IN THE SUPREME COURT

STATE OF CALIFORNIA

NO. S054501

AEROJET-GENERAL CORP. AND CORDOVA CHEMICAL CO., Plaintiffs/Appellants, v. TRANSPORT INDEMNITY INSURANCE CO., et al., Defendants/Respondents.	Court of Appeal Nos. A053808, A057812 and A059976 San Mateo County Superior Court No. 262425

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF AEROJET-GENERAL CORPORATION

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I. INTEREST OF AMICUS CURIAE

Amicus curiae United Policyholders ("United Policyholders" or "Amicus curiae") is a non-profit corporation dedicated to educating the public about the rights and duties of insurance policyholders in the claims process. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders is primarily supported by donated labor and contributions of services and funds.

Amicus curiae has a vital interest in seeing that the standard form liability insurance policies sold to countless policyholders, including policyholders who own property in California, are interpreted consistently and fairly by insurance companies and the courts. As a public interest organization, United Policyholders seeks to educate the public; including judicial and legislative bodies, on policyholders' insurance rights, and to see those rights consistently enforced. Thus, United Policyholders has a direct and vital interest in the resolution of the issue of the scope of the "duty to defend" under standard-form CGL insurance policies in California.

II. STATEMENT OF ISSUES

Amicus curiae relies on the Statement of Issues of Appellant Aerojet-General Corporation ("Aerojet") set forth in Appellant's Opening Brief. United Policyholders limits its brief to Appellant's Issue 5:

> May an insurance company evade its obligation to fully defend its insured in litigation brought by third parties by off-setting a portion of the defense costs to years when the insured did not have coverage for defense?

III. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a insurance coverage case in which Aerojet has been alleged in various suits, brought by private and government parties (Exs. 820, 821; RT 13928-13932) to be liable for environmental damage that occurred during several decades ("the underlying suits"). Throughout the relevant period, Aerojet had in effect primary comprehensive general liability ("CGL") insurance coverage that was provided to it by several successive insurance companies. With the exception of certain insurance policies sold to Aerojet by the Insurance Company of North America ("INA"), the CGL insurance policies sold to Aerojet were standard-form "occurrence" CGL insurance policies, with standard-form terms ("the non-INA CGL policies"). Each of the non-INA CGL insurance policies provided that the insurance companies would "pay on behalf of [Aerojet] all sums which [Aerojet] shall become legally obligated to pay as damages because of injury to or loss, destruction or loss of use of property." See, e.g., Exs. 57, 68, 73. Each of these insurance policies had a defense provision which required the issuing insurance company to "defend any suit against [Aerojet] arising out of or alleging such injury, loss, destruction or loss of use, . . . even if such suit is groundless, false, or fraudulent." See, e.g., Id.

For a part of the period in question, Aerojet obtained primary insurance policies from INA ("the INA years"). The INA insurance policies specifically excluded insurance coverage of defense costs. Simply because the INA policies excluded defense costs, the Court of Appeal held that the non-INA insurance companies should not be held responsible for the portion of the defense of the

underlying suits which the court allocated to the INA years. Instead, the Court of Appeal held that this portion of the defense costs should be borne by Aerojet and not by the non-INA insurance companies.

As set forth within, amicus curiae United Policyholders argues that the Court of Appeal's ruling on this issue was erroneous. The plain language of each of the non-INA CGL insurance policies sold to Aerojet specifically provides that the respective insurance company must defend Aerojet against "any suit" alleging or arising out of a loss that would be potentially covered under the CGL insurance policy.

When the "occurrence" form of the Comprehensive General Liability ("CGL") insurance policy was drafted in the 1960's, the drafters intended that: 1) each and every CGL insurance policy that was triggered would respond for all of the damages (up to the policy limits); 2) each and every such CGL insurance policy would be responsible for a complete defense of all potentially covered claims against the policyholder; and that 3) no portion of the costs of indemnity or defense were to be allocated to the policyholder. Each and every non-INA CGL insurance policy issued to Aerojet was intended to provide, and the language of each of these policies provides, that the insurance company has an independent contractual duty to provide Aerojet with a full defense of any suit alleging or arising from a potentially covered loss, such as the underlying suits.

Each time a non-INA insurance company issued a CGL insurance policy to Aerojet, the insurance company undertook a contractual obligation to Aerojet to

provide Aerojet with a complete defense of any suit that alleged or arose out of a potentially covered loss. Each of these contractual duties were apart from and independent of any agreement between Aerojet and any other insurance company, including INA, concerning another insurance company's duty or non-duty to defend Aerojet. Instead of giving effect to each of the independent, contractual duties under the non-INA CGL insurance polices to provide a full defense to Aerojet, the Court of Appeal improperly used the defense exclusion in the INA insurance policies to allocate a portion of the defense costs to Aerojet, representing the portion of defense costs purportedly allocable to the INA years. The Court of Appeal thereby relieved each of the non-INA insurance companies of a portion of their independent contractual duty to provide Aerojet with a complete defense of the underlying suits.

The Court of Appeal appears to have been influenced in its decision by its speculation that "it is unrealistic to assume that Aerojet, or the insurers responsible for defending it against the private and governmental actions, had any intentions regarding this sort of [environmental] injury or damage at the time these policies were issued." Aerojet-General Corp. v. Transport Indemnity Co., et al., 50 Cal. App. 4th 354, 381 (1996). Contrary to the speculations of the Court of Appeal, when the insurance industry adopted the standard-form "occurrence" insurance policy in 1965, it specifically recognized that the CGL insurance policy provided insurance coverage for gradually-occurring hazardous waste and toxic tort liability. Contemporaneous with the introduction of the "occurrence" CGL insurance policy, many commentators, including the drafters of the CGL policy, specifically focused on the coverage

provided for gradually-occurring environmental liability, such as that alleged in the underlying suits.

The Court of Appeals ruling is inconsistent with the plain language of the non-INA CGL insurance policies and is inconsistent with the clear intent of the drafters of the CGL insurance policy that each CGL insurance policy provides that the insurance company has to defend the entire suit, not just the portion attributable to its policy period. It is also inconsistent with this Court's prior precedent in which it held that: 1) in a continuing injury situation the CGL insurance company must respond to the entire loss, including that portion of the loss that is outside of its policy period, Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 665 (1995) ("Montrose II"); and 2) once any duty to defend arises, the insurance company must defend the entire suit. Montrose Chemical Corp. v. Superior Court, 6 Cal. 4th 287, 295 (1993) ("Montrose I"); accord, Horace Mann Ins. Co. v. Barbara B, 4 Cal. 4th 1076, 1081 (1993).

IV. STATEMENT OF CASE

Amicus curiae relies on the Statement of Case in Appellant's Opening Brief.

V. ARGUMENT

A. The Drafters Of The CGL Insurance Policy Specifically Intended That No Proration Was To Be Made To The Policyholder; Allocation Disputes Between The Insurance Companies Were Intentionally Left Unresolved In The Language Of The Policy So That The Insurance Companies Could Work Out Allocations Among Themselves.

The drafting history of the CGL insurance policy unequivocally reveals that the drafters intended that there would be no right of proration or allocation of defense or indemnity against the policyholder. This Court has recently recognized the importance of insurance industry deliberation materials in general -- and the comments of the drafters of the CGL insurance policy in particular -- in resolving insurance coverage disputes. See, Montrose II, 10 Cal. 4th at 671.

The insurance industry always has understood that standard-form general liability policies obligate insurance companies to defend and pay in full for a continuing injury, without any allocation to the policyholder. The intention of the drafters of the CGL insurance policy in this regard is very clear -- the policy does not allow any defense or indemnity costs to be prorated to the policyholder:

> [P]rorating cannot be effectuated between the insurer and the claimant policyholder. Between two insurers, of course, they would prorate.

Minutes of the Joint Forms Committee Meeting, Sept. 21-23, 1964, at 11 (quoted in Allocation of Indemnity among Multiple Insurance Policies, by Heintz, Epstein and Anderson, Environmental Claims Journal, Vol. 9, No. 1 (Fall 1996) at p. 13). This

The issue of proration or allocation between multiple insurance companies became a major concern to the insurance industry in the late 1970's, when large numbers of asbestos-related bodily injury claims began to surface. In April of 1977, high-level claims officials representing nineteen insurance companies met to discuss insurance coverage for long-term asbestos-related damages. The clear understanding of these insurance company officials was similar to that of the drafters: in long-term injury cases, each individual CGL insurance policy was liable for the entire amount of the damages and defense. The "majority [of the insurance company representatives present] contended that each insurer on risk during any part of [the] period [from first exposure through discovery] would be fully responsible for the cost of defense and loss." (Quoted in Allocation of Indemnity among Multiple Insurance Polices, by Heintz, Epstein and Anderson, Environmental Claims Journal, Vol. 9, No. 1 (Fall 1996) at p. 13).[2]

In the mid-1980's, the insurance industry proposed a number of revisions to the standard-form CGL insurance policy. Included among these revisions was a proposal that would have limited an insurance company's defense obligation under a CGL insurance policy to an amount within the aggregate limit of the policy. In

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2. See, also, Owens-Illinois, 650 A.2d at 990 ("Some drafting history suggests that more than one year's policy would be applicable in the case of progressive environmental disease. The O-I briefs refer us to industry-group acknowledgements in 1977 that coverage existed for each carrier throughout the period of time an asbestos condition developed, that is, from the first exposure through the discovery and diagnosis. A majority of that same group also contended that each carrier on risk during any part of the period could be fully responsible for the cost of defense and loss."). The insurance industry articulated this understanding at a meeting of the American Insurance Association ("AIA"), a national trade organization representing two hundred property and casualty insurance companies. The discussion was among members of the insurance industry's so-called "Enterprise Liability Study Group," organized by the AIA.

response, the National Association of Insurance Commissioners ("NAIC") passed a resolution which stated in part that the "NAIC recognizes that the 'duty to defend' assumed and imposed upon insurers is an unlimited duty, without a dollar limitation; ...." NAIC Commercial Lines -- Property and Casualty Insurance (D) Committee, Resolution on Defense Within Limits, 1986 NAIC Proceedings, Vol. II, at 732. The NAIC's recognition that the duty to defend is an "unlimited duty" echoes drafter Katz's comment that "we cannot defend our pro rata share of claims, but must defend the entire claim." Katz, supra, quoted in Allocation of Indemnity among Multiple Insurance Polices, by Heintz, Epstein and Anderson, Environmental Claims Journal, Vol. 9, No. 1 (Fall 1996) at p. 13.

The Court of Appeal found that Aerojet "made a deliberate business decision to assume its own costs of defense, including investigation and attorneys fees, for any liability claim against it during that period it knew it had no other liability coverage providing defense costs for claims arising from 'occurrences' during this period." Aerojet-General Corp. v. Transport Indemnity Co., et al., 50 Cal. App. 4th at 381. The effect of this so-called "deliberate decision," was merely that INA did not have any duty to defend Aerojet or pay for Aerojet's defense costs. There is nothing in this private agreement between INA and Aerojet that should have any impact on any non-INA insurance company's wholly independent contractual obligation under its CGL insurance policy to provide Aerojet with a complete defense.

The Court of Appeal appears particularly troubled by the fact that "following Aerojet's argument to its logical conclusion would permit it to have been

fully insured, for example, with Transport Indemnity Company for only 1 year out of the 30 years at issue here . . . but claim a defense with Transport Indemnity for the entire 30-year period." Aerojet-General Corp. v. Transport Indemnity Co., et al., 50 Cal. App. 4th at 384.[3] This result is entirely consistent with the drafter's intent that each CGL insurance policy triggered in an exposure-type case will be responsible for full defense and indemnification. When, as here, multiple insurance companies have duplicative defense obligations, that allocation can be allocated by and among the insurance companies.

In the Court of Appeal's hypothetical, Aerojet paid Transport a premium that envisioned a full defense of any covered claim and full indemnity up to the applicable limits of the insurance policy. The amount of that premium would have been based on the industry-wide understanding that Transport would be responsible to provide Aerojet with a complete defense and indemnity for a covered exposure-type claim.

The fact that an insurance company with only a single year's worth of insurance coverage could be held liable for the entire defense and indemnity, even assuming that were the case here, was recognized throughout the insurance industry. This recognition was plainly evidenced at the April 1977 meeting on asbestosis, in which the majority of insurance companies agreed that "each insurer on risk during any part of [t]he period [from first exposure through discovery] would be fully

3. Actually the Transport Indemnity Co. policy is a three year policy. Other companies have a longer relationship with Aerojet, such as Lloyd's, which provides at least 14 years of coverage.

responsible for the cost of defense and loss." (Quoted in Allocation of Indemnity among Multiple Insurance Polices, by Heintz, Epstein and Anderson, Environmental Claims Journal, Vol. 9, No. 1 (Fall 1996) at p. 13).

The Court of Appeal's holding herein has the clear effect of improperly limiting the non-INA insurance companies' "unlimited" defense obligation under standard-form CGL insurance policies.

It has long been the rule that courts should not make a better contract for the parties than they made for themselves. Phelps v. Allstate Ins. Co., 106 Cal. App. 3d 752, 758-59 (1980). The insurance industry intentionally drafted an insurance policy that obligates each insurance company to provide its policyholder with an unlimited defense and indemnification of a covered claim in continuous exposure-type cases. The Court of Appeal, by holding that part of the defense cost should be borne by Aerojet, improperly made a better insurance policy for the insurance companies than the one the insurance companies drafted and sold to Aerojet. For that reason, the Court of Appeal's opinion should be reversed on the issue of proration to the policyholder.

B. The Drafters Of The CGL Insurance Policy Specifically Intended That the CGL Insurance Policy Would Provide Insurance Coverage For Gradually-Caused Environmental Injuries.

The Court of Appeal apparently thought it was significant that part of the underlying claims involved strict liability under the Superfund statute, opining that the insurance companies could not have anticipated Superfund-type liability when the CGL

insurance policy was drafted. Although the insurance industry might not have been able to anticipate the passage of the Superfund legislation, the drafting history reveals that the policy's drafters were acutely aware of the potential for gradually-occurring environmental injuries when it introduced the CGL insurance policy. The CGL insurance policy, with its specified coverage for long-term injuries, was tailor-made for environmental waste disposal-type cases. 74 Georgetown Law Journal 1237, 1251 (1986), "The Pollution Exclusion Clause Through the Looking Glass," by E. Joshua Rosenkranz. Numerous representatives of insurance industry trade associations and the insurance companies that participated in drafting the revised CGL policy actively promoted this policy as providing new, broadened coverage for liabilities arising from gradual pollution. Original Intent, Revisionism and the Meaning of the CGL Policy, by Bradbury, 1 Environmental Claims Journal 279 at 283 (1990). G.L. Bean, Assistant Secretary of Liberty Mutual Insurance Company, stated in a paper presented at the Mutual Insurance Technical Conference in 1965 that: "[I]t is in the waste disposal area that a manufacturer's basic premises-operation coverage is liberalized most substantially." Pendygraft, Plews, Clark & Wright, Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation, 21 Ind. Law Rev. 117, 141 (1988).

Lyman J. Baldwin, Jr., Secretary of Underwriting, Insurance Company of North America, also echoed this theme:

> Let us consider how this would apply in a fairly commonplace situation where we have a chemical manufacturing plant which, during the course of its

> operations, emits noxious fumes that damage the paint on buildings in the surrounding neighborhood. Under the new policy there is coverage until such time as the insured becomes aware that the damage was being done.

Id., at 142.

The source of the liability (the federal Superfund statute) is not really significant to this insurance coverage case. What is important is that the type of liability -- i.e., long-term, gradually-occurring environmental property damage and toxic tort liability -- was well-recognized in the mid-1960's. In 1970, the insurance industry's recognition that the CGL insurance policy was "tailor-made to extend coverage to most pollution situations," led the insurance industry's national policy drafting organizations to develop the "sudden and accidental" polluter's exclusions. Rosenkranz, supra, 74 Georgetown Law Journal at 1251. The history set forth above demonstrates that the insurance industry specifically developed the language of the "occurrence" policy with long-term gradual pollution cases in mind. The defense provision of the CGL insurance policy was clearly envisioned by the drafters to apply to environmental liabilities, and the fact that the underlying liability arose in part under the Superfund statute should not change the plain meaning of the insurance policy.

C. The Court Of Appeal's Opinion Is Inconsistent With This Court's Recent Opinion in Montrose II In Which This Court Recognized That, Once Its CGL Policy Is Triggered, The Insurance Company Is Obligated To Defend And Indemnify The Entire Claim.

In addition to being in conflict with the drafting history of the CGL insurance policy, the Court of Appeal's decision is inconsistent with the plain meaning of the "all sums" language in the CGL insurance policy as interpreted by this Court in Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal. 4th 645, 665 (1995) ("Montrose II"), as well as two recent Court of Appeals decisions. Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1 (1st Dist. 1996) ("Armstrong World") (no proration of defense costs permissible under the CGL policy); Stonewall Insurance Co. v. City of Palos Verdes Estates, 46 Cal. App. 4th 1810 (2nd App. Dist. 1996) (no proration of indemnity permissible under the CGL policy); Cf. IMCERA Group, Inc. v. Liberty Mut. Ins. Co., 47 Cal. App. 4th 699, 740-41 (1996) (pending before this Court at S052878) (allocating part of defense cost to policyholder).

In Montrose II, this Court observed that once coverage is established under a third-party liability insurance policy, the language of the policy requires that the insurance company indemnify the policyholder for "all sums" for which the policyholder is liable. Montrose II, supra, 10 Cal. 4th at 665. This Court also recognized that where there is a continuing injury, an insurance company becomes liable for the entire loss, subject to its policy limits, even though the continuing injury extends across several policy limits. Id., 10 Cal. 4th at 678, 681 (citing Gruol

Construction Co. v. Insurance Co. of North America, 524 P.2d 427 (1974)). Thus, it is clear under Montrose II that the each of the non-INA insurance companies are liable to Aerojet to provide insurance coverage for the entire loss, subject to their policy limits.

Because each of the non-INA insurance companies are independently liable to provide insurance coverage to Aerojet, prior precedent of this Court also establishes that each of the non-INA insurance companies owe Aerojet a complete defense of the underlying suit. The duty to defend is broader than the duty to indemnify. See, e.g., Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993) ("Horace Mann"); Gray v. Zurich Insurance Co., 65 Cal. 2d 263, 275 (1966). As the non-INA insurance companies have a duty under their CGL insurance policies to indemnify Aerojet, they necessarily have a duty to defend Aerojet. See, Gray, 65 Cal.2d at 275 ("the carrier must defend a suit which potentially seeks damages within the coverage of the policy"). Each of the non-INA insurance companies' duty to Aerojet to provide a defense "is a continuing one, arising on tender of defense and lasting until the underlying lawsuit is concluded, or until it has been shown that there is no potential for coverage...." Montrose I, 6 Cal. 4th at 295; accord, Horace Mann, 4 Cal. 4th at 1081.

In the present case, the insurance companies have failed to demonstrate that there is no potential for coverage and thus must be held to their obligation to provide or pay for the defense of the entire underlying lawsuit. See, e.g., Republic Indemnity Co. v. Superior Court, 224 Cal. App. 3d 492, 499 (1993) (insurance

company must defend entire suit unless defense of suit is clearly excluded by the terms of the policy). As the Court of Appeal recently stated, "[i]f [the insurance company] owes any defense burden it must be fully borne with allocations of that burden with other responsible parties to be determined later." Haskel, Inc. v. Superior Court, 33 Cal. App. 4th 963, 976 n.9 (1995) (citing Horace Mann, 4 Cal. 4th at 1084.) The Haskel court treated an insurance companies acceptance of only a portion of the defense burden as a denial.

Two recent and well-reasoned Court of Appeal cases have held that each triggered CGL insurance policy is liable for "all sums" and that no part of the liability can be prorationed to the policyholder. In Armstrong World, the trial court held that where the injury spanned multiple policy periods, each policy has an independent obligation to respond "in full" to the claim. See, 45 Cal. App. 4th at 49. The trial court based its ruling on the plain meaning of the insurance policy which, as here, requires the insurance company to pay for "all sums which the insured shall become liable to pay as damages." Id. The Court of Appeal affirmed, citing this Court's Montrose II decision:

> As the Montrose court put it, "an insurer on the risk when continuous or progressively deteriorating damage or injury first manifests itself remains obligated to indemnify the insured for the entirety of the ensuing damage or injury."

Id., 45 Cal. App. 4th at 50 (citing Montrose II, 10 Cal. 4th at 686).

The Armstrong World policyholder was completely self-insured for part of the period of a continuous injury. The trial court found that the policyholder could

not be held responsible for any portion of the injury. The Court of Appeal affirmed this part of the ruling, relying once again on this Court's Montrose II opinion. 45 Cal. App. 4th at 56. Quoting Montrose II, the Court of Appeal noted that a distinction had to be drawn between apportionment between multiple insurance companies and apportionment between the insurance companies and the policyholder:

> In suits between an insured and an insurer to determine coverage, interpretation of the policy language . . . will typically take precedence . . . . In contrast, where two or more CGL carriers turn to the courts to allocate the cost of indemnity for a paid loss, different contractual and policy considerations may come into play in the effort to apportion such costs among the insurers.

Armstrong World, 45 Cal. App. 4th at 56 (quoting Montrose II, 10 Cal. 4th at 665). The Armstrong World court went on to note that any apportionment among insurance companies has no bearing on the individual insurance company's obligation to the policyholder because the insurance policy provides that the "all sums" language in the policy obligates each insurance company "to cover the policyholder's liability 'in full' up to the policy limits." Id., 45 Cal. App. 4th at 56-57. The language of the duty to defend clause, obligating the insurance company to defend "any suit," similarly means that any apportionment between insurance companies does not affect each individual insurance company's obligation to provide Aerojet with a complete defense.

The Court of Appeal also addressed the proration question in Stonewall Insurance Co. v. City of Palos Verdes Estates, 46 Cal. App. 4th 1810 (2nd App. Dist. 1996) ("Palos Verdes Estates"), in the context of the indemnity obligation. The decision in Palos Verdes Estates is particularly significant because it was issued after

this Court had ordered the Court of Appeal to vacate an earlier order and to reconsider in light of this court's opinion in Montrose II. See, 46 Cal. App. 4th at 1822. Like Armstrong World, the Palos Verdes Estates court held that each insurance company whose policy was triggered was fully liable for the entire loss. The Court of Appeal noted that:

> Inherent in Montrose's conclusion that in cases such as the one at bar a 'continuing injury' trigger of coverage applies is the principle that damage was occurring throughout the period in question and that all carriers issuing primary policies for dates within that period are fully liable to the insured for the entire loss. [Footnote omitted.] Once an injury triggers coverage, according to the language of the policies in the case at bar (and the standard CGL policy), the insurer must indemnify the insured for 'all sums' which the insured becomes obligated to pay, whether during the period of the policy issued by that insurer or after; the policy language does not limit the insurer's liability to 'all sums which the insured becomes liable to pay during the policy period.' (See Montrose II, supra, 10 Cal. 4th at 665.)

Id., at 1855. Although Palos Verdes Estates did not need to address the question of defense costs, it is clear that the reasoning that it took from the Montrose II opinion applies equally to the insurance company's obligation to provide and pay for a complete defense.

Not only are the well-reasoned holdings in Armstrong World and Palos Verdes Estates completely consistent with the intent of the drafters of the policy language, they are also well-supported in the case law from other jurisdictions. See, Keene Corp. v. Ins. Co. of North America, 667 F.2d 1034, 1047-49 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982); J.H. France Refractories v. Allstate, 626

A.2d 502, 508 (Pa. 1993); Federal Ins. Co. v. Susquehanna Broadcasting Co., 727 F. Supp. 169 (M.D. Pa. 1989), aff'd, 928 F.2d 1131 (3d Cir.), cert. denied, 502 U.S. 823 (1991); Broderick Inv. Co. v. Hartford Acc. & Indem. Co., 742 F. Supp. 571 (D. Colo. 1989), rev'd on other grounds, 954 F.2d 601 (10th Cir. 1992), cert. denied, 113 S.Ct. 189 (1992); ACandS, Inc. v. Aetna Cas. & Sur. Co., 764 F.2d 968, 974 (3d Cir. 1985) (no proration to policyholder); Ray Indus. Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754 (6th Cir. 1992); Crown Ctr. Redevelopment Corp. v. Occidental Fire & Casualty Co., 716 S.W.2d 348 (Mo. Ct. App. 1986) (each insurance company has an independent obligation to fully indemnify its policyholder); Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co., 494 N.E.2d 634, 650 (Ill. App. Ct. 1986), aff'd sub nom., Zurich Ins. Co. v. Raymark Indus., Inc., 514 N.E.2d 150 (Ill. 1987); contra, Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178, 1202-04 (2nd Cir. N.Y. 1995); Ins. Co. of North Amer. v. Forty-Eight Insulations, 633 F.2d 1212, 1225 (6th Cir. Mich. 1980).

To recognize that Aerojet is entitled to full defense from each of the non-INA insurance companies is not to say that Aerojet is getting a free ride for the period during which it had the INA policies which excluded defense costs. Aerojet paid a full premium for each of the non-INA insurance policies. At the time those policies were issued, the insurance industry recognized that each of those policies would provide a complete defense in a continuous injury case and that there would be no proration of any defense costs to the policyholder. See, Messrs. Katz and Bean, supra at pp. 6-7, 13. Thus, the premium charged for each CGL insurance policy necessarily

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included the cost of a full defense. In a sense, with respect to this particular continuous injury, Aerojet can be said to have purchased excessive insurance coverage for the defense of that injury. One CGL insurance policy during the period of the continuous injury alleged in the underlying suits would be sufficient to defend the entire claim. Aerojet is just seeking to obtain what it paid for. If the insurance companies had wanted to be able to apportion the costs to the policyholder, then they could have included language in the CGL insurance policies to provide for apportionment to the policyholder. The reason that the insurance policies did not include such language is that the drafters of the policies contemplated that the policyholder would not be held responsible for any of the costs in a continuing injury, multiple-policy-year situation.

D. Historically, the Insurance Industry Has Judicially Represented that Policyholders Are Entitled To Determine and Designate Which General Liability Insurance Policies Are Liable To Respond to a Continuing Injury

Members of the insurance industry, including Fireman's Fund, an insurance company respondent herein, have confirmed to other courts that the policyholder is entitled to "determine and designate" which of several triggered CGL insurance policies are liable to respond to a continuous injury. They furthermore have confirmed that in no event are liabilities to be allocated to the policyholder. The essence of "determine and designate" is that policyholders are not responsible for any share of allocation costs. Needless to say, these insurance industry litigation positions

are absolutely inconsistent with the allocation position pressed before this Court. For instance:

- Fireman's Fund specifically has argued for a pro-rata allocation of costs among the insurance companies on the risk: "all carriers on the risk during the time of exposure to an injury-producing agent bear a pro-rata responsibility for the damage." Significantly, Fireman's Fund makes no mention of the policyholder in this allocation scheme.[4] This is because Fireman's Fund was advocating for allocation which would not place any of the risk or burden upon the policyholder. [5]

- First State Insurance Company, along with an underwriter at Lloyds (both insurance company respondents herein), in arguing for adoption of the continuous trigger, stated "[o]nly by applying the continuous and multiple trigger theories are Plaintiffs in this case and future potential plaintiffs assured of complete redress for their damages and injuries."[6]

- Centennial Insurance Company and Atlantic Mutual Insurance Company have cited with approval the continuous trigger and "determine and designate" allocation holding in Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982) ("Keene"), noting "[t]he Keene court went on to hold that any policy in force and effect either at the start, duration, or end of the injurious process would be triggered to defend and indemnify."[7]

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4. Notice of Motion and Motion for Summary Judgment or Alternatively for Summary Adjudication of Issues at 6-7 (filed July 21, 1989) in Fireman's Fund Ins. Co. v. Aetna Cas. & Sur. Co., No. 595328 (Cal. Super. Ct., San Diego).

5. Counsel for Amicus curiae have copies of all briefs and drafting history documents to which this memorandum refers, and will provide copies of same to the Court or counsel for any of the parties upon request.

6. Plaintiffs-Appellees' Brief on Appeal at 47 (filed Nov. 6, 1987) in Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. App. 1989), modified on other grounds, 461 N.W.2d 486 (Mich. 1990), rev'd on other grounds, 476 N.W.2d 392 (Mich. 1991) (emphasis added).

7. Memorandum of Points & Authorities in Opposition to Aetna's Motion for Summary Judgment and/or Summary Adjudication of Issues at 29 (filed Feb. 24, 1986) in Aetna Cas. & Sur. Co. v. Great Am. Ins. Co., No. CV 84-2995-WPG (C.D. Cal.).

- CNA Insurance Company, another insurance company respondent herein, and Valley Forge Insurance Company have argued in favor of Keene's "determine and designate" allocation ruling:

  A clear statement of law in the Keene case is that where more than one policy of insurance is applicable to the acts of an assured committed over a period of time, some of which acts fall within one policy period, some within another policy period, and some within the policy coverage of more than one carrier, and where those acts give rise to losses that occur over a period of time, which also may occur during the coverage period of one or more of the policies, each policy fully indemnifies the insured for that loss up to the limits of the policy and subject to the "Other Insurance" provisions of each policy.[8]

- United States Fidelity & Guaranty Company requested a court to follow Keene and "hold that an insurer with a policy in effect at any point in time between a claimant's initial exposure to a toxic substance and a manifestation of injury is liable in the full amount of indemnity due":

  Under the doctrine of [Keene], each insurer whose coverage is "triggered" is liable in the full amount of

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8. Plaintiff's Second Trial Brief at 11 (filed July 12, 1983) in CNA Ins. Co. v. Transamerica Ins. Co., No. 78-2263 (E.D. Pa.) (emphasis added). CNA and Valley Forge quoted the precise passage in Keene rejecting "pro rata" allocation:

> Our starting point is the interpretation of the policies as the insurers' promises of certainty to Keene. The policies that were issued to Keene relieve Keene of the risk of liability for latent injury of which Keene could not be aware when it purchased insurance. Keene did not expect, nor should it have expected, that its security was undermined by the existence of prior periods in which it was uninsured, and in which no known or knowable injury occurred. If, however, an insurer were obligated to pay only a pro-rata share of Keene's liability, as the District Court held, those reasonable expectations would be violated. Keene's security would be contingent on the existence and validity of all the other applicable policies. Each policy, therefore, would fail to serve its function of relieving Keene of all risk of liability. The logical consequence of this is that the policies must require that once an insurer's coverage is triggered, the insurer is liable to Keene to the full extent of Keene's liability up to its policy limits. . . .

Id. at 9 (quoting Keene, 667 F.2d at 1047-48).

indemnity due, subject only to the provisions in the policies that govern the allocation of liability when more than one policy covers an injury. 667 F.2d, at 1050. The Keene Court intended that the burden be taken off the insured and placed on the insurer.[9]

- Hartford Fire Insurance Company previously has expressly rejected "pro rata" allocation, and argued that a policyholder "may place the entire loss upon the carrier of its choice":

  The insured contracts with his insurer and should have the right to seek or not seek the insurer's participation in a claim as the insured chooses. The Illinois Supreme Court has recognized this principle by refusing to order pro rata allocation of defense and indemnity obligations among the various insurance policies applicable to the risk. Zurich Ins. v. Raymark Industries (1987) 118 Ill.2d 23, 57, 514 N.E.2d 150.[10]

As shown below, the insurance industry's prior litigation position that the policyholder has a right to "determine and designate" which CGL insurance policy will have to respond when multiple insurance policies are triggered is completely inconsistent with that the industry presses before this Court. This prior litigation position is, however, entirely consistent with the industry's intent that each triggered CGL insurance policy creates an independent responsiblity to fully defend and indemnify the policyholder for the entire loss, as expressed in the contemporaneous statements by the insurance industry's CGL insurance policy drafters.

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9. Memorandum of Points and Authorities in Opposition to Motion of Great American Surplus Lines Insurance Company To Dismiss USF&G's Third Amended Third-Party Complaint at 2, 5 (filed Mar. 15, 1988) in Hobart Bros. Co. v. United States Fidelity & Guar. Co., No. 86-518 (D.D.C.).

10. Memorandum in Support of Hartford's Cross-Motion for Summary Judgment and in Response to Plaintiff's Motion for Summary Judgment at 8, filed in Institute of London Underwriters v. Hartford Fire Ins. Co., No. 89 CH 09741 (Ill. Cir. Ct.) (emphasis added).

E. The Doctrine of Quasi-Estoppel and Maintenance of the Integrity of the Judicial Process Requires this Court To Prevent the Insurance Companies from Profiting from Their Inconsistent Positions

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter simply because his interests have changed, assume a contrary position. . . ." Davis v. Wakelee, 156 U.S. 680, 689 (1895). This Court should join those around the country that have refused to reward the insurance industry for taking inconsistent positions as its shifting interests change.

For instance, in Morton International Inc. v. General Accident Insurance Co., 629 A.2d 831, 851 (N.J. 1993), reconsideration denied (Jan. 13, 1994), cert. denied, 114 S. Ct. 2764, reh'g denied, 115 S. Ct. 25 (1994) ("Morton"), the Supreme Court of New Jersey held that -- because of its representations to state regulators at the time the change was proposed that the "polluters exclusion" was a mere "clarification" which continued preexisting insurance coverage for "accidental" pollution -- the insurance industry is barred from relying upon a construction of the word "sudden" in that exclusion that would bar coverage for gradual pollution. 629 A.2d at 852-53. The Morton court recognized that allowing an insurance company to renounce its prior representations would: (i) violate strong public policy requiring regulation of the insurance business in the public interest; and (ii) reward the industry

for its misrepresentation and nondisclosure to state regulatory authorities.[11]

In general, this doctrine applied in Morton and similar cases is labelled "quasi estoppel," and "applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit":

> The doctrine classified as quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit.

31 Corpus Juris Secundum § 107; see also Simmons v. Burlington, Cedar Rapids & N. R. Co., 159 U.S. 278 (1895); Wormser v. Metropolitan S.R. Co., 76 N.E. 1036 (N.Y. 1906); Marcus v. Marcus, 90 N.Y.S.2d 830, 843 (1949). Quasi estoppel applies here. It would be unconscionable to allow respondent insurance companies to assert "pro rata" allocation to the policyholders' disadvantage, when the insurance

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11. 629 A.2d at 855; see also General Ceramics Inc. v. Fireman's Fund Ins. Cos., 66 F.3d 647 (3d Cir. 1995); Sandoz, Inc. v. Employers Liab. Assurance Corp., 554 F. Supp. 257, 258 (D.N.J. 1983) ("With the growth of claims that have taken years to manifest themselves and the size of the class of potential claimants, many insurance companies faced with such claims have run for cover rather than coverage. The small print suddenly has been magnified, and insurance companies can be seen scurrying about the Courts of this country in search of ways to avoid honoring their policies."); Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 689 (Ga. 1989); Joy Technologies v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 497 (W. Va. 1992) (barring an insurance company from taking a position inconsistent with its "studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies"); Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 571 (Wis. 1990); Universal Underwriters Ins. Co. v. Travelers Ins. Co., 451 S.W.2d 616, 622-23 (Ky. 1970) ("It seems that insurers generally are attempting to convince the customers when selling the policy that everything is covered and convince the Court when a claim is made that nothing is covered"); George Pendygraft, et al., Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation, 21 Ind. L. Rev. 117, 152 (1988).

industry has profited -- in the form of additional premiums from additional sales of policies, and verdicts in other cases -- from previously asserting "determine and designate" allocation.

Indeed, prohibiting inconsistent conduct before this and other courts serves public policy by preventing four types of abuse:

> First, inconsistent results, which weaken public confidence in the judiciary;
>
> Second, intentional inconsistency by parties seeking to manipulate the judicial process;
>
> Third, the appearance of control of the judiciary by powerful and frequent users of the courts; and
>
> Fourth, unnecessary litigation, which diminishes the efficiency of the judicial system.[12]

In service of these goals, this Court should reject the insurance companies' effort to renounce prior judicial representations and thereby profit.

In summary, the plain language of their CGL insurance policies requires each of the non-INA insurance companies with an independent duty to provide Aerojet with a complete defense. This interpretation of the CGL insurance policies at issue is consistent with the intention of the drafters of the language at issue, with this Court's precedent in Montrose II and Horace Mann, and with the insurance industry's affirmative judicial representations. In contrast, the allocation of costs to Aerojet is

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12. See Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-99 (6th Cir. Mich. 1982); USLIFE Corp. v. United States Life Ins. Co., 560 F. Supp. 1302, 1304-05 (N.D. Tex. 1983).

completely inconsistent with the drafters intent, this Court's precedent on the scope of the duty to defend, and with the insurance industry's judicial representations.

CONCLUSION

The drafting history of the standard CGL insurance policy, the plain language of the insurance policies at issue, this Court's opinions in Montrose II and Horace Mann, substantial California and national precedent, and the insurance industry's own judicial representations all lead to the same conclusion. Each non-INA insurance company whose CGL policy is triggered in this continuous injury situation is responsible for providing Aerojet a complete defense and complete indemnity (up to the limits of the insurance policy) and no proration should have been made to Aerojet for any portion of defense or indemnity costs.

Dated: March 26, 1997

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is One Sansome Street, Suite 1610, San Francisco, California 94104.

On March 27, 1997, I served the foregoing document described as **AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF AEROJET-GENERAL CORPORATION** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE THE ATTACHED MASTER SERVICE LIST
and to :

Clerk of the Court
San Mateo County Superior Court
Hall of Justice and Records
401 Marshall Street
Redwood City, CA 94063

Clerk of the Court
Court of Appeal of the State of California
Marathon Plaza, South Tower
303 Second Street, Suite 600
San Francisco, CA 94107

I caused such envelope to be deposited in the mail at San Francisco, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the Firm's practice of collecting and processing correspondence for mailing with the United States Postal Service. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business.

Executed on March 27, 1997, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Sharran L. Rodd
Type or Print Name

Sharran Rodd
Signature

AEROJET-GENERAL CORPORATION v. TRANSPORT INDEMNITY CO., ET AL.
CALIFORNIA SUPREME COURT CASE NO. S054501
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