07-1452

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

BOSTON GAS COMPANY, D/B/A KEYSPAN ENERGY DELIVERY,

Plaintiff-Appellee,

-against-

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; CERTAIN LONDON MARKET INSURANCE COMPANIES; TRAVELERS CASUALTY AND SURETY COMPANY; ASSOCIATED ELECTRIC & GAS INSURANCE SERVICES LIMITED; AETNA CASUALTY & SURETY COMPANY; THE HARTFORD INSURANCE COMPANY,

Third-Party Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* ON BEHALF OF BOSTON GAS COMPANY, PLAINTIFF-APPELLEE SUPPORTING AFFIRMATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1 of the United States Court of Appeals for the First Circuit, United Policyholders, *Amicus Curiae* herein, states that it is a tax-exempt, not-for-profit corporation organized under the laws of the State of California and funded by donations and grants.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders is a non-profit corporation founded in 1991 to educate the public, the judiciary, and elected officials on insurance issues and the rights of policyholders. The organization is tax-exempt under §501(c)(3) of the Internal Revenue Code. United Policyholders is funded by donations and grants from individuals, businesses, and foundations and governed by an eight member Board of Directors. United Policyholders operates in Massachusetts and nationwide.

A wide range of personal and commercial line policyholders throughout the United States regularly communicate their insurance concerns to United Policyholders. In turn, the organization advances policyholders' interests in courts nationwide by filing *Amicus Curiae* briefs in cases involving important insurance principles.[1] United Policyholders advances the shared interest that

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[1] United Policyholders has filed *Amicus Curiae* briefs on behalf of policyholders in more than 225 cases throughout the United States in the past six years. A significant number of those cases have been adjudicated in the First Circuit. See, e.g., Diane Denmark v. Liberty Life Assurance Co. of Boston, United States Court of Appeals, First Circuit, Case No. 05-2877, on appeal from the U.S.D.C. for the State of Massachusetts; Francie E. Harrison v. Unum Life Ins. Co. of America, United States Court of Appeals, First Circuit, Docket No. 05-1577; Heritage Healthcare Services, Inc. v. Beacon Mutual Insurance Company, (March 2007) State of Rhode Island Superior Court, Providence S.C., C.A. No. 2002-7016; Foreign Car Center v. Travelers Indemnity, No. 1:97-CV-12587, United States District Court, Massachusetts; Foreign Car Rental Company v. The Travelers Indemnity Company, No. 96-13184-JNF United States Bankruptcy Court, District of Massachusetts. United Policyholders has also filed *Amicus Curiae* briefs in numerous cases before the United States Supreme Court. The U.S. Supreme Court cited United Policyholders' *Amicus Curiae* brief in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999). United Policyholders was the only national consumer organization to submit an *Amicus Curiae* brief in the landmark case of State Farm v. Campbell, 538 U.S. 408 (2003).

commercial and personal lines policyholders have in equitable insurance practices. The organization's activities are supported by donated labor and contributions of services and funds.

United Policyholders has a vital interest in ensuring that insurance companies fulfill the promises they make to their policyholders. While insurance companies are in business to earn profit through risk assumption, businesses and individuals rely on insurance to protect property and livelihoods. United Policyholders seeks to prevent insurance companies from shifting risk back to policyholders through schemes that are not authorized by insurance contracts or public policy. The organization works to counterbalance the widely-represented interests of insurance companies by serving as an advocate for large and small policyholders in forums throughout the country.

In the case at bar, United Policyholders seeks to appear as *Amicus Curiae* to address certain questions before the Court that are of significance well beyond the application of law to the specific facts of this litigation. These important issues will affect policyholders nationwide. It should be noted that no party to this case has contributed directly or indirectly to the preparation of this brief.

I. PRELIMINARY STATEMENT

An insurance company should be required to comply with the plain language of and intent behind its general liability insurance policy by being held jointly and severally liable for damages resulting from a continuing operation and continuing injury. Therefore, *Amicus Curiae*, United Policyholders, respectfully petitions this Court to affirm the District Court's "all sums" loss allocation in the case at bar.

II. ARGUMENT

A. "All Sums" Allocation Is Consistent With the Insurance Industry's Prior Judicial Representations That Policyholders Are Entitled to Designate Which Policies Respond Fully to a Continuing Injury.

The District Court held that "all sums" risk allocation is appropriate in this case.[2] Although the appellant here argues for "pro rata" allocation, for years, members of the insurance industry have confirmed to other courts that, when multiple general liability insurance policies are triggered to respond by a continuous injury, a policyholder is entitled to determine and designate the general liability insurance policies from which it is entitled to full relief. Needless to say, the insurance industry's previous litigation positions are wholly consistent with the "all sums" allocation decision of the District Court.

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[2] See Boston Gas Co. v. Century Indem. Co., No. 02-12062 RWZ, 2006 WL 1738312, *1 (D. Mass. June 21, 2006) (stating that although the Massachusetts Supreme Judicial Court has not decided the question of allocation, the Massachusetts Appeals Court has adopted "all sums" allocation (citing Rubenstein v. Royal Ins. Co., 694 N.E.2d 381 (1998), and Commercial Union Ins. v. Gillette Co., No. 012917, 2004 WL 1427157 (Mass.Sup.Ct. May 27, 2004))).

Insurance companies themselves have urged that each insurance company on the risk during a long-term injury is "fully liable" for the whole of the policyholder's liability, citing the "determine and designate" allocation mechanism of the court in Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981). For instance, Certain Underwriters at Lloyd's—a third-party defendant in this case—together with First State Insurance Company, in arguing for adoption of the continuous trigger, have stated that "[o]nly by applying the continuous and multiple trigger theories are [policyholders] in this case and future potential [policyholders] assured of complete redress for their damages and injuries."[3] A pro-rata allocation of insurance coverage negates the intent to provide policyholders complete redress, which could only be accomplished by holding each insurance company jointly and severally liable for its promise to pay "all sums" of the policyholder's loss.

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[3] Plaintiffs-Appellees' Brief on Appeal at 47 (filed Nov. 6, 1987) in Upjohn Co. v. New Hampshire Insurance 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). Upjohn is a "disappearing" decision, as, predictably, First State eventually repudiated many of the pro-policyholder positions taken in this brief and even obtained a dismissal *"ab initio"* from the trial court. Roger Parloff, Rigging the Common Law, Am. Law., Mar. 1992, at 74; Stacy Gordon, Vanishing Precedents, Bus. Ins., June 15, 1992, at 1. Indeed, fifty percent of the pro-policyholder judicial decisions are wiped off the law books by the insurance industry. See Phillip Carrizosa, Making the Law Disappear: Appellate Lawyers Are Learning To Exploit the Supreme Court's Willingness to Depublish Opinions, Cal. Law., Sept. 1989, at 65. This astonishing manipulation of our judicial system — probably our most precious heritage — has been the subject of focus by commentators. See, e.g., Jill E. Fisch, The Vanishing Precedent: Eduardo Meets Vacatur, 70 Notre Dame L. Rev. 325 (1994); Jill E. Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Cornell L. Rev. 589 (1991).

Many insurance companies have cited Keene's allocation holding with approval. Centennial Insurance Company and Atlantic Mutual Insurance Company noted that "[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."[4] CNA Insurance Company and Valley Forge Insurance Company have likewise argued in favor of Keene's "determine and designate" allocation rule, urging:

> [W]here 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.[5]

United States Fidelity & Guaranty Company has asked for courts to "hold that an insurer with a policy in effect at any point in time between a claimant's initial

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[4] 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.). All insurance company briefs cited herein are on file at the offices of counsel for *Amicus Curiae*, Anderson, Kill & Olick, P.C.

[5] Plaintiff's Second Trial Brief at 11 (filed July 12, 1983) in CNA Ins. Co. v. Transamerica Ins. Co., (E.D. Pa.), No. 78-2263 (emphasis added).

exposure to a toxic substance and a manifestation of injury is liable in the full amount of indemnity due."[6]

Likewise, Hartford Fire Insurance Company has expressly rejected pro-rata allocation, and argued that a policyholder "may place the entire loss upon the carrier of its choice who is then jointly and severally liable for the total indemnity and defense costs."[7] Hartford argued that "the insured contracts with his insurer and should have the right to seek or not to seek the insurer's participation in a claim as the insured chooses."[8] Similarly, Fireman's Fund Insurance Company has urged a court to adopt joint and several liability for continuing injury.[9]

Further, as will be shown in the following section, these prior litigation positions are consistent with the insurance industry's intent for the standard-form general liability insurance policy, as expressed in statements written when the policy was drafted. Appellant in this action should not be permitted to

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6 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.C.).

7 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 Inst. of London Underwriters v. Hartford Fire Ins. Co., (Ill. Cir. Ct.), No. 89 CH 09741 (emphasis added).

8 Id.

9 Notice of Motion and Motion for Summary Judgment or Alternatively for Summary Adjudication of Issues; Memorandum of Points and Authorities; Declaration of Lynn M. Bouslog at 8 (filed July 21, 1989) in Fireman's Fund Ins. Co. v. Aetna Cas. & Sur. Co., (Cal. Super.), No. 595328; Appellant's Reply Brief at 2-3 (filed Mar. 30, 1990) in Fireman's Fund Ins. Co. v. Aetna Cas. & Sur. Co., No. D011199, (Cal. App.).

take positions in this litigation inconsistent from those, as set forth above, that the industry has previously taken. Indeed, Section 205 of the Restatement (Second) of Contracts confirms the Appellant's bad faith in advocating a position on allocation that is contrary to the understanding they have expressed before other courts:

> The obligation of good faith and fair dealing extends to the assertion, settlement and litigation of contract claims and defenses. See, e.g., [Restatement of Contracts] §§ 73, 89. The obligation is violated by dishonest conduct such as conjuring up a pretended dispute, asserting an interpretation contrary to one's own understanding or falsification of facts.

Restatement (Second) of Contracts § 205, cmt. e (1981)(emphasis supplied). Furthermore, third-party defendant Aetna Casualty & Surety Company has itself relied on this comment to the Restatement in stating that "[a] party cannot fairly or honestly use the benefit of 20/20 hindsight to excuse the unconscionability of asserting an argument that is entirely inconsistent with the actual fact of its own understanding of a contract."[10] Aetna characterized "a contracting party's assertion of a legal position contrary to its factual understanding" as "basic unfairness and dishonesty."[11] Aetna and other insurance companies, such as the appellant in this case, should not be permitted to adhere to good faith and fair

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[10] Letter from Brian R. Ade, Esq. to the Honorable Robert E. Francis, Gloucester County Courthouse, New Jersey, dated June 8, 1994, in Aetna Casualty & Sur. Co. v. Morton Int'l, Inc., No. L-2568-93 and Morton Int'l, Inc. v. Aetna Casualty & Sur. Co., Docket No. L-1033-93, at 3.

[11] Id.

dealing only when it benefits them. "All sums" allocation comports with both parties' expectations of coverage under the general liability insurance policy. Therefore, the District Court's endorsement of "all sums" allocation should be affirmed.

B. Once Triggered, A Liability Insurance Policy Is Jointly And Severally Liable For The Whole Of A Policyholder's Liability For Continuing Damage.

1. The "all sums" approach is consistent with the policy drafters' intent that policyholders have the right to designate which policies are liable to respond fully to a continuing injury.

As reflected by its litigation positions, the insurance industry always has understood that standard-form general liability policies require insurance companies to pay in full for a continuing injury. The insurance industry's previous litigation postures are consistent with the statements and analyses made by the insurance industry at the time the policy language was written, discussing how the policy language should apply. These contemporaneous statements and analyses—sometimes called "drafting history"—emphasize the intentional omission of any allocation provision in standard-form general liability insurance policies. Allowing the insurance industry, including the appellant, to benefit from a decision inconsistent with its previous litigation positions and drafting history, would undermine the basic tenets of fairness and consistency crucial to the proper working of, and public confidence in, the judicial system. It also would diminish

the benefit of the insurance for which policyholders—large and small—have purchased for decades.

Indeed, the drafters of the general liability standard forms[12] understood that the promise to pay "all sums" required insurance companies to pay the whole of a policyholder's liability, even if only a portion of the continuous injury took place during the policy period.[13] Richard A. Schmalz, Assistant Counsel of Liberty Mutual Insurance Company, told the Mutual Insurance Technical Conference in 1965 that there was "no pro-ration formula in the policy, as it seemed impossible to develop[] a formula which would handle every possible situation with complete equity."[14] Some years later, at an April 21, 1977

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[12] In the 1960's, domestic insurance companies, acting through industry trade associations, including the National Bureau of Casualty Underwriters, the Insurance Rating Board, and the Mutual Insurance Rating Board (all predecessors of the Insurance Services Office, Inc. ("ISO"), formed by merger in 1971), established several committees which engaged in the process of revising the standard-form general liability policy. These committees, which consisted of the insurance industry's most respected experts and legal counsel, developed a revised standard-form general liability insurance policy, substituting the concept of "occurrence" for the "accident" trigger used in the prior, 1955 standard-form policy. See Eljer Mfg., Inc. v. Liberty Mut. Ins. Co., 972 F.2d 805, 810-12 (7th Cir. 1992); American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983), aff'd as modified, 748 F.2d 760 (2d Cir. 1984); Montrose Chem. Co. v. Admiral Ins. Co., 897 P.2d 1, 14 (Cal. 1995) ("Most courts and commentators have recognized that the presence of standardized industry provisions and the availability of interpretive literature are of considerable assistance in determining coverage issues."); Hoechst Celanese Corp. v. National Union Fire Ins. Co., 623 A.2d 1128, 1129, 1129 n.1 (Del. Super. 1992) (noting "most if not all insurers use ISO standard-form language in their policies" and "most insurers do in fact use ISO language nearly or completely verbatim"). The result was the 1966 standard-form general liability policy, the insuring agreement of which remained unaltered in the subsequent 1973 standard-form general liability policy.

[13] Eugene R. Anderson, et al., Environmental Insurance Coverage in New Jersey: A Tale of Two Stories, 24 Rutgers L.J. 83, 203 (1992). The authors of this Article are policyholder counsel and represent *Amicus Curiae*. The article is referenced only for the source material contained therein.

[14] Id. (quoting Richard A. Schmalz, The New Comprehensive General Liability and Automobile Program, Presentation Before the Mutual Insurance Technical Conference 6 (Nov. 15-18, 1965); see also

insurance-industry meeting devoted to discussing the insurance industry's response to asbestos-related coverage claims, the "majority" of the insurance company representatives present "contended" that, for continuing injuries, "each carrier on risk during any part of that period" could be "fully responsible" for the entire loss.[15]

The insurance industry's drafting history, like its prior judicial representations, is consistent with the "all sums" decision of the District Court. Just as Restatement (Second) of Contracts Section 205 bars insurance companies from arguing a position that it contrary to "all sums" allocation, the appellant should also be prevented from contradicting their original understanding of the policies they sold.

Owens-Illinois v. United Ins. Co., 650 A.2d 974, 990 (N.J. 1994) (quoting Messrs. Bean and Katz); Eugene R. Anderson, et al., Liability Insurance Coverage for Pollution Claims, 59 Miss. L.J. 699, 729-30 (1989) (quoting Mr. Bean). Again, the authors of this article are counsel to policyholders and represent *Amicus Curiae*, and the article is cited for the source material contained therein.

[15] 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.").

C. The Court of Appeals Should Affirm "All Sums" Allocation Because "Pro Rata" Allocation Schemes, Like That Proposed By The Defendant, Are Unfair And Unworkable And Lead To Endless Complications And Litigation.

Even the case which first applied "pro-rata" allocation recognized that its methodology might prove impossible to implement.[16] Experience has demonstrated the truth of this sentiment: insurance companies, aiming to minimize or eliminate their liability for losses stemming from claims of gradual injury, have so exploited the complexities inherent in "pro-rata" allocation as to make it completely unworkable.[17]

The complexities surrounding "pro rata" allocation so complicate any "pro-rata" allocation rule as to make it completely unworkable. Indeed, these complications arise primarily because general liability policies do not contain any provision detailing how a court is to construct its "primary-first" allocation scheme. This is a purposeful omission because, as the insurance industry has admitted, it proved "impossible to develop[] a formula which would handle every

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[16] Owens-Illinois, 650 A.2d at 995 (adopting "pro-rata allocation" under New Jersey law, and stating that "[w]e realize that many complexities encumber the solution that we suggest," and that, "[i]f, after experience, we are convinced that our solution is inefficient or unrealistic, we will not hesitate to revisit the issue").

[17] Examples of these complications include: policies that exclude coverage for the continuing loss; categories of claims that the insurance industry as a whole has excluded from coverage, e.g. "total" pollution exclusions and "asbestos exclusions;" primary policy exhaustions; differences in primary policy limits; allocation of loss to self-insurance and retained limits; primary programs where the policy holder has significant deductibles; pre-acquisition coverage; coverage for years during which the corresponding insurance policy has been "lost;" periods during which policyholders' loss was covered by now insolvent insurance companies; and periods covered by policies including "non-cumulation" clauses.

possible situation with complete equity."[18] Rather, the policies contain only the promise that they will pay "all sums" the policyholder becomes obligated to pay. Further, the end result of these complications is to deprive policyholders of coverage they would have under the rule stated by the District Court which enforces the insurance company's promise to pay all sums.

1. Massachusetts courts endorse "all sums" allocation because it is fair, simple and workable.

Massachusetts courts have suggested that joint and several liability is contemplated "for the kind of extensive damages that may arise from ongoing pollution in environmental cases." Chicago Bridge & Iron Co. v. Certain Underwriters at Lloyd's, London, 797 N.E.2d 434, 443 n.11 (Mass. App. Ct. 2003).[19] In Chicago Bridge & Iron Co., 797 N.E.2d at 443, the Appeals Court of Massachusetts rejected "pro rata" allocation, stating that it is more equitable that

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[18] Eugene R. Anderson, et al., Environmental Insurance Coverage in New Jersey: A Tale of Two Stories, 24 Rutgers L.J. 83, 203 (1992) (quoting Richard A. Schmalz, The New Comprehensive General Liability and Automobile Program, Presentation Before the Mutual Insurance Technical Conference 6 (Nov. 15-18, 1965).

[19] In Chicago Bridge & Iron Co, 797 N.E.2d at 443, the Appeals Court of Massachusetts applied Illinois law to declare "all sums" allocation appropriate in case where the policyholder sued Lloyd's of London—one of the insurance companies implicated in the present case—to recover costs of "environmental cleanup and litigation expenses in connection with a lumber company's processing operation." Although the Appeals Court of Massachusetts applied Illinois law in Chicago Bridge & Iron Co., it stated that it's "analysis is not inconsistent with [it's] treatment of similar matters in Rubenstein v. Royal Ins. Co., 694 N.E.2d 381 (Mass. App. Ct. 1998), decided under Massachusetts law." Chicago Bridge & Iron Co., 797 N.E.2d at 435. Rubenstein, 694 N.E.2d at 388, is the seminal Massachusetts case for "all sums" risk allocation. For other Massachusetts state and federal cases affirming the "all sums" approach, see Liberty Mutual Ins. Co. v. Black & Decker Corp., 383 F.Supp.2d 200 (D. Mass. 2004); Massachusetts Electric Co. v. Commercial Union Ins., No. 9900467B, 2005 WL 3489874 (Mass. Super. Oct. 25, 2005); Commercial Union Ins. v. Gillette Co., No. 012917H, 2004 WL 1427157 (Mass. Super. May 27, 2004).

joint and several liability be imposed upon the insurance company in cases where "the moment of environmental property damage cannot be pinpointed, but rather occurs over a period covered by more than one policy . . . " Id. at 443-44.

When the Appeals Court of Massachusetts adopted "all sums" allocation in Rubenstein, 699 N.E.2d at 388, it cited Keene and Hatco Corp. v. W.R. Grace & Co.-Conn., 801 F.Supp. 1334, 1346 (D.N.J. 1992), for support. Keene, 667 F.2d at 1050, reasoned that joint and several liability should be imposed against insurance companies for damages arising from on ongoing injury because it was "[t]he only logical resolution of this [liability allocation] issue." The court stated that, when multiple policies cover an injury, "the only way that [the policyholder] can be assured the security that it purchased with each policy" is if the policyholder can "collect from any insurer whose coverage is triggered, the full amount of indemnity that it is due . . . " Id.

The court in Hatco, imposed joint and several liability on the insurance companies for the cost of environmental clean up because:

> First, the language of the policies [like the policies at issue in this case] . . . does not limit coverage to injury that occurs during the policy period. Thus, as a matter of contract interpretation, overlapping coverage has been bargained for. Second, the Insurers agreed to 'pay all sums which the insured shall become legally obligated to pay as damages,' they in effect step into the shoes of the insured. Here, regardless of when Grace [the polluter defendant] disposed of hazardous substances on the Fords site, under tort law principles and

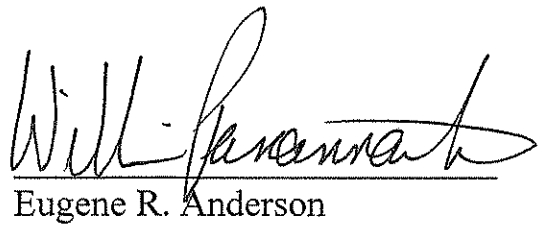
> CERCLA it will be jointly and severally liable for the full extent of the damage sustained by Hatco [the plaintiff] during any period of time if the harm sustained was indivisible. Thus, provided Grace bears its burden to establish that injury was continuous and is indivisible, all triggered Maryland Casualty policies and the excess policies following form to the Maryland Casualty policies are jointly and severally liable for all continuous harm.

Hatco Corp., 801 F.Supp. at 1346 (citations omitted).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* United Policyholders respectfully requests this Court to affirm the decision of the District Court.

Dated: New York, New York
August 13, 2007



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Certificate of Service

I hereby certify that on this 13th of August, 2007, I have served two (2) copies of the foregoing Brief and Motion for Leave to File Brief of *Amicus Curiae* upon counsel listed below:

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