IN THE
INDIANA SUPREME COURT

Cause No. _____

THOMSON INC. n/k/a, TECHNICOLOR USA, INC. Appellant/Cross-Appellee, vs. INSURANCE COMPANY OF NORTH AMERICA n/k/a CENTURY INDEMNITY COMPANY, et al. XL INSURANCE AMERICA INC. f/k/a WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY, TRAVELERS PROPERTY CASUALTY CO., et al, Appellees/Cross-Appellants.	)	Appeal from Court of Appeals No. 49A05-1109-PL-470 Marion Superior Court 49D07-0807-PL-30747 Hon. Michael D. Keele, Judge

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT/CROSS-APPELLEE THOMSON INC.'S PETITION TO TRANSFER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 that is a voice and an information resource for insurance consumers in Indiana and throughout the United States. UP assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations, and volunteers support our work. UP does not accept funding from insurance companies. UP is based in San Francisco, California but operates nationwide.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing consumer laws and public policy). UP hosts a library of tips, sample forms, and articles on all types of insurance products, coverage, and claims at www.uphelp.org.

UP's Executive Director has been selected for six consecutive terms to be an official consumer representative to the National Association of Insurance Commissioners where she works with insurance regulators, including Commissioner Stephen W. Robertson and the Indiana Department of Insurance. Academics and journalists throughout the U.S. routinely engage with United Policyholders on insurance and legal matters.

UP assists courts as *amicus curiae* in coverage and claim related appellate proceedings throughout the U.S. UP's *amicus* brief was cited with approval in the U.S.

Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999), and its arguments have been cited and relied upon by many state and federal courts, including in Indiana.

UP has filed over 300 *amicus curiae* briefs nationwide and has appeared as *amicus curiae* in the following Indiana cases: *Wellpoint Inc. v. National Union Fire Insurance Co.* (No. 49A05-1202-PL-92, Ind. 2014); *Commonwealth Land Title Insurance Co. v. Stephen W. Robertson, Insurance Commissioner of the State of Indiana, on behalf of the Indiana Department of Insurance* (No. 49A04-1302-PL-00084, Ind. Ct. App. 2013); *Travelers Casualty & Surety Co. v. United States Filter Co.* (No. 49A02-0604-CV-00289, Ind. Ct. App. 2006); *Cincinnati Insurance Co. vs. Wills* (No. 79S00-9808-CV-458, Ind. 1998); and *Dana Corp. vs. Hartford Accident & Indemnity Co., et al.* (No. 49A02-9602-CV-110, Ind. Ct. App. 1997).

REASONS TO GRANT TRANSFER

Amicus curiae has filed this brief in support of transfer for two reasons: *first*, to underscore the importance of this case, and particularly the scope of coverage under the standard form commercial general liability ("CGL") policy at issue, for policyholders seeking coverage for "long-tail" claims involving injury or damage developing over an extended period of time; and, *second*, to bring to the court's attention the extensive drafting history compiled by the insurance industry, which confirms that the CGL policy, once triggered by injury or damage happening during the policy period, is

intended to provide coverage for a policyholder's liability in full up to the policy limits, rather than some lesser, prorated amount for a given policy period.[1]

Amicus notes that the absence of express proration language in the policy is itself fatal to any argument that the policy mandates anything less than full coverage. But it is also true that the insurance industry drafters *specifically rejected* proposed proration provisions, as well as the concept of proration based on each insurer's respective time on the risk. The drafting history further confirms that, when the insurers changed the operative policy language from "[we] will pay *all* sums" to "[w]e will pay *those* sums," they did so only to clarify that the "all sums"/"those sums" language does not override relevant policy limits and exclusions. Their reasoning had nothing to do with prorating the policyholder's liability and left unchanged the fact that, once triggered, the policy covers the sums the insured is legally obligated to pay up to the policy limits, subject to any exclusions.

I. Coverage for Long-Tail Claims Is an Important, Recurrent Issue for Policyholders, and the Court Of Appeals' Proration Decision Was in Error.

Amicus has filed this brief to address the scope of coverage under a standard CGL policy where the policyholder purchased successive policies and the injurious event spanned longer than a single policy period. This issue is important for the many policyholders facing "long-tail" claims based, for example, on latent injuries as in this

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[1] *Amicus* has sought leave to file an Addendum to this brief attaching selected drafting history materials and tendered the proposed Addendum with its motion.

case, or environmental damage, that develop progressively over time and may be difficult or impossible to assign to a particular policy period.

The policies at issue here, following the insurance industry's standard CGL form, state that:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. . . .
>
> This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury or property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2) The "bodily injury" or "property" damage" occurs during the policy period.

This language appears in thousands of policies, and the issue in the long-tail context—i.e., whether the insurer should be responsible to the policyholder for all of the sums that the policyholder "becomes legally obligated to pay," or only some prorated fraction for the given policy period—is a recurrent question that has been addressed by courts across the country.

As the trial court and Judge Vaidik in dissent in the Court of Appeals noted, this Court has already held that the standard form CGL language in effect from 1966 until 1985 required a policy, once triggered, to respond "for the entire amount of damages for which the policyholder is liable, up to the policy's limits," rather than some prorated share. Thomson's Allocation App., at 43-44 (citing *Allstate Ins. Co. v. Dana*, 759 N.E.2d

1049, 1058 (Ind. 2001) [hereinafter *Dana II*]); *Thomson Inc. v. Ins. Co. of N. Am.*, 2014 WL 2772834, at *43 (Ind. Ct. App. June 19, 2014) (Vaidik, J., dissenting in part). The trial court recognized that "[i]n this case, the policies . . . use the words 'those sums' and not 'all sums,'" as in *Dana II*, but the court held that "[t]his does not change the result" because "[t]he use of 'those' instead of 'all' does not constitute the clear proration language *Dana II* noted insurers would need to support proration." Thomson's Allocation App., at 43-44. Rather, the change is nothing more than "a difference without a distinction." *Id.*; *accord Thomson Inc.*, 2014 WL 2772834, at *44 (Vaidik, J., dissenting in part).

Amicus agrees, and notes that this conclusion is the only reasonable reading of the policy language, when the "those sums" policy here, like the "all sums" policy at issue in *Dana II*, nowhere references—much less mandates—proration of liability by policy period. *See Tippecanoe Valley Sch. Corp. v. Landis*, 698 N.E.2d 1218, 1221 (Ind. Ct. App. 1998) (holding that "a court may not rewrite an insurance contract" by adding terms that are not there). That the plain language of the policy nowhere requires proration likely explains why this Court's decision a decade ago in *Dana II* accords with its sister state supreme courts in states including Ohio, Illinois, Pennsylvania, and Wisconsin, among other courts. *See, e.g., Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1047-50 (D.C. Cir. 1981) (adopting an "all sums" approach); *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 626-27 (Wis. 2009) (same); *Goodyear Tire & Rubber Co. v.*

Aetna Cas. & Sur. Co., 769 N.E.2d 835, 840-41 (Ohio 2002) (same); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 509 (Pa. 1993) (same); *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150, 165 (Ill. 1987) (finding no error in court of appeals' rejection of proration); *John Crane, Inc. v. Admiral Ins. Co.*, 991 N.E.2d 474, 491 (Ill. Ct. App. 2013) (reaffirming *Raymark*'s application of an "all sums" approach).[2]

It is also important to note that, although nothing in the policy language reduces the scope of each insurer's threshold obligation to the policyholder, an insurer that steps up and pays the insured's entire liability under a triggered policy is free to seek contribution and apportionment from other insurers whose policies also are triggered. *See, e.g., ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 974 (3d Cir. 1985). It is not, however, permitted to apportion responsibility back to the policyholder—who paid premiums for insurance protection—merely because some portion of the injury developed outside the policy period (including during an uninsured period). *See id.; see also Dana II*, 759 N.E.2d at 1058.

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[2] Other courts that have considered the question with respect to the "all sums" vs. "those sums" issue have agreed that the minor wording change, still making no reference to proration, cannot alter the "all sums" rule. *See, e.g., Aerojet Gen. Corp. v. Transport Indem. Co.*, 948 P.2d 909, 919-20 (Cal. 1997) (rejecting proration when construing "those sums" language); *Norfolk S. Ry. Co. v. Gee Co.*, No. 02 CH 19786, at 5 (Circuit Ct. of Cook Cnty., Ill., Jan. 7, 1995) (finding the replacement of "all sums" with "those sums" to be a "difference without a distinction"); *State Farm Fire & Cas. Co. v. Martinez*, 995 P.2d 890, 895 (Kan. Ct. App. 2000) (same); *Fluke Corp. v. Hartford Accident & Indem. Co.*, 7 P.3d 825, 828 n.1 (Wash. Ct. App. 2000) (same), *aff'd*, 34 P.3d 809 (Wash. 2001).

II. The Drafting History Confirms Neither "All Sums" nor "Those Sums" Policy Language Was Intended to Require Proration.

Although the plain language of the policies in this case is sufficient to refute pro rata allocation of the policyholder's liability, and any ambiguity must be construed against the insurer that drafted the policy, *see, e.g., Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985), *amicus* wishes to emphasize that the drafting history of the CGL forms with "all sums" and "those sums" policy language confirms that neither formulation was intended to require proration.[3]

The insurance industry drafters, including, for example, Appellee Century Indemnity Co.'s predecessor, Insurance Company of North America, intentionally wrote the modern "occurrence"-based CGL policy form to provide broad coverage for

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[3] This Court has repeatedly relied on similar materials in construing disputed policy language. *See, e.g., State Auto. Mut. Ins. Co. v. Flexdar, Inc. & Rts. Realty*, 964 N.E.2d 845, 849 n.3, 852 (Ind. 2012) (considering legislative developments regarding policy language and alternative forms of policy language used by an insurer); *Sheehan Constr. Co., Inc. v. Cont'l Cas. Co.*, 935 N.E.2d 160, 162 (Ind. 2010) (discussing at length the drafting history of standard form insurance policy language as background to its interpretation of the policy language at issue); *Dana II*, 759 N.E.2d at 1059 ("Evidence of industry practice is admissible to construe terms of art or ambiguous agreements."); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947-48 (Ind. 1996) (relying on the insurance industry's own understanding of disputed policy language); *see also Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 891 (Cal. 1995) ("Most courts and commentators have recognized . . . that the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues."). In summarizing the drafters' repeated consideration and rejection of restrictive proration clauses, United Policyholders also fulfills *amici*'s traditional function of calling to the Court's attention publicly available information that might otherwise escape its consideration.

long-term latent injuries or damages implicating multiple policy years.[4] Given this—and their *repeated* consideration of the long-tail issue—the drafters certainly could have included in the standard form policy provisions language expressly limiting ("prorating") each insurer's indemnity obligation to the amount of injury taking place during each triggered policy period or to some proportionate share when injury developed over a number of years, including uninsured periods. But they *deliberately* did not do so. And the drafting history further confirms that, when the insurers changed the operative policy language from "all sums" to "those sums," the change had nothing at all to do with proration; the scope of coverage remained unchanged.

A. The Insurance Industry Drafters of the Standard Form CGL Policy Considered and Rejected Proration.

The drafting history of the "all sums" policy language considered in *Dana II* reveals that the insurers who drafted it purposefully chose *not* to adopt proration provisions for long-tail claims. Apparently, they feared that imposing such a vast restriction on the scope of coverage would affect the premiums they could charge.

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[4] *See, e.g., ISO Commercial Liability Forms: A Side-by-Side Comparison* ix (1986) ("The concept of insuring 'accidents' was gradually broadened to become insurance for 'occurrences' that cause bodily injury or property damage, including events that cause injuries or damage but do not happen at a fixed, identifiable point in time. Such events were first described as 'occurrences' and as 'continuous or repeated exposures to conditions' in the 1966 CGL form."); *see also New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1181 (3d Cir. 1991); *Montrose Chem. Corp.*, 913 P.2d at 891.

The 1964 Joint Forms Committee. In September 1964, the insurance industry's Joint Forms Committee ("JFC"), which played a leading role in promulgating the 1966 revisions to the standard CGL policy form that established "occurrence"-based coverage, met to discuss the issues presented by claims involving injury or damage that occurs over successive policy periods.[5] Proration of the policyholder's coverage was rejected:

> Mr. Katz [of Aetna] . . . explain[ed] that prorating cannot be effectuated between the insurer and the claimant. Between the two insurers, of course they would prorate. We cannot ask our Claims Departments to adjust parts of claims; also, we cannot defend our pro rata share of claims, but must defend the entire claim.

Addendum 14 (JFC Minutes, Sept. 21-23, 1964, at 11). Later, discussing the example of ingestion of a toxic substance over two policy periods, the committee considered what would happen "[if there had not] been a second insurer." Addendum 16 (JFC Minutes, Sept. 21-23, 1964, at 12). The "consensus was that probably Mr. Schoen's company [the first insurer] would have had to pay all of the damages." *Id.*

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[5] The Joint Forms Committee was one of several committees convened by the National Bureau of Casualty Underwriters ("NBCU"), representing stock insurance companies, and the Mutual Insurance Rating Bureau ("MIRB"), representing mutual insurers, to revise the standard CGL policy. This project culminated in the promulgation of the 1966 CGL form. *See Am. Home Prods. Corp. v. Liberty Mut. Ins. Corp.*, 565 F. Supp. 1485, 1501 (S.D.N.Y. 1983), *aff'd as modified by* 748 F.2d 760 (2d Cir. 1984). Century's predecessor INA was a subscriber of the NBCU during the 1960s. *See* Addendum 3. The NBCU and MIRB were predecessors of what is now the Insurance Services Office ("ISO"), an insurance trade association that provides rating, statistical, and policy drafting services. *See Montrose Chem. Corp.*, 913 P.2d at 891. This Court cited similar minutes of such industry groups in *Kiger*. *See* 662 N.E.2d at 948.

The 1965 Presentation. At the time that the 1966 version of the CGL policy form was adopted, one of its principal drafters, Richard Schmalz of the Hartford Insurance Group, informed industry representatives that the policies did not contain any language that provided for proration of losses in cases involving injury or damage that occurred over an extended period of years:

> [I]t is possible that where the injury actually occurs over two or more policy periods, the Claims Department will have to make some sort of reasonable allocation to each. There is no pro-ration formula in the policy, as it seemed impossible to develop a formula which would handle every possible situation with complete equity.

Addendum 32 (R.A. Schmalz, Presentation to the Mutual Insurance Technical Conference, Nov. 15-16, 1965, at 6).

1978 Meeting of the Ad Hoc Committee. Insurance industry drafters revisited the subject of proration during the late 1970s, as the number and variety of long-tail claims were expanding. In April 1978, the drafters considered language that would have required insurers to contribute "proportionally based on the length of their coverage during the exposure period" and would have further required that "[i]f the insured is self-insured for a given period during the involved exposure period, the insured will have to contribute to the judgment based on the exposure period self insured." Addendum 37 (April 1978 Minutes, at 2). Nothing in the minutes suggests that the form CGL policy already provided for proration. Quite the contrary. Confirming that existing pricing did *not* reflect any expectation that covered losses

would be prorated to the policyholder for uninsured periods, the Committee noted that this new proration proposal "might have some impact on pricing of insurance and the excess insurance marketplace." *Id.* This proposal was not adopted.

In May 1978, the Committee studied draft language that would prorate damages among policy periods in different ways, depending on whether the damages could be "clearly and distinctly assigned to the respective annual periods." Addendum 48 (May 1978 Minutes, at 1206a). This language also was not adopted.

Indeed, no proration language was ever incorporated into the standard form CGL policy. That such language was considered and rejected, moreover, confirms that the insurance industry drafters understood that, in the absence of such language, each policy would pay on an "all sums" basis once it was triggered by injury or damage happening during the policy period. In other words, this Court in *Dana II* got it right.

B. Drafting History from Indiana, as Elsewhere, Makes Clear That the Policy Change from "All Sums" to "Those Sums" Was Not Intended to Provide for Proration.

In the 1986 CGL policy form, the insurance industry drafters changed the language "[t]he company will pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay" to "[w]e will pay *those sums* that the insured becomes legally obligated to pay as damages." *ISO Commercial Liability Forms: A Side-by-Side Comparison* 16 (1986) (emphasis added). The change was made without comment in the drafters' "side-by-side comparison" commentary, comparing the old

and new forms. *Id.*[6] Had the drafters meant to incorporate a dramatic change in the scope of coverage to a pro rata allocation system, surely the change would have merited *some mention* in the commentary.[7]

Particularly pertinent here, there is evidence *from Indiana* that the insurers made the change from "all sums" to "those sums" for a specific reason entirely unrelated to proration. On September 18, 1985, Regional Representative of the Insurance Services Office ("ISO") drafters Tony Shannon wrote to Keith Kendall of the Indiana Department of Insurance ("IDOI") "in response to the questions [the IDOI] raised at [ISO's] August 15 meeting on the CGL." Addendum 49 (Letter from ISO to IDOI, Sept. 18, 1985). Among the questions addressed was: "Why has the wording in the insuring agreement

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6 ISO's side-by-side comparison also notes that the phrase "which occurs during the policy period" in the 1986 form "is the same phrase that formerly appeared in the [pre-1986] CGL definitions of 'bodily injury' and 'property damage." *ISO Commercial Liability Forms* 8 cmt. a. According to the ISO drafters, this change in position was made so that the terms "bodily injury" and "property damage" could "be defined without reference to time"—i.e., without any intention to effect proration in long-tail claims. *Id.* This fact is inconsistent with the Court of Appeals' position that the use of the "during the policy period" language in the post-1986 policy at issue in this case is somehow "critical," despite the fact that the same language appeared in the pre-1986 policy at issue in *Dana II* that the Court of Appeals and this Court agreed does not mandate proration. *See Thomson Inc.*, 2014 WL 2772834, at 32.

7 In attempting to dispute this argument, XL Insurance Co. noted in its reply brief as cross-appellant in the Court of Appeals that ISO's replacement of "all sums" with "those sums" "undercut[s] any language-based argument supporting [an 'all sums'] approach under the CGL forms." Br. at 18 (quoting *Allocation of Losses in Complex Insurance Coverage Claims* 4:2[b]). But this statement, merely recognizing the fact that the terms "all sums" and "those sums" involve different language, posits nothing at all about the drafting history and purpose of these provisions, because there is no support in the drafting history for XL's proration position.

been changed from 'pay on behalf of the insured *all sums* . . .' to 'pay those sums . . .'"? (emphasis in original). ISO responded:

> The wording has been changed in an effort to avoid creating a reasonable expectation on the part of the insured that the policy will pay for any and all claims against the insured. Obviously, the policy will not respond to claims to which the insurance does not apply, to excluded losses or to losses beyond the policy limits.

Id. No mention is made of any proration purpose. Thus, ISO made plain in official correspondence with the Indiana agency charged with approving policy forms and endorsements that the change from "all sums" to "those sums" had *nothing* to do with proration. Rather, the change was simply a clarification, like other changes in the 1986 CGL form, in this case to assure that the policyholder recognized that the "all sums"/"those sums" language does not override relevant policy limits and exclusions.

Given this drafting history, it is clear that the "all sums" policy language was not intended to incorporate proration when it was written and that the change from "all sums" to "those sums" was not intended to do so either. The drafting history confirms that the insurance industry, including at least one of the very insurers in this case, made sophisticated policy drafting choices in the 1960s, 1970s, and 1980s, as the expansion of long-tail liabilities unfolded, to assure that the CGL policy provided broad protection against those emerging liabilities for commensurate premiums. There is no reason for this Court to impose an extra-contractual proration-to-the-policyholder regime at the behest of the insurance industry now—to the detriment of policyholders and, not least,

injured victims—when those same proration concepts were left on the cutting room floor by the insurance industry's own drafters.

CONCLUSION

For the foregoing reasons, this Court should grant transfer and affirm the trial court's judgment that any triggered policy is obligated to pay a policyholder's claim in full up to the policy limits.

DATED: July 21, 2014

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WORD CERTIFICATE

I verify that this brief contains no more than 4,200 words.

DATED: July 21, 2014

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