id.*

[105] Parks, 472 F.3d at

[106] *Id.* at 49.

[107] Williston on Contracts § 49:111 (4th ed. 2006).

[108] *Id. See also* Ganapolsky v. Boston Mut. Life Ins. Co., 138 F.3d 446 (1st Cir. 1998); Stoney Run Co. v. Prudential-LMI Commercial Ins. Co., 47 F.3d 34 (2d Cir. 1995); State of N.Y. v. Blank, 27 F.3d 783 (2d Cir. 1994); Ritter v. U.S. Fidelity & Guaranty Co., 573 F.2d 539 (8th Cir. 1978).

encompassing definitions set forth by the insurance companies.[109] The only way to make the reasonable expectations doctrine effective is to force insurance companies to use language that is "clear, plain, and conspicuous" within their contamination exclusions.[110] This would avoid situations in which the reasonable businessperson anticipates coverage, but the insurance company believes the situation is under the excluded risks and is, therefore, not covered.[111]

One of the criticisms of the contextual approach is that the courts may overstep their boundaries and create coverage issues that the insurance policy clearly did not intend to encompass.[112] Keeping in mind the fact that courts should only be forced to interpret and construct contract language when it contains an ambiguity, it is important to recognize that courts cannot read into and enforce terms which are clearly contradictory to the written provisions of the contract.[113] The courts cannot be proactive in policing contracts and the terms therein when there is no ambiguity because the courts have no warrant to use strained construction by stretching words to find against the insurer.[114] When the language is clear, there is no need to consider the context in order to find a working definition of terms, and the exclusion should be given full effect.[115]

Another reason courts should not use a broad definition set forth by insurance companies ex-post facto, but rather determine the definition of the word through context in order to comply with the reasonable expectations of a businessperson, is due to the fact that the allocation of risk is more easily burdened by the insurance company.[116] All-risk policy

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[109] *Id.*

[110] *Id.*

[111] *Id. See also* Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382 (9th Cir. 1994); Lancaster v. U.S. Shoe Corp., 934 F.Supp 1137 (N.D.Cal. 1996).

[112]

[113] Schenkel & Schultz, Inc. v. Homestead Ins. Co., 119 F.3d 548 (7th Cir. 1997); State Farm Mut. Auto. Ins. Co. v. Shahan, 141 F.3d 819 (8th Cir. 1998); F.D.I.C. v. American Cas. Co. of Reading, Pa., 998 F.2d 404 (7th Cir. 1993).

[114] Williston on Contracts § 49:111.

[115] Porterfield v. Audubon Indem. Co., 2002 WL 31630705 (Ala. 2002). The court stated that when there is clear language courts cannot defeat the express provisions by creating a new contract for the parties. *Id.*

[116] Couch on Insurance § 22:32.

seekers, by definition, typically find insurance policies that cover any possible loss the insured may endure since such policies cover any losses caused by any fortuitous peril.[117] The reasonable expectations doctrine becomes a factor in order to provide coverage where a reasonable person who purchased an all-risk insurance policy would construe the policy as affording coverage.[118] Interpreting broadly defined exclusions at a point in time after the contract is entered into would eliminate enough coverage so as to destroy the bargain the insured thought had been entered into.[119]

In light of the problems presented by adopting the broad interpretation of "contamination" presented by St. Paul, the Second Circuit correctly identified the best course of action in remanding the case back to the lower court in order for the definition of "contamination" to be defined contextually.[120] If the court allowed the broad, sweeping definition of "contamination" to stand, the reasonable expectations of the insured would not have been fulfilled.[121] By defining "contamination" contextually, the Second Circuit allows the trial court to give effect to the intention of the parties entering into the contract.[122]

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[117] Ostrager & Newman, *Insurance Coverage Disputes*, § 21.02[a], at 1306 (13th ed. 2006).

[118] Couch on Insurance §22:32. Couch further states: "The standard of reasonable construction requires that effect be given to exceptions and limitations couched in language which has a plain meaning, and which is not inconsistent with other clauses or provisions of the contract." *Id.*

[119] *Id.* To put it in other words:

> The far-reaching consequences of the expectations doctrine may be appreciated by considering the countless insurance policies which begin with a broad sweeping declaration of the general coverage afforded and then later at some other location in the policy, often buried between definitions, conditions, and provisions, limit the coverage by exclusions or limitations which, though couched in language for the most part understandable after careful consideration, is at best confusing in light of the cursory examination made by the vast majority of the insureds.

Perlet, The Insurance Contract and the Doctrine of Reasonable Expectation, 6 Forum 116, 126 (Jan. 1971).

[120] Parks, 472 F.3d at 48.

[121] *Id.* at 42.

[122] *Id.*

VI. CONCLUSION

Parks answered a question that has forced many courts to split. Several courts have adopted a broad definition of "contamination" which allows virtually any situation to fall under the contamination exclusion and leave the insured with huge losses that they thought would be covered by the insurance. Other courts have taken the approach of defining "contamination" contextually in order to determine which definition best fits each specific situation. *Parks* took the approach of defining "contamination" contextually in order to restrict exclusion from coverage. At the same time, *Parks'* approach allows future courts the flexibility of a pragmatic definition, which allows the court to determine the definition on a case-by-case basis.

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