No. 05-4708
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GENERAL REFRACTORIES COMPANY
Plaintiff – Appellant,
v.

FIRST STATE INSURANCE COMPANY, et al.
Defendants – Appellees.

ON APPEAL FROM THE ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED SEPTEMBER 26, 2005 AND OCTOBER 27, 2005 AT CIVIL ACTION NO. 04-CV-3509

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT GENERAL REFRACTORIES COMPANY

John N. Ellison, Esq. (ID. No. 51098)
Michael Conley, Esq. (ID. No. 54142)
Jocelyn A. Gabrynowicz, Esq. (ID. No. 93372)

Anderson Kill & Olick, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA. 19103
Tele: (215)568-4202
Fax: (215)568-4573

OF COUNSEL:
Amy Bach, Esq.
Law Offices of Amy Bach
42 Miller Avenue
Mill Valley, CA 94941
Tele: 415-393-9990

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders ("UP") is a not-for-profit corporation founded in 1991 as an educational resource for the public on insurance issues and insurance consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c) (3). UP is based in California but operates nationwide and is funded by donations and grants from individuals, businesses, and foundations and governed by an eight-member Board of Directors. UP contributes on an ongoing basis to the formulation of insurance related public policy at both the national and state level.

UP exists because businesses and individuals rely on the insurance they buy to protect themselves; their property and their livelihoods against the risk of loss and insurance companies are in business to earn profits by assuming that risk. Insurance is a regulated industry because of this dynamic and the fact that the financial security insurance policies provide is an integral part of the fabric of our society and economy.

UP monitors the insurance sector, works with public officials, has a nationwide network of volunteers and affiliate organizations, publishes written materials, files *amicus* briefs in cases involving coverage and claim disputes and is a general information clearinghouse on consumer issues related to commercial and personal lines insurance products. UP provides disaster aid to property owners across the U.S. via educational activities designed to illuminate and demystify the

claim process. For more information about UP, please visit www.unitedpolicyholders.org

In this brief, United Policyholders seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." Miller-Wohl Co. v. Commissioner of Labor & Indus., 694 F.2d 203, 204 (9th Cir. 1982). This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)).

United Policyholders has filed over one hundred and thirty five *amicus* briefs since it was founded. UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in Humana Inc. v. Mary Forsyth, 525 U.S. 299 (1999). UP was the only national consumer organization to submit an *amicus* brief in the landmark case of State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). Arguments from our *amicus curiae* brief were cited with approval by the California Supreme Court in Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999), and discussed in Julian v. Hartford Underwriters Ins. Co., 110 P.3d 903 (Cal. 2005). UP's *amicus* brief factored into the decision in Watts Industries, Inc.

v. Zurich American Insurance Co., 121 Cal. App. 4th 1029 (Cal. App. 2d Dist. 2004).

United Policyholders has filed *amicus* briefs on numerous insurance cases decided by Pennsylvania state and federal courts, such as Sunbeam Corp. v. Liberty Mutual Insurance Co., 781 A.2d 1189 (Pa. 2001); Lititz Mutual Insurance Co. v. Steely, 785 A.2d 975 (Pa. 2001); Birth Center v. St. Paul Cos., Inc., 787 A.2d 376 (Pa. 2001); Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Insurance Co., 825 A.2d 641, 643-44 (Pa. Super. Ct. 2003), *alloc. granted*, 848 A.2d 925 (Pa. 2004); Willow Inn, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224, (3d Cir. 2005); and Hollock v. Erie Ins. Exchange, 842 A.2d 409 (Pa. Super. Ct. 2004), *alloc. granted,* 878 A.2d 864 (Pa. 2005); and.

II. STATEMENT OF THE CASE

Contrary to Pennsylvania law and Third Circuit precedent, the district court in General Refractories Co. v. First State Insurance Co., Civ. A. No. 04-3509, 2005 WL 2405969 (E.D. Pa. Sept. 27, 2005), granted the insurance companies' motion to dismiss for failure to join other insurance companies from which the policyholder was not seeking any insurance coverage as indispensable parties. While far from clear, it appears that the district court ruled that all absent insurance companies that sold policies to GRC during the relevant time are indispensable parties. Importantly, the court's ruling on indispensability ignores prevailing

Pennsylvania law on allocation of responsibility among insurance companies, as well as the impact of insurance company insolvencies or prior settlements with the policyholder on a Pennsylvania policyholder's ability to have a forum in which to enforce its insurance coverage rights.

The practical implications for Pennsylvania policyholders are many, but the big picture is that the court's holding could force the unnecessary docket congestion and burden on courts of naming potentially dozen of parties to a litigation that do not need to be named because a policyholder must sue all of its insurance companies in every single coverage action it undertakes. The court's holding eviscerates Pennsylvania law regarding a policyholder's right to "pick and choose" the insurance company responsible for providing coverage for a particular claim and could make coverage actions cost prohibitive for policyholders. In addition, the ruling effectively may deprive policyholders of a forum because in order for a policyholder to pursue a declaratory judgment action in Pennsylvania state court, the policyholder must join all underlying injured claimants under the ruling in Vale Chemical Co. v. Hartford Accident and Indemnity Co., 516 A.2d 684 (Pa. 1986) ("Vale Chemical"). Since may coverage disputes involve underlying claimants having no connection to Pennsylvania whatsoever, policyholders cannot satisfy Vale Chemical's requirement because no jurisdiction exists in a Pennsylvania state forum over those individuals.

III. ARGUMENT

Since the 1980s, General Refractories Company ("GRC") has been sued in tens of thousands of asbestos cases throughout the United States. At various times GRC has sought coverage and obtained insurance coverage for these claims. In some instances, GRC has had to resort to litigation to obtain coverage. See, e.g., General Refractories Co. v. Travelers Ins. Co., Civ. A. No. 88-2250,1988 WL 136317 (E.D. Pa. Dec. 15, 1988) (GRC brought suit against three primary insurance companies seeking a declaratory judgment relating to asbestos coverage); General Refractories Co. v. Travelers Ins. Co., Civ. A. No. 88-2167, 1994 WL 192064 (E.D. Pa. May 17, 1994) (reflecting that GRC brought a declaratory judgment action against Travelers and that Travelers filed a third party complaint against National Union); General Refractories Co. v. Allstate Ins. Co., Civ. A. No. 89-7924, 1994 WL 246375 (E.D. Pa. June 8, 1994) (GRC brought a declaratory judgment action seeking to determine its rights under various excess liability insurance policies).

In July 2004, having exhausted its coverage under policies without any asbestos-related exclusions, GRC instituted the instant declaratory judgment action involved in this appeal against sixteen of its insurance companies that had sold policies to GRC for the years 1979 to 1986. GRC's primary argument against the insurance companies was that each of the sixteen insurance companies had

invalid asbestos-related exclusions contained in their policies. GRC did not sue every single insurance company that had sold it policies during 1979 through 1986. GRC chose not to sue those insurance companies whose policies were already subject to settlements and releases. GRC chose not to sue those insurance companies that had been declared insolvent. GRC chose not to sue those insurance companies whose policies had already exhausted. GRC also chose not to sue those insurance companies that would destroy diversity. (See GRC's Appellate Br. at 2-3).

Policyholders like GRC routinely bring coverage actions against their insurance companies when they are denied coverage under their policies. Insurance companies routinely deny policyholders coverage under their policies. Claims exceeding $10 million are seldom resolved without litigation.[1] In fact, the insurance industry admits that it spends over $1 billion a year battling their policyholders in court.[2]

Policyholders like GRC often file suit against specific insurance companies rather than against every single insurance company that might provide

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[1]Richard A. Archer, *Preparing For A 'Mega-Loss'*, Bus. Ins., Oct. 10, 1994 at 23. Mr. Archer is the retired deputy chairman of Jardine Insurance Brokers, Inc.

[2] See L. Brenner, *The Polluted Open Box*, Corp. Fin., June/July 1995 at 34, 35 ("No matter what the policy language, if there's a significant seven-digit claim, it's not going to be covered [by the policyholder's insurance company]."); See also Eugene R. Anderson, et al., *Insurance Nullification By Litigation*, Risk Mgmt., Apr. 1994, at 46. (Mr. Anderson is the name partner in the firm representing United Policyholders).

coverage. Proceeding against specific insurance companies makes sense for policyholders, and indeed, in Pennsylvania, it is a policyholder's right to do so.

A. The District Court's Ruling Is Contrary To Pennsylvania Law and Third Circuit Precedent Upholding Policyholders' "Pick and Choose" Rights.

The district court erroneously granted the insurance companies' motion to dismiss for failure to join an indispensable party and dismissed the case as to all defendants. The court's ruling deprives Pennsylvania policyholders of rights under Pennsylvania law to "pick and choose" which triggered policy will respond to a loss.

Under Pennsylvania law, a policyholder can "pick and choose" which triggered liability insurance policy will respond to a loss, exhaust the limits of liability of that policy, and then continue to select policies until its liability is fully reimbursed through insurance proceeds.[3] In J.H. France, the Pennsylvania Supreme Court vested in the policyholder the sole right to determine when to trigger any particular policy:

> [W]e conclude that each insurer which was on the risk during the development of an asbestosis-related disease is a primary insurer. In order to accord [the policyholder] the coverage promised by the insurance policies, [the policyholder] should be

[3] J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 509 (Pa. 1993). See also ACandS, Inc. v. Aetna Cas. & Sur. Co., 764 F.2d 968 (3d Cir. 1985); Air Prods. & Chems. v. Hartford Acc. & Indem. Co., 25 F.3d 177 (3d Cir. 1994) (rejecting chronological and seriatim allocation).

> free to select the policy or policies under which it is to be indemnified.
>
> * * *
>
> When the policy limits of a given insurer are exhausted, [the policyholder] is entitled to seek indemnification from any of the remaining insurers which was on the risk during the development of the disease. Any policy in effect during the period from exposure to manifestation must indemnify the insured until its coverage is exhausted.

J.H. France, 626 A.2d at 508-09.

Thus, in Pennsylvania, a policyholder is "free to select the policy or policies under which it is to be indemnified." J.H. France, 626 A.2d at 508-09. Once the limit of one triggered policy is exhausted, the policyholder defending asbestos claims is "entitled to seek indemnification from any of the remaining insurers which was on the risk during the development of the disease." Id. Because GRC's policies have been triggered by the exhaustion of "underlying insurance," GRC is free to select a policy to respond to covered claims.

The Third Circuit reiterated J.H. France's holding in Koppers v. Aetna Cas. & Sur. Co., in the context of excess liability policies:

> We have held today that the [non-settling, non-paying excess insurance company's] liability under their excess policies was triggered as soon as the two directly underlying primary policies were settled, and **that the existence of other primary policies applicable to the indivisible loss was irrelevant for the purpose of resolving the threshold issue of whether [non-settling, non-paying excess insurance company's] policies were triggered.**

Id. at 1455-56 (emphasis added).

B. The Right to Contribution Acquired by an Insurance Company After Payment Does Not Render It Indispensable.

The district court's ruling also ignores law in Pennsylvania with regard to contribution and indemnity claims. After an insurance company pays its obligations under a policy, it can then seek to obtain contribution from other insurance companies through application of the "other insurance" provision or the doctrine of equitable contribution. Id. at 509(?); see also, American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., 951 P.2d 250 (Wash. 1998); Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835, 841 (Ohio 2002); Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) (insurance company responsible for indemnification can seek contribution from other insurance companies), *cert. denied*, 455 U.S. 1007 (1982).

The United States Court of Appeals for the Third Circuit, applying Pennsylvania law as ruled in J.H. France, specifically determined that any such redistribution of burdens among insurance companies should take place in a separate action, after the policyholder obtains full coverage. Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1454 (3d Cir. 1996)

> "Under J.H France, the insured gets indemnified first (pursuant to the insuring agreements) and then the insurers may seek to redistribute the burden among themselves. It is only at this later stage that the 'other insurance' clauses become relevant, so

> the London Insurers exhaustion argument based on the 'other insurance' clause must be rejected."

The Pennsylvania Supreme Court has determined that when several insurance companies are liable for a particular loss, their liability is joint and several, and their policyholder, not any of the insurance companies, has the right to select which of the triggered policies will provide coverage for any particular loss:

> When the policy limits of a given insurer are exhausted, J.H. France is entitled to seek indemnification from any remaining insurers which was on the risk during the development of the disease. Any policy in effect during the period from exposure through manifestation must indemnify the insured until its coverage is exhausted.[4]

Although J.H France did not directly resolve the issue because it only dealt with primary insurance policies, the rationale and principles set forth in that case yield a determination that the policyholder also has the option of whether to exhaust horizontally or vertically, because the policyholder, not the insurance company, is free to select which policies pay for which losses.

Additionally, the Pennsylvania Supreme Court determined that the insurance company that is so selected can re-distribute the burden through the application of "other insurance" provisions or the doctrine of equitable

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[4] Id. at 509.

contribution **after** an insurance policy (either primary or umbrella) is selected by the policyholder as the policy under which coverage should be afforded:

> This conclusion [the "pick and choose approach"] does not alter the rules of contribution or the provisions of "other insurance" clauses in the applicable policies. There is no bar against an insurer obtaining a share of the indemnification or defense costs from other insurers under "other insurance" clauses or under the equitable doctrine of contribution.

Id. at 509.

Indeed, the United States Court of Appeals for the Third Circuit, in predicting Pennsylvania law and following the rationale and principles underlying J.H. France, specifically rejected the need for horizontal exhaustion, and determined that such re-distribution of burdens among the various triggered insurance policies should take place in a separate or later proceeding, after the policyholder obtains full coverage:

> [T]he [non-settling, non-paying excess insurance companies] argue that all applicable primary coverage must be exhausted before any excess insurer will be obligated to pay. This argument is predicated on the policies' "other insurance" clauses, which state essentially that all other available insurance must be exhausted first. Under J.H. France, however, a policy which promises to pay "all sums" must provide full coverage once triggered, without regard for such "other insurance" clauses. The court held that it was irrelevant whether other policies were also triggered, concluding that "[t]he insurer in question must bear potential liability for the entire claim." Here, the [non-settling, non-paying excess insurance companies] agreed to pay "all sums" in excess of the specified limits of the directly underlying policies. Once the directly

> underlying coverage has been exhausted, then each excess policy must indemnify the insured for the full excess loss up to policy limits. Under J.H France, the insured gets indemnified first (pursuant to the insuring agreements) and then the insurers may seek to redistribute the burden among themselves. It is only at this later stage that the "other insurance" clauses become relevant ....

Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1454 (3d Cir. 1996) (applying Pennsylvania law) (citations and footnotes omitted).[5]

Contrary to the district court's ruling in this case, the "absent insurance companies" are simply additional insurance companies, beyond those already made party to the suit, who have sold policies covering the subject matter and who could be held jointly and severally liable in states whose law provides for joint and several liability. The statute of limitations on an action for contribution does not begin to run until liability has been adjudged and excess payment has been made. See Resolution Trust Corp. v. Farmer, 836 F. Supp. 1123 (E.D. Pa. 1993); Campbell v. Meadow Gold Products Co., 52 F.R.D. 165 (E.D. Pa. 1971). Likewise, a cause of action for indemnity does not accrue "until the indemnitee's liability is fixed by a judgment against, or payment in settlement by, the indemnitee." Bridgestone/Firestone, Inc. v. Carr's Tire Serv., Inc., Civ. A. No. 90-

[5] Pennsylvania courts have cited Koppers with approval. See Rohm & Haas Co. v. Continental Cas. Co., No. 1449, November Term, 1991, 35 Phila. Cty. Rptr. 193 (C.P. Phila. Cty. Dec. 8, 1997), *aff'd*, 781 A.2d 1172 (Pa. 2001) (attached as Exhibit "A" hereto).

7106, 1992 WL 96303 (E.D. Pa. Apr. 24, 1992) (quoting Thermo King Corp. v. Strick Corp., 467 F. Supp. 75, 77 (W.D. Pa.) *aff'd*, 609 F.2d 503 (3d Cir. 1979)).

Indeed, courts which found that these additional insurance companies were not necessary premised their findings on the fact that the policies involved were each entirely separate policies, not contingent ones, and that any insurance company held liable could and would institute suit against each of the other insurance companies to recover their proportional shares of the liability. Reading Co. v. Travelers Indem. Co., Civ. A. No. 87-2021, 1988 WL 13242 (E.D. Pa. Feb. 18, 1988); Keene Corp. v. Ins. Co., 667 F.2d 1034, 1050-51 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); Brinco Mining, Ltd. v. Federal Ins. Co., 552 F. Supp. 1233 (D.D.C.1982); Continental Cas. Co. v. PPG Indus., Inc., No. 88 C 6076, 1987 WL 6601 (N.D. Ill. Feb. 6, 1987).

C. The District Court Erred In Its Finding That The Absent Insurance Companies Were Indispensable.

The district court failed to make a reasoned determination that the non-joinder of the absent insurance companies makes just resolution of the action impossible. Once jurisdiction has been established, dismissal is disfavored. "As a general rule, courts prefer to avoid dismissing the action. Thus, 'very few cases should be terminated due to the absence of non-diverse parties unless there has been a reasoned determination that their non-joinder makes just resolution of the action impossible.'" Travelers Indem. Co. v. Crown Cork & Seal Co., 865 F.

Supp. 1083, 1088 (S.D.N.Y. 1994) (citing Jaser v. New York Prop. Ins. Underwriting Ass'n, 815 F.2d 240, 242 (2d Cir. 1987)); Rickles, Inc. v. Frances Denney Corp., 508 F. Supp. 4, 7 (D. Mass. 1980) (refusing to dismiss because of the drastic nature of such dismissal); see also Limone v. Condon, 372 F.3d 39, 42 (1st Cir. 2004) (holding that courts should construe all evidence in favor of the party opposing the motion to dismiss); Moldflow Corp. v. Simon, Inc., 296 F. Supp. 2d 34, 45 (D. Mass. 2003) (same).

A quick application of those Rule 19 requirements for necessary parties indicates that:

(1) Complete relief can be afforded the existing parties in the absence of an absent insurance company. Under Pennsylvania law, the liability of all insurance companies on the risk is several, with a policyholder able to pick and choose among all its insurance policies for those he wishes to satisfy the liability at issue. J.H. France, 626 A.2d at 508.

(2) The determination of the existing parties' rights would not impair or impede the absent parties' ability to protect any interest in the subject of the litigation. The effect of *stare decisis*, alone, does not impair an absent party's ability to protect its interest in the sense necessary to make the absent party's joinder necessary. The fact that a decision construing other policies at issue in the case might act as "persuasive precedent" is insufficient to make an insurance

company a necessary party. See Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406-07 (3d Cir. 1993); UTI Corp. v. Fireman's Fund Ins. Co., 896 F. Supp. 389, 393-94 (D.N.J. 1995).

(3) Continuation of this action without the absent insurance companies would not expose any existing defendant to a substantial risk of double, multiple, or otherwise inconsistent obligations. Since, under Pennsylvania law, every insurance company defendant in this action is potentially liable for GRC's entire losses, continuation of this action without the absent insurance companies would pose no risk to any existing Defendants here. See Janney, 11 F.3d at 411-12; UTI, 896 F. Supp. at 394.

D. The District Court's Ruling Could Deprive Policyholders Of A Forum.

Perhaps most importantly, the district court's ruling could deprive policyholders of a forum in which to litigate coverage actions. The final factor listed in Rule 19(b) is "whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder" of the absentee party. Fed. R. Civ. P. 19(b); see Fitzgerald v. Haynes, 241 F.2d 417, 420 (3d Cir. 1957) (The fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible).

Often dismissal is not a hardship because plaintiff will be able to bring the action in another federal court or in a state court, which frequently is a more appropriate tribunal for dealing with local matters than is a federal court. On the other hand, in some cases there may not be an alternative forum in which all interested parties can be joined. For example, suit in a state court may be foreclosed because the applicable limitations period has expired since the institution of the federal action. In this instance, suit in state court is effectively foreclosed to GRC due to the Pennsylvania Supreme Court ruling, requiring joinder of all injured claimants.

In Vale Chemical, the Pennsylvania Supreme Court confirmed that under the Pennsylvania Declaratory Judgment Act, 42 Pa. C.S. § 7540, "underlying claimants must be joined in declaratory action on the issue of coverage":

> Our Supreme Court has consistently held that where claims are asserted against an insured, the persons asserting the claims are indispensable parties in a declaratory judgment action on the issue of coverage between the insured and the insurance carrier. The failure to join a claimant whose interests would be affected has been held to be fatal error.

Id. at 686 (quoting Pleasant Twp. v. Erie Ins. Exch., 348 A.2d 477, 479-80 (Pa. Commw. Ct. 1975)) (emphasis added).

The Vale Chemical rule requiring the joinder of all underlying claimants explains the dearth of environmental insurance coverage actions litigated

in Pennsylvania. This requirement also explains the expensive and innovative legal maneuvering that arises in an attempt to avoid Pennsylvania's joinder requirement. For example, insurance companies have argued that joinder of underlying asbestos bodily injury claimants is not required where a declaration is sought on only already-settled, underlying claims. Travelers Indem. Co. v. Aetna Cas. & Sur. Co., No. 12205, slip op. (C.P. Beaver Cty. Mar. 8, 1996).

The Vale Chemical rule renders GRC's coverage action in state court virtually impossible. GRC has been, and continues to be sued every day, by tens of thousands of claimants seeking recovery for injury due to alleged exposure to asbestos. Many of these claimants have no connection to Pennsylvania and cannot be sued there. In order to pursue coverage against its insurance companies in state court, GRC would be required to join every single asbestos claimant to date, which it cannot do.

E. The Practical Ramifications of the District Court's Broad Finding of Indispensability Compel Reversal.

If affirmed, the practical implications of the district court's ruling for policyholders are many, but the big picture is that the court's holding could force a policyholder to sue all of its insurance companies in every single coverage action it undertakes. Not only is this ruling contrary to Pennsylvania law from a logistical standpoint, this ruling makes absolutely no sense. The district court's ruling

directly contravenes to the mandates of Rule 1 of the Federal Rule of Civil Procedure, which states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action. FED. R. CIV. P. 1.

If this Court affirms the district court's ruling, it could become cost prohibitive for policyholders to seek coverage under their insurance policies. Policyholders that are successful in actions against their insurance companies are able to fund subsequent litigation filed against them. If the policyholder is forced to sue every insurance company at once, it is unlikely in many instances that the policyholder would have the resources to prosecute the case effectively, if at all. In stark contrast to the typical policyholder's experience, an insurance company is a financial colossus with unmatched resources and expertise in insurance coverage litigation.[6] Litigation is the bread and butter of insurance companies. While the insurance company machine can sustain protracted and complicated litigation, the district court's holding would make it impracticable for policyholders to sue their insurance companies.

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[6] *THE FACT BOOK 1998: Property/Casualty Insurance Facts* 5, Insurance Information Institute (1998) (the insurance industry "[a]ltogether . . . has responsibility for assets totaling $3.1 trillion at the end of 1996. The property/casualty segment of the business is responsible for assets totaling $802.3 billion at the close of 1996"). See also, "A World View Of Insurance Insolvency Regulation III", H. Subcomm., 103 Cong. (Comm. Print 1994) (describing insurance as "a $2.3 trillion financial industry....").

The court's sweepingly broad ruling also ignores the effect that an insurance company insolvency could have on the policyholder. One effect is that a policyholder could be barred indefinitely from bringing a coverage action where one of its insurance companies is insolvent and all actions are stayed against it. See 11 U.S.C.A. § 362. Similarly, guaranty associations regularly argue that they are not subject to jurisdiction in states other than those own. See Texas Prop. & Cas. Ins. Guar. Ass'n v. Boy Scouts of Am., 947 S.W.2d 682, 687 (Tex. Ct. App. 1997).

The court's ruling could also have a chilling effect on settlement. Why would insurance companies ever settle with policyholders if they knew that there was a fairly good chance that they would be hailed back into court? Would insurance companies require policyholders to indemnify the insurance companies for defense costs in the event of future litigation as part of any settlement agreement? Courts would likely see an increase of cases going to trial because the cost benefit analysis would be sharply skewed in favor of taking a case to trial.

The sheer number of insurance coverage cases that are litigated—past, present and future—underscore the vast scale of the effect the district court's ruling could have on policyholders, insurance companies, courts, and third party claimants, alike. Insurance companies themselves boast that they have filed "tens

of thousands of briefs across the country in a number of courts and in a vast variety of contents" against their policyholders.[7]

This rule will ultimately hurt third parties that are claimants under the policyholder's policies. The third parties in this instance are underlying claimants who have been injured by asbestos exposure. The outcome of the district court's rule will be to slow down or eliminate payment to the people who need the benefits of the insurance policy the most.

Moreover, the court's ruling will not simplify matters or eliminate multiplicity of litigation. To the contrary, the court's ruling will needlessly complicate matters and will force policyholders and insurance companies to litigate disputes that are not ripe for adjudication, or that the parties do not want to litigate.

IV. CONCLUSION

For the aforementioned reasons, this Court should reverse the district court's decision in General Refractories Company v. First State Insurance Co., Civ.

[7] Eugene R. Anderson et al., *Why Courts Enforce Insurance Policyholders' Objectively Reasonable Expectations of Insurance Coverage*, 5 Conn. Ins. L. J. 335, 383 (1998-1999) (citing Brief and Appendix of *Amicus Curiae* Insurance Environmental Litigation Association (IELA) in Support of Continental Insurance Company, Aetna Casualty and Surety Company and Fireman's Fund Insurance Company of Newark, N.J., at 25, n.21, County of Columbia v. Continental Ins. Co., 595 N.Y.S.2d 988 (App. Div. 3d Dep't 1993), *aff'd*, 634 N.E.2d 946 (N.Y. 1994)).

A. No. 04-3509, 2005 WL 2405969 (E.D. Pa. Sept. 27, 2005) and reinstate GRC's Complaint.

Respectfully submitted,

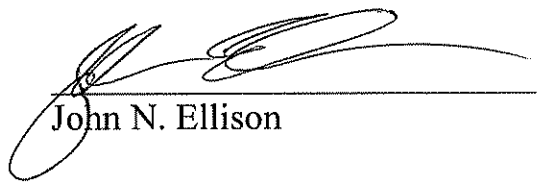
Dated: March 21, 2006

John N. Ellison, Esq. (ID. No. 51098)

Anderson Kill & Olick, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
Tele: (215) 568-4202
Fax: (215) 568-4573

CERTIFICATION OF ADMISSION

I, John N. Ellison, attorney for Amicus Curiae United Policyholders, do hereby certify, in accordance with Local Appellate Rule 28.3(d), that I am admitted to the bar of the Court of Appeals for the Third Circuit.

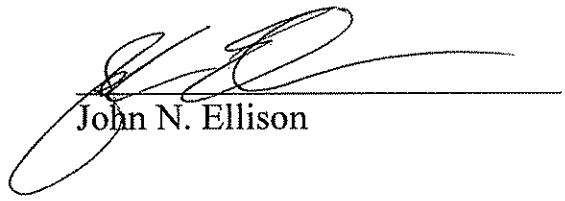


John N. Ellison

CERTIFICATE OF COMPLIANCE

I, John N. Ellison, attorney for Amicus Curiae United Policyholders, do hereby certify, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1, and that this brief, excluding the Title Page, Table of Authorities, Table of Contents and certifications of counsel contains 4,763 words.

The electronic Brief of United Policyholders is identical to the hard copy sent to the Court. The virus software used to check the Brief is Norton Anti-Virus.



John N. Ellison

CERTIFICATE OF SERVICE

I hereby certify that the following documents: Brief of Amicus Curiae United Policyholders In Support of Appellant General Refractories Company; Motion of Amicus Curiae United Policyholders for Leave to File A Brief in Support of Appellants General Refractories Company; and Motion of Amicus Curiae United Policyholders for Leave to File Brief in Support of Appellants General Refractories Company Out of Time was sent by first class mail to the following listed on the attached service list.

Dated: March 21, 2006

John N. Ellison, Esq. (ID. No. 51098)

SERVICE LIST

Francis P. Maneri, Esquire
Dilworth Paxson LLP
3200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103-7595
Phone: (215) 575-7000

Paul M. Hummer, Esquire
Joseph C. Monahan, Esquire
Saul Ewing LLP
1500 Market Street, 38th Floor
Centre Square
Philadelphia, PA 19102
Phone: (2150 972-7788

Jennifer Gallagher, Esquire
Daniel I. Schlessinger, Esquire
Lord, Bissell & Brook, LLP
115 South LaSalle Street
Suite 2900
Chicago, IL 60603
Phone: (312) 443-0600

Karen H. Moriarty, Esquire
Kevin E. Wolff, Esquire
Coughlin Duffy LLP
350 Mount Kemble Avenue
P.O. Box 1917
Morristown, NJ 07962-1917
Phone: (973) 267-0058

Elit R. Flex, III, Esquire
Margolis Edelstein
The Curtis Center, 4th Floor
601 Walnut Street
Philadelphia, PA 19106-3304
Phone: (215) 931-5870

James F. McNaboe, Esquire
Cortner McNaboe Colliau & Elenius
110 Cornwall Road
1st Floor South
P.O. Box 904
Monmouth Junction, NJ 08852
Phone: (732) 398-5401

Howard M. Cyr, Esquire
Paul M. Quinones, Esquire
Harvey Pennington Cabot Griffith & Renneisen, Ltd.
11 Penn Center
1835 Market Street, 29th Floor
Philadelphia, PA 19103
Phone: (215) 575-4141

H. Christopher Bartolomucci, Esquire
William J. Bowman, Esquire
Ann M. Ungvarsky, Esquire
Hogan & Hartson, LLP
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
Phone: (202) 637-5600

Marjorie A. Weiss, Esquire
Gregory T. LoCasale, Esquire
Patricia B. Santelle, Esquire
White & Williams, LLP
1800 One Liberty Place
1650 Market Street
Philadelphia, PA 19103
Phone: (215) 864-7110

Chester F. Darlington, Esquire
Eric A. Fitzgerald, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin
1845 Walnut Street, 18th Floor
Philadelphia, PA 19103
Phone: (215) 575-2600

Wendy E. Schultz, Esquire
Lynberg Watkins, P.C.
International Tower Plaza, 16th Floor
888 South Figueroa Street
Los Angeles, CA 90017
(213) 624-8700

Bradley J. Mortensen, Esquire
Cynthia Ruggerio, Esquire
Christie, Pabarue, Mortensen and Young, P.C.
1880 J.F.K. Blvd., 10th Floor
Philadelphia, PA 19103
Phone: (215) 587-1646

Wendy H. Koch, Esquire
Koch & Corboy
Jenkintown Plaza, Suite 450
101 Greenwood Avenue
Jenkintown, PA 19046
Phone: (215) 881-2282

Tara Stagg, Esquire
Rivkin Radler, LLP
EAB Plaza
Uniondale, NY 11556-0111
Phone: (516) 357-3000

Samuel J. Arena, Jr., Esquire
Kimberly A. Hendrix, Esquire
Stradley, Ronon, Stevens & Young LLP
2600 One Commerce Square
2005 Market Street
Philadelphia, PA 19103-7098
Phone: 215) 564-8000