No. 99-15614

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIREMAN'S FUND INSURANCE COMPANY
Plaintiff/Appellant,

v.

THE CITY OF LODI, CALIFORNIA, et al.,
Defendants/Appellees.

Appeal from United States District Court for the
Eastern District of California
Honorable Frank C. Damrell, Jr.

AMICUS CURIAE, UNITED POLICYHOLDERS', REQUEST FOR JUDICIAL NOTICE

Eugene R. Anderson, Esq.
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020-1182
Telephone: (212) 278-1751
Facsimile: (212) 278-1733
Attorneys for Amicus Curiae
United Policyholders

Of Counsel:

Amy Bach, Esq.
Law Offices of Amy Bach
42 Miller Avenue
Mill Valley, CA 94941
Tel: (415) 381-7627
Fax: (415) 381-5572

and

John A. MacDonald, Esq.
Anderson Kill & Olick, P.C.
1600 Market Street
Philadelphia, PA 19103
Tel: (215) 568-4707
Fax: (215) 568-4573

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Fireman's Fund Insurance Company Insurance Company, Plaintiff/Appellant, v. The City of Lodi, California, et al., Defendants/Appellees.	No. 99-15614

AMICUS CURIAE, UNITED POLICYHOLDERS',
REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rule of Evidence 201 amicus curiae, United Policyholders requests the Court to take judicial notice of the attached exhibits:

1. Letter from Leslie Cheek, III, Vice President, Federal Affairs, Crum & Forster Insurance Cos., dated Sept. 10, 1980, to Hon. Howard W. Cannon, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C., Congressional Record-Senate, Sept. 18, 1980, at 26058;

2. Letter from James L. Kimble, Counsel, American Insurance Association, dated Sept. 17, 1990, to Hon. Howard W. Cannon, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C., Congressional Record-Senate, Sept. 18, 1980, at 26060;

3. Brief of Amicus Curiae American Insurance Association (dated Feb. 25, 1993) Affiliated FM Insurance Co. v. Constitution Reinsurance Corp., No. SJC-06165 (Mass. Sup. Jud. Ct.);

4. Leslie Scism, Tight-Fisted Insurers Fight Their Customers To Limit Big Awards, Wall St. J., Oct. 15, 1996, at 1; and

5. Wash. Admin. Code § 284-30-920, "Procedures for resolving lost policy disputes regarding

environmental claims"; Wash. Admin. Code § 284-30-930, "Specific unfair environmental claims settlement or trade practices defined"; and Wash. Admin. Code § 284-30-940, "Environmental claim medication program."

These exhibits are proper subjects of judicial notice. See Ritter v. Hughes Aircraft Co., 58 F.3d 454, 458-59 (9th Cir. 1995) (approving judicial notice of newspaper articles); Peters v. Del. River Port Auth., 16 F.3d 1346, 1356 n.12 (3d Cir. 1994) (taking judicial notice of newspaper articles for the first item on appeal); Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (holding that matters of public record are appropriate for judicial notice).

DATED: September 21, 1999

Eugene R. Anderson, Esq.
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020-1182
Telephone: (212) 278-1751
Facsimile: (212) 278-1733

By: _____
Eugene R. Anderson
Attorneys for Amicus Curiae
United Policyholders

Of Counsel:

Amy Bach, Esq.
Law Offices of Amy Bach
42 Miller Avenue
Mill Valley, CA 94941
Tel: (415) 381-7627
Fax: (415) 381-5572

and

John A. MacDonald, Esq.
Anderson Kill & Olick, P.C.
1600 Market Street
Philadelphia, PA 19103
Tel: (215) 568-4707
Fax: (215) 568-4573

CERTIFICATE OF SERVICE

I am a citizen of the United States, over eighteen years of age, not a party to this action and employed in New York, New York, at 1251 Avenue of the Americas, New York, New York, 10020. Today I served the foregoing:

AMICUS CURIAE, UNITED POLICYHOLDERS',
REQUEST FOR JUDICIAL NOTICE

via United States first class postage, with all fees fully paid, on the following:

Party	Number of Copies	Party Represented
Hon. Cathy Catterson Clerk United States Court of Appeals for the Ninth Circuit 95 Seventh St. (94103) PO Box 193939 San Francisco, CA 94119-3939 Tel: (415) 556-9800 Fax:	original and 15	
Randall A. Hays City Attorney City of Lodi, California 221 West Pine Street Lodi, CA 95240 Tel: (209) 333-6701 Fax: (209) 333-6807	2	City of Lodi, CA, Jack Sieglock, Richard Prima, and Fran Forkas
Michael C. Donovan Cecelia C. Fusich John R. Till Assistant City Attorneys for the City of Lodi, CA Envision Law Group, LLP Century Centre II, Ste 305 1400 Fashion Island Blvd. San Mateo, CA 94404 Tel: (650) 372-5100 Fax: (650) 372-5110	2	City of Lodi
Stephen C. Neal, Esq. Benjamin K. Riley, Esq. Eugene M. Pak, Esq. Cooley Godward, LLP One Maritime Plaza, 20th Fl. San Francisco, CA 9411-3580 Tel: (415) 693-2000 Fax: (415) 951-3699	2	Michael Donovan, Adam Babich, Steven Doto, Bret Stone, John Till, and ZHGMP&F, LLP

Party	Number of Copies	Party Represented
Gary L. Fontana, Esq. Karl D. Belgum, Esq. Thelen, Reid & Priest, LLP Two Embarcadero Center Suite 2100 San Francisco, CA 94111-3945	2	American Insurance Association
Craig A. Berrington Laura L. Kersey 1130 Connecticut Ave., N.W. Suite 1000 Washington, D.C. 20036 Tel: (202) 828-7100 Fax: (202) 293-1219	2	American Insurance Association
Noel Edlin, Esq. Geoffrey S. Long, Esq. Walsworth, Franklin, Bevins & McCall, LLP 550 Montgomery Street, 8th Floor San Francisco, CA 94111	2	Harry Bader
Dennis Zaragoza, Esq. Law Offices of Dennis Zaragoza One Embarcadero Center, No. 750 San Francisco, CA 94126 Tel: (415) 217-4757 Fax: (415) 398-5773	2	Plaintiff's/ Appellants Unigard Insurance Company and Unigard Security Insurance Company in 99-15802
Richard P. Hill, Esq. Moody & Hill 214 Grant Avenue, Third Floor San Francisco, CA 94108 Tel: (415) 398-1285 Fax: (415) 391-1285	2	Plaintiff's/ Appellants Unigard Insurance Company and Unigard Security Insurance Company in 99-15802
Elliot L. Bien, Esq. Bien & Summers LLP 23 Palomino Road Novato, CA 94947 Tel: (415) 898-2900 Fax: (415) 898-1922	2	Insurance Environmental Litigation Association and American Insurance Association
Judith H. Volkart, Esq. Fireman's Fund Insurance Co. 777 San Marin Drive Novato, CA 94998	2	Fireman's Fund Insurance Company

Party	Number of Copies	Party Represented
Terry J. Houlihan, Esq. Edward L. Strohbehn, Jr., Esq. Karen L. Kennard, Esq. McCutchen Doyle Brown & Enersen LLP Three Embarcadero Center San Francisco, CA 94111-4067 Tel: (415) 393-2000 Fax: (415) 393-2286	2	Fireman's Fund Insurance Company
Amy Bach, Esq. Law Offices of Amy Bach 42 Miller Avenue Mill Valley, CA 94941 Tel: (415) 381-7627 Fax: (415) 381-5572	2	United Policyholders
John A. MacDonald, Esq. Anderson Kill l& Olick, P.C. 1600 Market Street Philadelphia, PA 19103 Tel: (215) 568-4707 Fax: (215) 568-4573	2	United Policyholders

Dated: New York, New York
September 21, 1999

Eugene R. Anderson

Letter from Leslie Cheek, III, Vice President, Federal Affairs, Crum & Forster Insurance Cos., dated Sept. 10, 1980, to Hon. Howard W. Cannon, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C., Congressional Record-Senate, Sept. 18, 1980, at 26058.

CRUM & FORSTER INSURANCE COS.,
Washington, D.C., September 10, 1980.

Re S. 1480, The Environmental Emergency Response Act.

HON. HOWARD W. CANNON,
Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Crum & Forster Insurance Companies, the Nation's 14th-ranked group of property-casualty insurers, are major writers of the kind of liability insurance that S. 1480 would virtually compel owners and operators of many hazardous substances disposal facilities or sites to buy in order to establish evidence of financial responsibility.

As eager as we are to make a market for those subject to the bill's requirements, we do not believe that the liability scheme established by S. 1480 is insurable. We are concerned that enactment of the bill in its current form will impose on many owners and operators an obligation they will be unable to fulfill through the purchase of insurance.

To be insurable, an event must be reasonably predictable both as to the frequency with which it occurs and as to the severity of losses it produces. S. 1480, in our view, makes the prediction of loss frequency and severity nearly impossible. Many of the legal rules it establishes, the categories of loss it makes compensable, and the classes of claimants it makes eligible for recovery, are entirely new, rendering past experience meaningless for purposes of estimating future costs (and, hence, premiums).

Unless major changes are made in S. 1480, we would strongly recommend that it not be enacted. As much as we appreciate the desirability of compensating the victims of hazardous substance releases into the environment, we believe there must be a better balance between this objective and the interests of owners and operators (and their insurers) than S. 1480 now strikes.

First, with respect to the legal framework in which losses are to be compensated, S. 1480 abandons all current and time-tested rules of liability in favor of an untried concept of joint, several and strict liability (section 4(a)) whose unfamiliarity is compounded by its retroactive applicability.

"Owner or operator" is defined in section 2(b)(15)(A) to "include the person who owned or operated or otherwise controlled activities at such facility or site *immediately prior to (its) abandonment or at the time of any discharge . . .*" (emphasis supplied). Section 4(a) subjects such owners and operators and "any person who *at the time of disposal of any hazardous substance* owned or operated any facility" to joint, several and strict liability for the universe of damages resulting from a discharge. The exceptions to this retroactivity in subsections 4(n)(1)-(3) are cold comfort, since they apply only to damages and releases occurring "wholly" before a specified date.

Thus, S. 1480 would apply entirely new statutory liabilities to actions taken and contracts made years, even decades, ago under traditional common law standards. We and other insurers would become subject, under contracts long since terminated, to liability exposures we never agreed to assume and could not possibly have foreseen, and the extent of our liability would be determined not according to the legal rules and the state of the waste disposal art at the time we entered into our contracts, but under an untried formula that would strip us and our former insureds of virtually all defenses.

We know it would be unfair, and we believe it would be unconstitutional, for the Congress to change the rules for hazardous substances liability retroactively as well as prospectively. We would not hesitate to challenge such a law if, pursuant to it, we were to be ordered to pay millions of dollars on behalf of former insureds for legal liability that did not exist when the actions involved were taken, and for which we collected no premium.

The strict liability dragnet in S. 1480 is so broad as to sweep within it any person who at any time had even the remotest connection with a facility or site, and to require that person to pay the entire damages from a discharge before he can seek either limitation or apportionment of his liability from the parties actually responsible for the damages (see section 4(f)(3)). From an insurer's perspective, this provision alone creates a contingent liability so enormous as to defy calculation, and would likely make it extremely difficult for persons utilizing disposal sites to obtain insurance protection.

The scope of the definition of "facility" in section 2(b)(9) of S. 1480 is so broad as to include farmers' tiny ponds and drainage ditches as well as massive commercial chemical dumps. No attempt is made to discriminate among "facilities" on the basis of their capacity, loss history or risk potential.

Thus, a farmer would be subject to the same one year's imprisonment or $10,000 fine that would be levied against a chemical dump operator for his failure to notify EPA of "the existence of (his) facility or site" and "the amount and type of any hazardous substances to be found there," and subject to the same *absolute* and *unlimited* liability for damages resulting from any subsequent discharge or lease (see section 3(a)(4)(A)).

We must ask if it is truly the desire of Congress to impose on a farmer who may have a pesticide residue in his pond or drainage ditches the draconian requirements set out in S. 1480. If not, surely some distinction should be drawn between those facilities which pose relatively little risk of environmental harm and those which pose a greater risk. Absent such distinctions, the owners of farms, motor vehicles and other onshore facilities will face a Hobson's choice: they will either be unable to obtain insurance protection against liability arising under S. 1480; or they will be able to obtain it only at prices reflecting the huge exposure the bill creates for even the smallest facility.

Ironically, the bill places no limit on the liability of any person subject to it, but permits any insurer acting as a guarantor of such a person under the bill's financial responsibility requirements (section 7) to escape liability by excluding, through restrictive endorsement, coverage for subrogation claims by the Hazardous Substance Response Fund (see section 6(b)(3)(E)). If a guarantor were to deny direct liability, forcing claimants to proceed against the Fund, and also excluded subsequent subrogation claims, the entire burden of the subrogated claim would rest on the insured. We doubt seriously that any reputable insurer would enter into such a contract, but point out that the bill contemplates the use of insurance policies as evidence of financial responsibility while permitting insurers to exclude liability by restrictive endorsement.

Second, the categories of loss that S. 1480 makes compensable are in many instances either entirely new or so broadly defined as to defy quantification. We do not believe that insurers will be able to accurately price coverage for unfamiliar or unquantifiable kinds of losses. Unless the elements of compensable loss are more precisely defined and limited, we believe they will further discourage insurer participation in the market for risks subject to S. 1480.

"Damages" are specified in section 2(b)(8) to include both "economic loss" and damages for "personal injury." The latter presumably would include such non-economic losses as pain and suffering, loss of consortium, etc., which are extremely difficult to estimate in advance. Non-economic losses typically constitute 60 per cent of automobile liability insurance payments, and, if permitted under S. 1480, would substantially increase the costs imposed by the bill. For example, would "psychic trauma" induced by disclosure of an orphan dump site next door to an established residential neighborhood constitute the sort of "personal injury" compensable under the bill?

"Remedial action" could, subject solely to Presidential discretion, impose on a discharger pursuant to section 4(a)(1)(A) such potentially staggering costs as "permanent relocation of residences, businesses and community facilities" and "the provision of permanent alternative drinking water supplies" (see section 2(b)(1)). Determination as to whether such costs are reasonable or necessary is entirely out of the hands either of the discharger or his insurer, but his liability for them is virtually absolute.

There is no requirement in section 4(a)(2)(B) that "loss of use of real or personal property" result from damage to the property itself, as is currently required under insurance contracts. Does this mean that a family is entitled to recover damages for loss of use of an island retreat if the bridge to the island is closed after a truck carrying a hazardous substance has overturned?

Similarly, there is no requirement in either sections 4(a)(2)(D) (loss of use of natural resources) or 4(a)(2)(E) (loss of income or earning capacity) that the claimant derive any income from either the natural resources or the property damaged. Does this mean that a weekend fisherman denied his sport on a contaminated local lake is eligible for recovery of damages? Does it mean that a gas station owner whose traffic to and from the same lake declines is entitled to seek compensation? If so, there is no end to the theoretical universe of damages that can be conjured up (bait suppliers to the fishermen, auto parts dealers with the gas stations, etc.).

We would also like to point out that S. 1480, in defining "release" (section 2(b)(16)), repeals the Price-Anderson Act's $560 million limitation on public liability arising out of a nuclear incident by providing that a "release" does not include "nuclear material . . . to the extent such release is covered by financial protection required" under the Price-Anderson Act. Thus, once the Price-Anderson limits have been reached, unlimited recovery would be permitted under S. 1480. We do not think it is sound public policy to bury an implied repeal of a major statute in the definitions section of an apparently unrelated 91-page bill.

Third, the classes of claimants that S. 1480 makes eligible for recovery of damages are nowhere, except with respect to loss of tax and other revenues and of natural resources by governments, limited. The impossibility of measuring the numbers of claims that might result from a given incident increases the likelihood that insurers will avoid exposures created by S. 1480.

Much of the imprecision in the classes of claimants eligible for recovery derives from similar imprecision (noted above) in the bill's description of compensable losses. We believe that a new section, specifying which classes of persons are eligible for recovery of which category of damages, would greatly improve this bill.

For example, recovery for "loss of use of real or personal property" (section 4(a)(2)) should be limited to those whose property is actually damaged by a release, discharge, or disposal.

Similarly, only those who derive a major portion of their livelihood from natural resources should be eligible to recover for loss of use thereof, and only those whose income-producing property is damaged should be able to seek damages for loss of income or profits or impairment of earning capacity (see sections 4(a)(2)(D) and (E)).

We would be pleased to work with your Committee and its staff in an effort to create an Environmental Emergency Response Act that better balances the interests of those victimized by hazardous substances discharges with those of potential dischargers and their insurers. We do not want to surrender yet another market to the taxing power of the Federal Government without working to make S. 1480 an insurable venture for ourselves and our competitors.

Sincerely yours,

LESLIE CHEEK III,
Vice President, Federal Affairs.

Letter from James L. Kimble, Counsel, American Insurance Association, dated Sept. 17, 1990, to Hon. Howard W. Cannon, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C., Congressional Record-Senate, Sept. 18, 1980, at 26060.

AMERICAN INSURANCE ASSOCIATION,
Washington, D.C., September 17, 1980.

Re S. 1480, the Environmental Emergency Response Act.

Hon. HOWARD W. CANNON,
Committee on Commerce, Science, and Transportation, U.S. Senate, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR CANNON: The American Insurance Association (AIA) is a trade association of 152 stock, property and casualty insurance companies. If S. 1480 is enacted, the member companies of AIA will be the principal domestic source of liability insurance for onshore facilities to service the liability system established in the bill.

S. 1480 currently provides for a five year period following enactment of the bill during which financial responsibility (FR) requirements are not obligatory. FR requirements will then be phased-in over a period of 3 to 6 years. Without the provision of insurance, owner/operators who cannot self-insure will not be able to meet the financial responsibility certification requirement mandated by the bill.

The American Insurance Association opposes enactment of S. 1480 in its current form. The liability system created by S. 1480 presents an enormous liability exposure and for many insurers would represent an uninsurable risk.

The establishment of levels and categories of insurance coverage by federal legislative mandate is a serious problem for the insurance industry. The demand for insurance coverage to service federal liability systems may exceed the industry's capacity to provide protection. Legislation which imposes levels of financial responsibility on owner/operators as a prerequisite for doing business transforms insurance from a consumer product to a societal necessity. The supply of insurance to service a liability system which responds to toxic discharges and ham waste disposal is not perfectly elastic—it is largely a function of and limited by the general condition of the United States and foreign primary insurance and reinsurance markets, the competing demands for capacity from a variety of other insurance risks, and the specific economics of the risk of catastrophic loss associated with S 1480.

The current limitations on pollution liability insurance are a result of public policy, rapidly developing common law liability theory, potential magnitude of loss associated with toxic waste and hazardous discharges, and the inevitable legal ambiguities of casual relationship and multiple causation associated with disease-related injuries.

The independent development of federal tort law concepts which would nationally codify the most advanced common law theories and add presumptions which are common to compensation systems but not liability systems will further impede the development of an insurance market for pollution liability.

"Superfund" legislation introduces broad new categories of claimants and compensable damages which will make risk assessment extremely difficult until a data base is generated through claims experience under the liability system. During this initial period insurers would be in the uncomfortable position of basing their rates more on conjecture than on responsible judgment supported by hard data.

Elements of concern which could preclude the development of an insurance market are as follows:

UNMEASURABLE CATEGORIES OF COMPENSABLE

The definition of "damages" and the ambiguity in sections 4(a)(2) A-D result in a lack of clarity with respect to whether "damages for . . . personal injury" includes non-economic loss such as pain and suffering. With respect to the latter subsection, it is not clear whether the specification of what is included in "all damages" implies that elements not listed (*e.g.*, pain and suffering) are therefore not included. The phrasing "economic loss or loss due to personal injury" would suggest that non-economic loss is included, although the ensuing list does not specify any non-economic losses.

The element of non-economic loss is the most unpredictable and the most easily manipulated portion of damages. If the bill intends to permit recovery for non-economic loss, it should clearly specify it. If recovery for such loss is permitted, it would further discourage insurer participation.

CLAIMANT STANDING

We are concerned with section 4(a)(1)(A)(2)(E) because the phrase "loss of income or profits or impairment of earning capacity" is totally unqualified as to the percentage of income a claimant must derive from damaged property or resources in order to be eligible for an award.

Neither does it qualify the time period over which such damages may be claimed. Without such qualifications, the subsection has the potential for allowing youthful claimants to seek lifetime income replacement awards, regardless of how little of their income was derived from the damaged property or resources and regardless of their ability to obtain other employment.

PRESUMPTIONS

Section 6(e)(2) and (3) provides for a rebuttable presumption in favor of "any determination or assessment of damages for . . . natural resources" and further directs that assessment should be made by the Administration's environmental agencies. The presumption would give extraordinary evidentiary weight to damage assessment concepts and assumptions which have not been fully developed or recognized by the courts or legal academicians. The presumption will make the burden of defending natural resources claims and reducing assessments nearly impossible.

CLAIMS SETTLEMENT PERIOD

S. 1480 currently provides for a period of 15 days for settlement of claims between claimants and owner/operators (and their guarantors).

Proper assessment of damages in speculative areas of liability such as loss of use of natural resources or loss of income cannot be made in a period of less than 120 days. Many cases which could be settled would be referred to the court or the Fund, not because the fact are contested, but because proper damage appraisal is impossible.

A period of 120 days also may be needed to designate the proper defendant. Locating the source of the discharge in situations involving vessels and offshore facilities will normally be easy due to the spiller's location. However, in situations involving onshore facilities, facilities may be grouped together or evidence of damage may device over a long period of time, making designation of defendant more difficult.

RETROSPECTIVE APPLICATION OF LIABILITY

"Owner or operator" is defined in section 2(b)(15)(A) to "include the person who owned or operated or otherwise controlled activities at such facility or site immediately prior to (its) abandonment or at the time of any discharge. . . ." Section 4(a) subjects such owners and operators and "any person who at the time of disposal of any hazardous substance owned or operated any facility" to joint, several and strict liability for the universe of damages resulting from a discharge. The exceptions to this retroactivity in subsection 4(n)(1)-(3) are inadequate because they apply only to damages and releases occurring "wholly" before a specified date.

S. 1480 would apply the most advanced common law theories of liability coupled with rebuttable presumptions in the areas of natural resources assessment and medical injuries to fact situations which took place and insurance contracts which were made years ago. Premiums collected for insurance contracts for pollution liability terminated years in the past were based on common law theories of liability such as negligence, trespass, nuisance and riparian rights. If the occurrence which results in alleged liability is continual, insurers which provided pollution liability coverage years ago may be subjected to the liability concepts in S. 1480.

MODIFICATIONS TO THE PRICE-ANDERSON ACT

S. 1480's definition of release appears to remove the $560 million limitation on owner/operator liability arising out of a nuclear incident. Section 2(b)(16) provides that a "release" does not include "nuclear material . . . *to the extent* (emphasis added) such release is covered by financial protection required by" the Price-Anderson Act. The above language could also be interpreted in a fashion which would apply the liability concepts of S. 1480 to nuclear incidents.

JOINT AND SEVERAL LIABILITY

In adopting a joint and several, strict liability theory, S. 1480 would permit a claim-

ant to collect the entire award for damages from one defendant before that particular defendant can seek contribution from the remaining defendants. This approach creates a potential unforeseen liability for owner/operators and makes the process of underwriting and pricing a risk extremely difficult. A risk's individual potential for pollution liability becomes meaningless when he can be sued for an entire loss although he was only one of a number of participants.

FINANCIAL RESPONSIBILITY REQUIREMENT FOR

or $5 million, whichever is greater. This FR requirement would be "in addition to those in existing law". The recently enacted "Motor Carrier Act of 1980" mandates FR requirements of $5 million for transportation of extremely hazardous materials and $1 million for transportation of other hazardous materials. The S. 1480 requirement for rolling stock would be in addition to the FR requirements in the Motor Carrier Act, thereby creating an intolerable burden on commercial automobile insurers.

In reviewing the basic criteria for determining insurability of losses as delineated by Commercial Liability Risk Management and Insurance, the difficulty in underwriting pollution insurance for hazardous discharges becomes evident.*

LOSSES MUST BE DEFINITE IN TIME, PLACE, AND AMOUNT

Many pollution losses cannot be pinpointed as to time and place, nor to any one source. They are attributable to prolonged misuses or exposures by many sources. For example, it would be almost impossible to determine whether, and to what extent, illnesses or property damages are solely attributable to an insured. Another difficulty would be to prove that the actual cause of some diseases—emphysema for example—is the air pollution. Such diseases can be caused by other factors, such as smoking, or working in a hazardous industry. Multiple causes of loss could pose causation problems, even when a pollution incident is sudden and accidental.

LOSSES MUST BE ACCIDENTAL IN NATURE

Without question, some of the pollution that culminates in damage is willful or done with flagrant disregard to its possible effects. Also, some acts are intentional, but the results are unforeseen. A typical example is the dumping of mercury into streams and rivers, an occurrence that went on for a number of years. It was thought that mercury would sink and do no harm. However, it was subsequently discovered that mercury so disposed of would produce another harmful substance.

LOSSES SHOULD NOT HAVE AN UNMANAGEABLE CATASTROPHIC POTENTIAL

Pollutants and contaminants are obviously capable of producing catastrophic results. Whether the catastrophe potential of pollution liability can be managed now or in the future is not yet clear but the severe consequences of an error in making this judgment justify some caution on the part of insurers.

THERE SHOULD BE A LARGE NUMBER OF HOMOGENEOUS EXPOSURE UNITS

In order that losses may be predicted accurately, there should be a large number of homogeneous exposure units—i.e., similar type businesses or organizations in order to permit satisfactory predictions of the losses that will be incurred by firms that are actually insured. There also should be a substantial volume of credible loss experience and an acceptable means of forecasting significant increases in future losses. It would seem that there are ample numbers of similar firms interested in purchasing pollution liability insurance if the price is reasonable. Nonetheless, it is still a difficult task to predict the frequency and severity of insurable pollution liability losses for those who would constitute the insured group.

LOSSES SHOULD BE MEASURABLE IN TERMS OF MONEY

Measuring the dollar costs of property damage, bodily injury, sickness, death, loss of earning power, and loss of consortium

---

*Requisites for insurability were excerpted

and other such intangibles is sometimes difficult, though it is not impossible in the context of most types of legal liability. However, in some pollution cases, as mentioned earlier, it may well be impossible to determine the proper portion of a total dollar loss that was caused by a particular insured. There may be many causes involved, as well as many different polluters. Moreover, additional problems will surely arise if insurers are required to pay damages for such things as the aesthetic and/or enjoyment value of recreational areas or lakes.

INSURANCE MUST BE ECONOMICALLY FEASIBLE

If the statutory goals of curbing water, air, noise, and thermal pollution are met in the future, and if anti-pollution control devices and other effective techniques are implemented on a widespread basis, perhaps pollution liability insurance will become more readily available at economically feasible premiums. At present, however, these are not the realities. Pollution costs are enormously high and appropriate insurance is difficult to obtain, especially for premiums prospective buyers would pay.

In discussing the priority of importance insurers attach to the bill's "defects", it must be emphasized that it is difficult and perhaps misleading to establish such a priority because it fails to recognize that the concepts in S. 1480 interrelate with and thereby exacerbate each other. Enactment of S. 1480 in its current form will create an immediate availability and/or affordability of insurance problem as owner/operators attempt to obtain insurance protection from the risks presented in the bill's liability system. The availability problem will be acutely felt when FR requirements for onshore facilities become a prerequisite of doing business. Although insurers can avoid prospective liability by refusing to service S. 1480's liability system, insurers may not be able to avoid retrospective application of the liability system to existing claims. Accordingly, the American Insurance Association opposes passage of S. 1480.

Respectfully submitted,

JAMES L. KIMBLE, *Counsel.*

Commonwealth of Massachusetts

Supreme Judicial Court for the Commonwealth

No. SJC-06165

Norfolk County

AFFILIATED FM INSURANCE COMPANY

Plaintiff, Appellant

v.

CONSTITUTION REINSURANCE CORPORATION

Defendant, Appellee

On Appeal From A Judgement Of The Superior Court

BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION

Thomas W. Brunner
Christopher D. Cerf
John C. Yang
WILEY, REIN & FIELDING
1776 K Sureet, N.W.
Washington, D.C. 20006
(202) 429-7000

Rosanna Sattler
BBO No. 442760
Jeffrey W. Armstrong
BBO No. 547160
POSTERNAK, BLANKSTEIN & LUND
100 Charles River Place
Boston, MA 02114
(617) 367-9595

Attorneys for *Amicus Curiae*
American Insurance Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Miscellaneous

INDEX TO EXHIBITS

INTEREST OF AMICUS CURIAE

The American Insurance Association ("AIA") is a national trade organization representing 252 companies writing property and casualty insurance contracts in every state and jurisdiction of the United States. These companies together write more than $60 billion in combined premiums annually.[1] Together, AIA member companies are affiliated with thousands of independent insurance agents nationwide. A substantial portion of AIA member companies' business is commercial liability insurance. This form of coverage enables American businesses to provide the goods, services, jobs, and investments vital to the country's economic health. In addition, AIA member companies employ more than 145,000 people and contribute $2.2 billion in state taxes and fees (including payroll taxes) to state governments each year.

AIA's purposes include promoting the economic, legislative and public interests of its members and the insurance industry, providing a

---

[1] All financial figures are from 1990, the most recent year for which figures are available.

forum for discussion of problems that are of common concern to its members, and serving the public interest through appropriate activities including the promotion of safety and security of persons and property.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether a reinsurer is contractually obliged to pay a proportionate share of the litigation expenses incurred by the reinsured company in opposing an insured's demand for coverage.

STATEMENT OF THE CASE

Amicus incorporates by reference the Statement of the Case set forth in the Brief of the Plaintiff-Appellant Affiliated FM Insurance Company ("Affiliated") on pages 2-4..

STATEMENT OF THE FACTS

Amicus adopts the Statement of Facts set forth on pages 4-9 of Affiliated's brief.

SUMMARY OF ARGUMENT

This case presents a single question: whether a reinsurer is contractually obliged to pay a proportionate share of the litigation expenses incurred by the reinsured company in successfully opposing an insured's demand for coverage? Ignoring the plain language of the applicable agreement, an unbroken line of authority in both this country and Great Britain (including a seminal decision by this Court), the uniform view of treatise writers, and an ancient and heretofore unquestioned practice between and among reinsurers and reinsured, the trial court answered that question in the negative. (Pp. 10-20.)

The Superior Court's conclusions were more than merely erroneous. If permitted to stand, the decision is likely to have staggering consequences for the domestic insurance industry. While the sums at issue in this case are relatively minor, direct (i.e., primary and excess) insurers spend (conservatively) a billion dollars a year in so-called "coverage litigation," typically in the

form of declaratory judgment actions. Permitting reinsurers to escape paying their fair share of these costs confers an unwarranted and historically unprecedented windfall while saddling reinsureds with massive, completely unanticipated costs that inevitably will be borne by policyholders in the form of increased premiums. (Pp. 20-26.)

Such a radical reorientation of the relationship between reinsurers and reinsured has no basis in law. As a result of the historical tradition that reinsurance transactions are a matter of the "utmost good faith between the parties," reinsurance contracts are remarkably short and notably lacking in the legalisms that characterize other complex commercial arrangements. (Pp. 10-12.) Accordingly, from the very advent of reinsurance several centuries ago, dispute resolution has always centered around the guiding principle of "good faith" as informed by the historic customs and traditions of the business. (Pp. 12-13.)

Read in this light, Constitution Re's effort to dissociate itself from the coverage action is plainly unsupportable. Where the denial of coverage is sustained, a reinsurer -- which has contractually accepted a portion of the risk in consideration for a premium paid by the ceding insurer -- is a direct beneficiary of the coverage dispute. (Pp. 13-14.)

But even when a court rules that coverage is required, the reinsurer is inextricably associated with the judgment. Under the express terms of the agreement, a reinsurer agrees to "follow the fortunes" of the reinsured company -- i.e., to link its fate to that of the reinsured. Nonetheless, the reinsurer's obligations are "subject to" the terms and conditions of the policy issued to the insured. Put differently, to the extent the direct insurer has a legitimate coverage defense, that defense automatically inures to the benefit of the reinsurer as well. For this reason, reinsurers frequently urge the reinsured to resist coverage when there is a substantial basis for doing so. (Pp. 14-15.)

Moreover, if the reinsured ignores those exhortations -- or simply fails to litigate the coverage issue -- it does so at its peril. With increasing frequency, courts are ruling that the reinsurer is not liable to the reinsured to the extent the latter pays out under a policy where coverage was precluded "as a matter of law."

In short, as reflected by industry custom and as universally approved by courts and commentators alike, reinsurers have a vital stake in coverage litigation and, for that reason, should be required to pay for it. (Pp. 15-20.) Any other interpretation would allow reinsurers to become a "free rider." (Pp. 20-21.) Moreover, it would foment an adversarial relationship between reinsured and reinsurer in a manner at odds with the basic premise of the reinsurance transaction that their interests are aligned. (Pp. 21-22.) In cases of uncertain coverage, a direct insurer often will choose simply to pay out the claim. If, however, the reinsurer is not "on the hook" for declaratory judgment expenses, it has every reason to insist that the company resist coverage

as vigorously as possible -- or risk a fight over reimbursement down the line. The end result is a de facto conflict of interest between reinsured and reinsurer, as well as powerful impetus to invoke scarce judicial resources to resolve coverage issues. Neither consequence is in the public interest. (Pp. 22-23.)

Not surprisingly, the pertinent language of the reinsurance certificate is entirely consistent with these principles. Focusing on Clause A, the Superior Court found that the reinsurer's "liability" was "subject" to the "terms and conditions" of the Campbell Soup policy. (Pp. 23-24.) As the structure of the agreement makes plain, that language merely reflects the basic indemnity relationship of the parties: The reinsurer has the same duties, as well as the same coverage defenses, as the reinsured. Hardly, however, does it follow that "Affiliated's [litigation] expenses are not covered . . . because they would not be covered under the Affiliated/Campbell policy." Affiliated FM Ins. Co. v. Constitution Reinsurance Corp., No. 89-

2411, slip op. at 4 (Mass. Sup. Ct., Norfolk County Sept. 1, 1992) [hereinafter "Op. at __"]. To the contrary, Clause D expressly states that "in addition" to its basic obligation to reimburse Affiliated for losses associated with the underlying litigation (the EEOC/Campbell suit), the reinsurer "shall pay its proportion of expenses . . . incurred by [Affiliated] in the investigation and settlement of claims." (Pp. 24-25.) Indeed, Constitution Reinsurance Corporation's ("Constitution Re") recognition that the certificate requires it to pay some investigation expenses is fatal to its theory: If it has a duty to pay some expenses above and beyond those directly required by the Campbell Soup policy, then that policy does not set out the full universe of its obligations. (P. 26.)

Thus, the only real interpretive question presented in the case is whether the costs of a declaratory judgment coverage action qualify as "expenses incurred in the investigation and settlement of claims." (Pp. 26-27.) The language of the certificate -- which is supported by the

practices of the industry and the caselaw reflecting it -- compel the conclusion that they do. (Pp. 27-28.) In any event, the trial court's holding that such expenses are not covered as a matter of law is insupportable. At most, the phrase "investigation and settlement expenses" is sufficiently ambiguous as to warrant development of a fuller record concerning industry practice and the parties' intent. While AIA believes such an approach to be unnecessary in light of the clarity of the language and the nature of the reinsurer/reinsured relationship, a remand of this nature is the only even theoretical alternative to outright reversal.

ARGUMENT

The nature of the reinsurer/reinsured relationship, as reflected in longstanding, judicially-endorsed industry practice, compels the conclusion that both entities share in the cost of obtaining a judicial declaration of coverage obligations. This relationship, together with the historical expectation that parties to the

reinsurance transaction conduct themselves with "the utmost good faith," necessarily provide essential insight into the meaning of the applicable language in the agreement. Moreover, even if that language were viewed in isolation, it plainly obligates a reinsurer such as Constitution Re to bear its share of the costs associated with resolving the coverage dispute.

I. The Nature of the Reinsured/Reinsurer Relationship, Longstanding Industry Expectations and Associated Considerations of Public Policy Support Affiliated's Contractual Right to Reimbursement of Coverage Litigation Expenses.

As with any contract dispute, careful parsing of the actual language of the Affiliated/Constitution Re agreement is central to the correct resolution of this case. Nonetheless, the sometimes arcane nuances of the reinsurance transaction as it has evolved over the centuries make it both important and appropriate to put that language in its proper context.[2] Indeed, the

---

[2] Reinsurance has been described as "a mystery not worth the solving." Henry T. Kramer, (continued...)

legitimacy of this interpretive approach derives from the nature and history of the reinsurer/reinsured relationship. The rather informal arrangements that constitute the origins of modern reinsurance quickly gave rise to an "established tradition that reinsurance transactions are a matter of 'utmost good faith' between the parties." Robert F. Salm, Reinsurance Contract Wording, in Strain, supra, at 79.[3] Reflecting that tradition, a reinsurance agreement typically is "a relatively short, concise document, noticeably lacking in the legalisms" characteristic of other contracts. Id. For this reason, interpretive questions under an agreement traditionally are "settled . . . according to the

---

[2](...continued)
Nature of Reinsurance, in Reinsurance 1 (Robert W. Strain ed. 1980) [hereinafter "Strain"]. More to the point, the general absence of standard forms, together with the arcane nature of the transaction, has led one writer to observe that the "wordings [of the reinsurance agreement] do not readily speak for themselves." Id.

[3] See generally Reinsurance Law § A.2 (Robert Merkin ed. 1992) (tracing the history of reinsurance agreements from the fourteenth century).

customs and traditions of the business." Id.[4]

These "customs and traditions" virtually compel an interpretation of the pertinent contract language in the manner urged by Affiliated. In most respects, a reinsurance cession represents a specialized form of an indemnity agreement. American Ins. Co. v. North American Co. for Property & Casualty Ins., 697 F.2d 79, 81 (2d Cir. 1982). In exchange for a premium, the reinsurer agrees to reimburse the ceding insurer for a specified portion of any liability that may arise out of one or more contracts of insurance. The reinsurer further agrees to "follow the fortunes" of the reinsured -- that is, to link its fate to that of the ceding insurer provided that the ceding insurer conducts itself reasonably and in good faith.

---

[4] See also James V. Schibley, The Life Reinsurance Contract, in Resolving Reinsurance Disputes: Contracts, Arbitration, Litigation 4 (A.B.A. Torts & Ins. Prac. Sec. 1987) (noting that one important reason that reinsurance functions successfully without extensive legal authority is "the existence of a common body of insurance practices that are generally accepted within the industry.")

Notwithstanding this commitment, however, the reinsurer's obligations are made expressly "subject to" the terms and conditions of the underlying policy. The effect of this provision is to make the reinsurer a derivative beneficiary of any legitimate coverage defense possessed by the reinsured company, e.g., a particular policy exclusion or the insured's failure to satisfy a condition precedent to coverage. Indeed, as courts have frequently observed, the "subject to" clause operates as a potentially significant limitation on the otherwise broad sweep of the reinsurer's general obligation to follow the reinsured's "fortunes." See, e.g., Michigan Millers Mut. Ins. Co. v. North American Reinsurance Corp., 452 N.W.2d 841 (Mich. Ct. App. 1990).

The net effect, and indeed the purpose, of these provisions, viewed together, is to align the respective interests of reinsurer and reinsured closely. When the reinsured denies coverage, and that denial is sustained in a declaratory judgment action, the reinsurer necessarily benefits from

that course of events. Where, however, the insured pays out a claim despite a clear lack of coverage, it does so at its "peril." New York State Marine Ins. Co. v. Protection Ins. Co., 18 F. Cas. 160, 160 (C.C.D. Mass. 1841) (Story, J.). As numerous decisions now hold, a reinsurer is not liable to the reinsured to the extent the latter pays out under a policy where coverage was precluded "as a matter of law." Hiscox v. Outhwaite, 1990 Folio No. 2491 (U.K. Commercial Ct. App. Nov. 3, 1991) (Ex. 1).[5]

For these reasons, reinsurer and reinsured have a mutual interest in reaching an expeditious and correct determination of coverage. Not surprisingly, therefore, the reinsurer typically is more than a passive observer in this process. Pursuant to the express terms of the reinsurance agreement as well as the duty of "utmost good

---

[5] See also American Ins. Co. v. North American Co. for Property & Casualty Ins., 697 F.2d 79, 81 (2d Cir. 1982); State Auto. Mut. Ins. Co. v. American Re-insurance Co., 748 F. Supp. 556 (S.D. Ohio 1990); Reliance Ins. Co. v. General Reinsurance Co., 506 F. Supp. 1042, 1050 (E.D. Pa. 1980); Michigan Millers Mut. Ins. Co., 452 N.W.2d 841, 842-43 (Mich. Ct. App. 1990).

faith," the reinsured company must notify the reinsurer of any claim that may trigger the latter's indemnity obligation.[6] Moreover, the reinsurer specifically reserves the right to be "associated" with the reinsurer in the defense and control of any claim. As a practical matter, reinsurers often use this relationship to convey their views on the validity of the insured's demand for coverage and the proper response to it. When the demand is doubtful, reinsurers frequently encourage the reinsured company to resist it. That intimation can be explicit or it can be conveyed as a veiled suggestion that reimbursement might not be forthcoming if the reinsured company pays out on the claim.

Taken together -- this close relationship, the shared interest in correctly evaluating and, where appropriate, resisting demands for coverage, and the imbalance of assigning to the reinsured the risk of an incorrect coverage determination -- make the question presented here, in Justice

---

[6] See, for example, Clause C in the Affiliated/Constitution Re contract.

Story's words, not "of any intrinsic difficulty." New York State Marine Ins. Co., 18 F. Cas. at 160. With complete unanimity, courts and commentators alike have concluded that the reinsurer is contractually obliged to bear its proportionate share of the legal costs associated with investigating and, where appropriate, resisting demands for coverage. Because the cost and expenses of coverage litigation are "incurred for the benefit or the reinsurers and are indispensable for the protection of the reinsured," any other conclusion would be so unreasonable as to be plainly beyond the intent and expectations of the parties. Id.[7]

---

[7] All of the leading commentators and treatise writers have spoken with one voice on this issue. See 13A John L. Appleman & Jean Appleman, Insurance Law & Practice § 7700, at 566-67 (1976) (reinsured is contractually obliged to pay proportionate share of declaratory judgment costs); 19 George J. Couch, Couch on Insurance 2d § 80:68, at 675 (2d ed. 1983) (same); 44 Am. Jur. 2d Insurance § 1837, at 828 (1982) (same); Jonathan A. Bank et al., The Reinsurance of Environmental Claims: Shades of Grey, Mealey's Litig. Rep.: Reinsurance, Dec. 12, 1991, at 16, 29 (same). For a representative analysis, see Kenneth R. Thompson, Reinsurance 328-30 (4th ed. 1966):

(continued...)

The holding of this Court in Fanueil Hall Ins. Co. v. Liverpool & London Globe Ins. Co., 153 Mass. 63, 26 N.E. 244, 246 (1891), is illustrative, particularly in light of the technical (and incorrect, see infra pp. 23-26) arguments urged by Constitution Re on the basis of the policy language. In Fanueil Hall, as here, the Court construed a reinsurance contract that obligated the reinsurer to reimburse the reinsured for "all losses or damages arising under the[] [underlying] policies . . . subject to the same risks, conditions . . . as the policies reinsured." Id. at 66, 26 N.E. at 245. Rather than finding this language somehow limiting, the

---

[7](...continued)
Since the reinsured is bound at his peril that the claim against him is valid, after he has given notice to the reinsurer, he is justified in submitting the claim to the decision of the court and the costs which necessarily arise in such a suit might be considered as incurred upon reasonable grounds, and are allowed as composing part of a claim for indemnity against the reinsurer.

See also Robert F. Salm, Reinsurance Contract Writing, in Strain, supra, at 105 (reinsured should be encouraged to incur as much legal expense as necessary in resisting a claim where circumstances dictate).

Court held that the contract obligated the reinsurer to pay the reinsured "not only for the amount of the original loss [and the insured's defense costs], but also for the costs and expenses incurred by the [reinsured] in defending itself against the [insured]." Id. at 68, 26 N.E. at 246 (emphasis added).[8] Other decisions reaching precisely this conclusion -- both in this country and in Great Britain -- are legion.[9]

---

[8] The Superior Court therefore was simply wrong to brush aside this decision on the ground the pertinent policy language had not been presented or analyzed. Op. at 8-9.

[9] See Peerless Ins. Co. v. Inland Mut. Ins. Co., 251 F.2d 696, 701 (4th Cir. 1958); New York State Marine Ins. Co., 18 F. Cas. at 160; Central Nat'l Ins. Co. v. Devonshire Coverage Corp., 426 F. Supp. 7, 26 (D. Neb. 1976); Owens S.S. v. Aetna Ins. Co., 121 F. 882, 888-89 (S.D. Ga. 1903); Gantt v. American Central Ins. Co., 68 Mo. 503 (1878) (Ex. 2); Strong v. Phoenix Ins. Co., 62 Mo. 289, 295-98 (1876) (Ex. 3); Hastie v. De Peyster, 3 Cai. R. 190 (N.Y. 1805) (Ex. 4). For an especially instructive British case reaching the same conclusion, see Insurance Co. of Africa v. Scor (U.K.) Reinsurance Co., 1 Lloyd's Rep. 312, 325 (1985) (Ex. 5) (reinsured's right to reimbursement of coverage costs is an implicit term of the contract whether or not found in an explicit term of the agreement); see also British Dominions Gen. Ins. Co. v. Duder, 2 L.J.K.B. 394 (1915) (Ex. 6).

So uniform is the commentary and caselaw on this point that Constitution Re cannot reasonably suggest that it expected the pertinent contract language to have been interpreted any other way.[10] See Central Nat'l Ins. Co. v. Devonshire Coverage Co., 426 F. Supp. 7, 26 (D. Neb. 1976) (finding that coverage determination expenses were reimbursable, because "whether that 'standard practice' is one based on the express or implied terms of the contract," it was "within the

---

[10] The only two cases relied on by Constitution Re do not even remotely support its position. The only question at issue in Bellefonte Reinsurance Co. v. Aetna Casualty & Surety Co., 903 F.2d 910 (2d Cir. 1990), was whether the reinsured company could recover defense costs in excess of the limits set out in the insurance agreement, i.e., the costs of defending the insured in the underlying litigation. Id. at 911-912, 914. Thus, the case did not even involve coverage litigation expenses. Nor, of course is the modest sum Affiliated is seeking from Constitution Re anywhere near the limits set out in the Certificate. McKeithen v. S.S. Frosta, 430 F. Supp. 899 (E.D. La. 1977), is equally inapposite, and indeed did not even concern reinsurance. The issue there was whether an insurer could recover from its insured the costs of bringing an interpleader action to resolve their respective rights and liabilities. Because the court answered that question solely with regard to the language of the insurer/insured policy, the case has no bearing whatever on the reinsurance question at issue here.

contemplation of the parties"); Insurance Co. of Africa v. Scor (U.K.) Reinsurance Co., 1 Lloyd's Rep. 312, 325 (1985) (Ex. 5). Indeed, in the experience of AIA member companies, reinsurers routinely pay their proportionate share of the expenses associated with coverage litigation. Thus, to the extent that "customs and traditions" of the business shed light on the meaning of the policy language, see supra pp. 10-12, they overwhelmingly cut against Constitution Re's already strained interpretation of the contract language.

So too do considerations of both elemental fairness and sound public policy. "It has long been held . . . that when a right to indemnity is conferred . . . the indemnitee may recover reasonable legal fees and costs in resisting a claim within the compass of the indemnity." Amoco Oil Co., Inc. v. Buckley Heating, Inc., 22 Mass. App. Ct. 973, 495 N.E.2d 875, 876 (1986). That general principle applies with particular force when the indemnity arises in the context of a reinsurance agreement. Any other conclusion

would allow the reinsurer to assume the position of a "free rider" -- to stand by idly while the reinsured company, on its own nickel, litigates a coverage defense for the reinsurer's benefit or, if the reinsured declines to litigate, to refuse to indemnify on the ground that the reinsured failed to resist coverage with sufficient vigor.

Moreover, an interpretation that forces reinsured companies to make this Hobson's choice would foment an adversarial relationship between reinsured and reinsurer directly at odds with the basic premise of the reinsurance transaction that their interests are aligned.[11] Unless the

---

[11] See Great American Surplus Lines Ins. Co. v. Ace Oil Co., 120 F.R.D. 533, 538-39 (E.D. Ca. 1988) (recognizing the common interest and cooperation between the primary insurer and the reinsured); Vera Democrazia Soc'y v. Bankers' Nat'l Life Ins. Co., 10 N.J. Misc. 632, 633-34, 160 A. 767, 768-69 (1932) (noting that the reinsured and reinsurer must communicate freely and candidly to each other); Cecil E. Golding, The Law and Practice of Reinsurance 69 (5th ed. 1987) ("[T]he intention [of 'follow the fortunes' doctrine] is to set up a kind of community of interest in treaty matters, so that whatever fortune, good or bad, should befall the ceding company should be shared by the reinsurer and whatever the ceding company should decide to do in relation to any treaty matter should be equally binding on the reinsurer, even though it had not been consulted.").

reinsurer bears some responsibility for declaratory judgment expenses, it has no incentive to take anything other than a hard line on arguable demands for coverage. Specifically, it has every incentive to insist that the reinsured company resist coverage as vigorously as possible -- or risk a fight over reimbursement down the line. In contrast, the reinsured company often has an incentive simply to pay the claim (whether covered or not) rather than sustain the full expense of contesting coverage.

Thus, if Constitution Re's position were to prevail, these countervailing incentives would result in a de facto conflict of interest between reinsured and reinsurer. For the same reasons, sparing the reinsurer the costs of coverage litigation, while leaving it every incentive to insist on it, creates a powerful impetus to invoke scarce judicial resources to resolve coverage issues. Surely any such consequence is not in the public interest.

II. The Language of the Reinsurance Certificate Requires Constitution Re to Pay its Proportionate Share of the Costs of the Coverage Action.

These more general considerations find ample support in the express terms of the Reinsurance Certificate. Clause A provides that "[t]he liability of the Reinsurer shall follow that of the Company [Affiliated FM] and shall be subject in all respects to all of the terms and conditions of the Company policy [the Affiliated/Campbell Soup policy]." Relying on this provision, the trial court concluded that Affiliated is barred from recovering declaratory judgment expenses from the reinsurer because such expenses "would not be covered under the Affiliated/Campbell policy." Op. at 7. Stated differently, the trial court posited the following syllogism: (1) the reinsurer's obligations are coextensive with those of the reinsured company under its policy; (2) the reinsured company's investigation and declaratory judgment expenses are not covered under the Campbell Soup policy; and, therefore, (3) the

reinsurer has no obligation to reimburse the reinsured company for these expenses.

This reasoning is demonstrably incorrect, as any reading of the full Certificate readily confirms. By providing that the reinsurer's "liability" is "subject to" the "terms and conditions" of the Campbell Soup policy, Clause A merely articulates the basic indemnity relationship between the parties. That is, the reinsurer's obligations, being derivative, are "subject to" the same limitations on coverage set out in the underlying policy -- for example, the reinsurer cannot be called upon to indemnify the reinsured company if the latter pays an insured for property damage under a life insurance policy.[12]

It simply does not follow, however, that the underlying policy defines the entire universe of the reinsurer's duties to the reinsured. To the

---

[12] Cf. American Ins. Co. v. North American Co. for Property & Casualty Ins., 697 F.2d 79, 81 (2d Cir. 1982); State Auto. Mut. Ins. Co. v. American Re-Insurance Co., 748 F. Supp. 556 (S.D. Ohio 1990); Employers Reinsurance Corp. v. American Fidelity & Casualty Co., 196 F. Supp. 553, 561 (W.D. Mo. 1959).

contrary, Clause D expressly states otherwise. Thus, Clause D provides that "in addition" to its obligation to indemnify Affiliated for losses associated with the underlying litigation, Constitution Re "shall pay its proportion of expenses . . . incurred by [Affiliated] in the investigation and settlement of claims." The intent of the phrase "in addition thereto" could not be plainer: The obligations set out in Clause D are supplemental to -- not limited by -- the more general provisions of Clause A.[13]

Any doubt about this construction is removed by the inclusion of "expenses incurred in the investigation" of claims among the obligations accepted by Constitution Re. That provision must refer to "expenses" entirely apart from any

---

[13] Although the lower court cited to the preamble of the policy, quite appropriately it did not rely on it. The preamble provides that "in consideration of the payment of the premium and subject to terms, conditions, and limits of liability set forth herein . . . , the reinsurer does hereby reinsure the ceding company . . . in respect of the Companies' policies." As the underscored language shows, the "subject-to" language in the preamble references the reinsurance agreement rather than the underlying policy.

"terms" or "conditions" of the underlying Campbell Soup policy. Neither that policy -- nor any other of which AIA is aware -- assigns the insurer's coverage-determination expenses to the policyholder. Thus, as the introductory phrase again confirms, such expenses must be "in addition" to any obligations emanating directly from the underlying policy. Any other interpretation would render the provision for investigation expenses entirely superfluous.

Indeed, Constitution Re essentially concedes as much. Its standard practice is to reimburse its reinsureds for investigation expenses, including legal expenses, up to the point that they make the decision to deny coverage. If, however, Constitution Re has a recognized duty to pay some expenses beyond those arising directly under the Campbell Soup policy, then that policy does not define the entire set of its obligations. For this reason as well, the lower court's understanding of the interrelationship of Clauses A and D clause was plainly in error.

The only remaining question then is whether declaratory judgment expenses constitute "expenses (other than office expenses and payments to any salaried employee) incurred by the [reinsured] Company in the investigation and settlement of claims." For several reasons, that question should be answered in the affirmative. As an initial matter, the phrase in parentheses suggests an intent to cover all forms of expenses "other than" those specifically excepted. At the very least, that provision demonstrates that the parties to the agreement knew how to exclude certain forms of expenses when that was their intent. Their failure to exempt litigation expenses thus conveys an expectation that they would be included.

Moreover, drawing the line at pre-litigation expenses simply makes no sense. The line between hiring private counsel to render a coverage opinion and hiring them to defend a coverage action is blurry at best -- and certainly finds no support in the policy language, which references both "investigation and settlement" expenses.

Particularly in an era where contested commercial decisions frequently get resolved in a judicial forum, it is naive to draw the line in that fashion. Whether arising in the context of an on-site inspection, a pre-litigation analysis or an adjudication, all monies expended by the reinsured in a good faith effort to resolve the existence of coverage constitute "expenses incurred . . . in the investigation and settlement of claims."

Finally, the nature of the reinsurer/reinsured relationship -- as reflected in both industry practice and nearly two centuries of caselaw -- weigh decisively in favor of interpreting the language in that fashion. As explained in Part I, the structure, purpose, and practical operation of the reinsurance transaction all presuppose that the burdens of coverage litigation will be borne by reinsurer and reinsured alike.

For all of these reasons, the trial court's holding that declaratory judgment expenses are not reimbursable as a matter of law is unsupportable. To the extent the Court finds the phrase

"investigation and settlement expenses" to be less than entirely self-evident, at most this would justify development of a more complete record concerning industry practice and the parties' intent. While AIA believes such an approach to be unnecessary in light of both the clarity of the language and the structural backdrop against which it is set, a remand for these limited purposes is the only even theoretical alternative to outright reversal.

CONCLUSION

For the reasons set forth above, amicus curiae American Insurance Association respectfully requests this Court to reverse the decision below.

Respectfully submitted,

Rosanna Sattler
BBO No. 442760
Jeffrey W. Armstrong
BBO No. 547160
POSTERNAK, BLANKSTEIN
& LUND
100 Charles River Place
Boston, MA 02114
(617) 367-9595

OF COUNSEL:

Thomas W. Brunner
Christopher D. Cerf
John C. Yang
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Attorneys for
Amicus Curiae
American Insurance
Association

February 25, 1993

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 1993, a true and correct copy of the foregoing Motion for Leave to File Brief of the American Insurance Association as Amicus Curiae in Support of Plaintiff-Appellant Affiliated FM Insurance Company was served by first-class U.S. mail, postage prepaid, upon the following persons:

Rosemary Connolly
ROBINS, KAPLAN, MILLER & CIRESI
P.O. Box 710 Back Bay Station
Boston, MA 02117-0710
(617) 267-2300
Attorney for Affiliated FM Insurance Company

Mitchell S. King
MORRISON, MAHONEY & MILLER
250 Summer Street
Boston, MA 02210
(617) 439-7500

Leslie Scism, Tight-Fisted Insurers Fight Their Customers To Limit Big Awards, Wall Street J., Oct. 15, 1996 at 1.

THE WALL STREET JOURNAL.

TUESDAY, OCTOBER 15, 1996

Disputed Claims

Tight-Fisted Insurers Fight Their Customers To Limit Big Awards

AIG Shows How One Firm Can Battle Policyholders; It Says It's Being Prudent

'Like Pulling Hen's Teeth'

By LESLIE SCISM
Staff Reporter of THE WALL STREET JOURNAL

When the Canutillo Independent School District was sued for negligence by parents of five elementary-school students who were sexually abused by a teacher, it expected a protracted court battle.

What the Texas district didn't anticipate was that its biggest adversary would be its own insurance company. Three years after the parents were paid $1 million in a settlement, the poor, mostly Hispanic district near El Paso continues to slug it out with its insurer over who is responsible for that payment.

The insurer, National Union Fire Insurance Co. of Pittsburgh, a unit of industry giant American International Group Inc. of New York, emphatically maintains that at least three policy exclusions free it from any obligation. In its pursuit of the case, it has racked up two federal court orders compelling it to produce discovery material for Canutillo lawyers, plus a contempt citation and a $1,000 sanction for failing to do so.

A U.S. District Court jury in El Paso last year awarded the school district $7 million, mostly representing punitive damages against the insurer. National Union is appealing that award, and the case could drag on for months.

$1 Billion a Year

The school district is hardly alone in discovering that, sometimes, the only way to cash in on those hefty insurance premiums is to haul a carrier into court. Risk managers, insurance brokers and lawyers who specialize in representing policyholders report a growing fierceness on the part of many large insurers. One big insurance-trade group, the American Insurance Association in Washington, D.C., conservatively estimates that insurers are spending at least $1 billion a year on legal spats with customers, while just over a decade ago it didn't even bother to calculate such a figure.

The fractiousness has fueled the growth of bar-association committees, trade publications like Insurance Litigation Reporter and legal and consulting firms specifically devoted to such fights. "Demand for our services has just gone wild," says Robert Hughes, a Dallas insurance consultant whose Robert Hughes Associates Inc. often helps litigating policyholders.

'Prove-It Attitude'

More and more, insurers are defining the coverage offered in their policies as narrowly as possible. It is what Alan Levin, a property-and-casualty-insurance specialist at Standard & Poor's Corp.'s Insurance Ratings Group, calls a "prove-it attitude: You say it's covered, prove it."

Indeed, in the Canutillo case, U.S. District Judge David Briones found that the insurer's interpretation of its so-called errors-and-omissions liability policy (a form of professional-malpractice insurance) didn't cover "a single category of potential damages under Texas law." National Union vehemently disputes Judge Briones's finding, arguing that the policy covers a wide range of claims, but decidedly not Canutillo's.

Many industry observers attribute the new litigiousness to the financial squeeze on business insurers resulting from nine years of weakening premium rates and fierce competition.

Continued

Tight-Fisted Insurers Fight Customers

Battling customers in court can be a money-losing proposition, of course. Many insurers during the past few years have been hit with damage awards that run into the millions. Besides AIG's National Union, these include units of Chubb Corp., the Farmers Insurance Group unit of B.A.T Industries PLC, Liberty Mutual Insurance Co., and State Farm Group. Other insurers, including Aetna Casualty & Surety Co., now part of Travelers/Aetna Property-Casualty Corp., have been goaded by adverse judicial rulings into costly settlements.

The Paul Masson of Insurance

Still, insurers find these battles well worth the risk. In many instances, juries conclude the insurers were justified in denying coverage. Also, many rejected claimants don't bother to sue, and those who do usually don't have the sizable war chests or legal firepower the insurers do.

Few companies, policyholder lawyers contend, personify the no-holds-barred approach as well as AIG, the biggest seller of commercial and industrial coverages with a stunning $134 billion in assets. Its tactics have earned AIG Chairman Maurice R. Greenberg the sobriquet among detractors of the "Paul Masson of the insurance industry" — he pays no claims before their time. The company says that mistaken reputation is being spread by rival insurers and policyholder lawyers.

Like other insurers, AIG contends that it is merely exercising its right to weed out claims for which it shouldn't be responsible. To pay such claims, it says, would violate its obligations to shareholders and other policyholders. It maintains that it pays legitimate claims swiftly, and there is no question that it shells out staggering amounts to customers; last year, the claims-settlement bill in the U.S. hit $4.6 billion.

Far from preying on unsophisticated

Please Turn to Page A5, Column 1

Continued From First Page

policyholders, the company asserts that it is often the victim of greedy lawyers seeking big fees. Attorneys working on a contingency basis frequently file suits against AIG and other insurers "on the flimsiest of grounds," says Stanton F. Long, a top AIG claims executive.

Still, the company stresses that litigated disputes actually represent only an "infinitesimal fraction" of total claims. AIG says it currently faces about 550 cases in which negligent or unfair claims handling is alleged, out of 400,000 pending claims.

Undoubtedly, many clients are satisfied with AIG's claims handling, which helps explain why the insurer's premium volume last year grew about 6% — roughly double the industry's sluggish pace. AIG's various financial-services units together earned $2.51 billion in 1995, on $25.87 billion in revenue.

"We expect them to be tight-fisted, because if they're not, then our premiums are too high," says Virgil Moon, comptroller of Cobb County, Ga., an AIG liability-insurance client for the past five years. "I don't expect them to roll over and pay everything that's submitted," he says, adding that, so far, the county feels it "probably got treated as fair as we expected."

Some longtime AIG customers say they have learned to brace themselves for a fight whenever a big claim is involved. (Complaints against AIG mostly focus on claims approaching and exceeding $1 million, insurance brokers and policyholder lawyers contend.)

IMC Global Inc., a Northbrook, Ill., chemicals company, sued in early 1993 in a state court in Houston after AIG threatened not to pay a $25 million claim over a 1991 explosion at a plant in Sterlington, La., that killed eight people and injured more than 100 others. AIG initially said the policy might not kick in because of issues surrounding IMC Global's control of the factory under a complicated leasing and management arrangement. Several months after the suit was filed, the insurer settled for the full $25 million. AIG declines to explain its turnabout.

A5 Continued

Attributes Outweigh Downside

"I'm not being an apologist for AIG," says Dennis Flynn, risk manager for IMC Global. "There are days I'd just as soon shoot at them with a high-caliber weapon as shake their hands." But he believes the insurer's list of attributes — it sells some of the industry's most complex insurance packages, prices basic coverages competitively and carries the industry's highest financial-strength rating — is enough to overcome "the nature of the beast."

But not all once-exasperated customers are as loyal as Mr. Flynn. "We're not buying from AIG, and I would seriously hope I didn't ever have to," says David Lasseter, risk manager of State Industries Inc., a water-heater maker in Ashland City, Tenn. After a court awarded $7.4 million in the case of an Alabama teenager who died from carbon-monoxide poisoning allegedly due to a defective water heater, AIG sued State Industries and Mr. Lasseter personally in state court in Lowndes County, Ala., to avoid responsibility for its portion of the award.

AIG claimed State Industries hadn't reasonably tried to resolve the product-liability suit out of court, and once in court, that AIG hadn't been properly consulted about its handling. AIG declined to comment on why it dropped the suit late last year. It has paid its portion of the claim.

AIG's National Union has also watched its commanding lead in errors-and-omissions insurance for schools shrink during the past three years. In the wake of the Canutillo case and similar ones involving sexual misconduct by teachers in Durham, N.C., and Pittsburgh, National Union decided to specifically exclude coverage for negligence and civil-rights-violation suits involving harm to children from sexual abuse. That move, along with other revisions, helped prompt a national association of school officials to yank its recommendation of National Union's "School Leaders" policy.

"I would call it a divorce," August Steinhilber, general counsel of the National School Boards Association, says of the group's split with National Union. "We just couldn't get along, and I was so happy when we no longer endorsed them, because I didn't have to answer the phone [to hear] complaints from across the United States" on a range of insurance issues.

AIG maintains it lost the association's recommendation because, among other things, it refused to pay a fee of several-hundred-thousand dollars demanded by the group for its endorsement of the insurance product. Mr. Steinhilber denies that such a payment was ever requested of the insurer.

For every bad-faith award against AIG, the company wins other rounds. In May, the U.S. Court of Appeals for the First Circuit ruled in the insurer's favor in a coverage dispute in New Hampshire over one of its $1 million School Leaders policies. That case involves allegations that the Winnacunnet Cooperative School District was negligent in hiring and supervising a high-school teacher who manipulated several students into murdering her husband. (The case made the teacher, Pamela Smart, a tabloid celebrity, and was the basis for a 1991 TV movie and the Nicole Kidman film "To Die For.")

In fighting some big claims, one of AIG's hallmarks is a tough resistance to turning over material sought during the legal-discovery process.

Three days before trial was scheduled to begin in U.S. District Court in Greensboro, N.C., this past February in a coverage dispute with a municipal policy holder, National Union still hadn't produced some material under a six-week-old court order. The dallying so exasperated federal Judge N. Carlton Tilley Jr. that he took an extraordinary step: He dispatched an investigator to AIG's New York headquarters to report back on why the material hadn't been forthcoming.

'Bitter and Personal'

While the probe turned up no evidence that AIG was hiding any damaging information, the judge in August admonished AIG that he was "deeply troubled" by the legal hair-splitting of the carrier's outside attorneys, even as the company made "no reasonable effort" to compile the requested material. He accepted the insurer's offer to pay the $8,500 inquiry cost in lieu of other sanctions. "It was bitter and personal, and getting anything out of them was like pulling hen's teeth," says Jonathan Maxwell, county attorney for the municipality involved in the case, Guilford County, N.C.

In the end, county officials settled the case out of court. While Guilford County officials felt their prospects before a jury were bright, they thought it was prudent to accept a pact offered by National Union.

Continued

That agreement, which saddled National Union with costs of up to $1 million, essentially made the county whole for costs it incurred in resolving a negligence and breach-of-contract suit.

An AIG spokesman says the settlement reflected the realities of the cost of litigation rather than any change of heart it had about denying coverage. As for being slow to respond to the county's discovery requests, AIG says it had trouble compiling the material and wasn't trying to disobey the court.

But the Guilford County officials are not the only ones who have run into a brick wall when seeking discovery materials from AIG. When the owners and manager of a Houston apartment complex were sued in 1993 in state court in Houston for allegedly exposing tenants to pesticides, AIG issued eight objections to their requests to see their insurance policies. AIG maintained that the requests were irrelevant, unduly burdensome and vague.

The $50,000 File

AIG eventually relented, but the insurer's attorney, Ronald E. Tigner of Houston, didn't surrender quietly. One letter from him to the policyholders' lawyers warned in no uncertain terms that "the issue of discoverability" of a file with material about AIG's resolution of claims from some tenants who alleged pesticide injuries "will make another tour through the Texas appellate process before it will, if ever, cross your desk."

Charles Kelly and Douglas Sutter, the policyholders' attorneys in Houston, figure they spent $50,000 to obtain that file. That could be a bargain. Last year, they won a $16.5 million bad-faith and mostly punitive jury award against National Union.

The jury verdict hasn't been entered as a judgment yet, however. Two months after the trial ended, a former secretary for the insurer's attorney surfaced, claiming that National Union representatives had, among other things, concealed material that the policyholders' lawyers had sought and filed a false affidavit.

The allegations of misconduct have been referred to the State Bar of Texas, but it isn't yet known what impact, if any, they will have on the $16.5 million award. National Union, and other parties involved in the dispute, decline to comment because of a gag order imposed on them while the matter is in the hands of a state judge. AIG's attorney, Mr. Tigner, also declined to comment, citing the same gag order.

WASHINGTON ADMINISTRATIVE CODE
TITLE 284. INSURANCE COMMISSIONER
CHAPTER 284-30. TRADE PRACTICES
ENVIRONMENTAL CLAIMS
Current with amendments adopted through 4-7-1999

284-30-940. Environmental claim mediation program.

The commissioner has found and hereby defines it to be an unfair act or practice or an unfair method of competition for an insurer to fail to participate in good faith in nonbinding mediation requested by an insured concerning the existence, terms, or conditions of a lost policy, or regarding coverage for an environmental claim.

(1) The insured may request in writing that the insurer participate in nonbinding mediation.

(2) Upon request from an insured for nonbinding mediation, an insurer shall provide an insured with information concerning an environmental claim mediation program. The information shall include, but need not be limited to, a description of how an insured can efficiently commence a mediation program.

(3) The purposes of mediation shall include, but need not be limited to, the following:

(a) To assist the parties in resolving disputes concerning whether or not a general liability insurance policy applicable to the environmental claim was issued to the insured by the insurer or concerning the relevant terms, conditions, and exclusions of the policy;

(b) To determine whether the entire claim, or a portion thereof, can be settled by agreement of the parties;

(c) If the claim cannot be settled, to determine whether one or more issues can be resolved to the satisfaction of the parties; or

(d) To discuss any other methods of streamlining or reducing the cost of litigation.

(4) Mediation shall be conducted pursuant to mediation rules similar to those of the American Arbitration Association, the Center for Public Resources, the Judicial Arbitration and Mediation Service, RCW 7.70.100, or any other rules of mediation agreed to by the parties.

(5) Unless otherwise agreed, information provided and statements made by either party in a mediation shall be kept confidential by the parties and used only for purposes of the mediation in accordance with RCW 5.60.070.

(6) Insureds and insurers shall have representatives present, or available by telephone, with authority to settle the matter at all mediation sessions.

Statutory Authority: RCW 48.02.060, 48.30.010, 48.01.030, 48.05.280, 48.15.100 and 48.15.170. 95-09-014 (Order R 94-30), S 284- 30-940, filed 4/10/95, effective 5/11/95.

WA ADC s 284-30-940
END OF DOCUMENT

WASHINGTON ADMINISTRATIVE CODE
TITLE 284. INSURANCE COMMISSIONER
CHAPTER 284-30. TRADE PRACTICES
ENVIRONMENTAL CLAIMS
Current with amendments adopted through 4-7-1999

284-30-920. Procedures for resolving lost policy disputes regarding environmental claims.

The commissioner has found and hereby defines it to be an unfair act or practice or an unfair method of competition for an insurer to fail to investigate thoroughly and promptly all claims of lost policies. It is also an unfair practice or an unfair method of competition for an insurer to fail to provide all facts known or discovered during an investigation concerning the issuance and terms of a policy, including copies of documents establishing such facts, to an insured claiming coverage under a lost policy. A single violation of this section may be deemed by the commissioner to be an unfair act or practice or an unfair method of competition. The following procedures are minimum standards for the facilitation of reconstructing a lost policy and determining its terms. These procedures do not create a presumption of coverage for the loss once the contract is reconstructed.

(1) Within fifteen working days after receipt by the insurer of notice of a lost policy, an insurer shall commence an investigation into its records, including its computer records, to determine whether it issued the lost policy. If the insurer determines that it issued the policy in question, it shall promptly commence an investigation into the terms and conditions relevant to the environmental claim.

(a) For purposes of this section, 'notice of a lost policy' means written notice of the lost policy in sufficient detail to identify the person or entity seeking coverage, including information concerning the name of the alleged policyholder, if known, together with material facts known to the insured concerning the lost policy.

(b) Insureds and insurers shall fully cooperate with each other in the investigation of lost policy issues.

(i) Each shall provide to the other facts known or discovered during an investigation, including the identity of any witnesses with knowledge of facts related to the issuance or existence of a lost policy.

(ii) Each shall provide the other with copies of documents establishing facts related to the lost policy.

(iii) Neither an insured nor an insurer shall be required to produce material subject to the attorney-client privilege or the work product doctrine, or confidential claims documents provided to the insurer by another policyholder.

(2) If the insurer discovers information tending to show the issuance of a policy applicable to the claim, the following procedures shall apply:

(a) If the insurer is able to determine the terms of the policy, upon request the insurer shall provide to an insured an accurate copy or reconstruction of the policy or the portions of the policy located.

(b) If after diligent investigation the insurer is not able to locate all or part of the policy or to determine the terms, conditions, or exclusions of the policy, the insurer shall provide copies of all insurance policy forms potentially applicable to the environmental claim issued by the insurer during the applicable policy period. The insurer shall state which of the potentially applicable forms, if any, is most likely to have been issued and why, or alternatively, shall state why it is unable to

identify the forms after a good faith search. Providing copies of forms and meeting the standards of this section, is neither an admission by an insurer that a policy was issued or effective, nor, if a policy were issued, that it was necessarily in the form produced, unless the insurer so states.

(c) If it is concluded that a general liability insurance policy more likely than not was issued to the insured by the insurer, and neither the insured nor the insurer can produce any evidence which may tend to show the policy limits applicable to the policy, it shall be assumed, in the absence of other evidence, that the minimum limits of coverage offered by the insurer during the period in question were purchased by the insured.

Statutory Authority: RCW 48.02.060, 48.30.010, 48.01.030, 48.05.280, 48.15.100 and 48.15.170. 95-09-014 (Order R 94-30), S 284- 30-920, filed 4/10/95, effective 5/11/95.

WA ADC s 284-30-920
END OF DOCUMENT

Westlaw.

WASHINGTON ADMINISTRATIVE CODE
TITLE 284. INSURANCE COMMISSIONER
CHAPTER 284-30. TRADE PRACTICES
ENVIRONMENTAL CLAIMS
Current with amendments adopted through 4-7-1999

284-30-930. Specific unfair environmental claims settlement or trade practices defined.

The commissioner has found and hereby defines the following acts or practices related to the settlement of environmental claims to be unfair methods of competition or unfair or deceptive acts or practices in the conduct of the business of insurance. A single violation of this section may be deemed by the commissioner to be an unfair claims settlement practice, an unfair trade practice, or an unfair method of competition.

(1) Failure to pay interest at the statutory rate as set by the state treasurer from time to time, pursuant to RCW 19.52.025:

(a) On payments that an insured has made and which the insurer is legally obligated to pay as damages: Provided however, That interest shall begin to accrue only when a claim is presented or payment is made by the insured, whichever is the later; or

(b) On overdue payments that an insurer agreed to make pursuant to an agreed settlement with an insured: Provided however, That interest shall begin to accrue on the thirty-first day after the date of the settlement or the agreed time, if later.

(2) Failure of an insurer to commence investigation of an environmental claim within fifteen working days after receipt of a notice of an environmental claim.

(a) Insureds and insurers shall fully cooperate with each other in the investigation of environmental claims.

(i) Each shall provide to the other facts known or discovered during an investigation, including the identity of any witnesses with knowledge of facts related to an environmental claim.

(ii) Each shall provide the other with copies of documents establishing facts related to an environmental claim.

(iii) Neither an insured nor an insurer shall be required to produce material subject to the attorney-client privilege or the work product doctrine, or confidential claims documents provided to the insurer by another policyholder.

(b) An excess insurer may rely on the investigation of a primary insurer.

(3) Failure to make payments, under its duty to defend, for costs reasonably incurred in an investigation to determine the source of contamination, the type of contamination, and the extent of the contamination.

(4) Denying a claim on the basis that the insured expected or intended the damage unless, to the best of the insurer's knowledge, information, and belief, formed after reasonable inquiry, the insurer's position is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any

improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(5) Denying that there is damage to a site that is listed on the National Priorities List under the Comprehensive Environmental Response Compensation and Liabilities Act of 1980, 42 U.S.C. Sections 6901-6992k, or the hazardous sites list under the Model Toxics Control Act of Washington, chapter 70.105D RCW, if the federal Environmental Protection Agency or the state department of ecology has determined that there is actual damage on the site unless an insurer has evidence that no actual damage occurred. It should not be presumed that only sites on the National Priorities List or the hazardous sites list have environmental damage requiring action.

(6) Requiring the insured to provide answers to repetitive questions and requests for information concerning matters or issues unrelated to the insured's environmental claim. This does not prevent an insurer from clearly reserving its rights as to information that is not available at the time of the correspondence.

Statutory Authority: RCW 48.02.060, 48.30.010, 48.01.030, 48.05.280, 48.15.100 and 48.15.170. 95-09-014 (Order R 94-30), S 284- 30-930, filed 4/10/95, effective 5/11/95.

WA ADC s 284-30-930
END OF DOCUMENT