IN THE SUPREME COURT OF OHIO
CASE NO. 00-1984

The Goodyear Tire & Rubber Company, et al.,	)	On Appeal from the Summit County Court of Appeals, Ninth Appellate District
Appellants,	)	
v.	)	
The Aetna Casualty & Surety Company, et al.,	)	Court of Appeals Case No. 19121
Appellees.	)	

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REPLY ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The Court of Appeals' "pro rata" allocation decision is inconsistent with the insurance industry's prior judicial representations, in which the insurance industry has argued that policyholders are entitled to designate which general liability insurance policies are liable to respond fully to a continuing operation and continuing injury.

Proposition of Law No. 2: The Court of Appeals' "pro rata" decision is inconsistent with the insurance industry's drafting history for standard-form general liability insurance policies, which drafting history sanctions the policyholder's right to designate which general liability insurance policies are liable to respond fully to a continuing injury.

A. The Merit Briefs of the Insurance Companies and the IELA Do Not Even Address Their Inconsistent Positions on the Merits

In their Merit Briefs, the Insurance Environmental Litigation Association ("IELA") and the Appellee Insurance Companies assault United Policyholders for:

> (1) quoting positions the insurance industry has taken through its constituent companies before other judicial bodies supporting a policyholder's right to designate which of multiple triggered general liability insurance policies are liable to respond to continuous injury; and
>
> (2) demonstrating through undisputed drafting history that the insurance industry drafters of the standard-form policy language at issue here intended such language to provide the policyholder with the right to designate which insurance policies are liable to respond to continuous injury.

These previous insurance industry positions – on the same policy language at issue here – directly contradict the position of Appellee Insurance Companies and the IELA in this case: that this Court should create an allocation formula and insert that formula – which the insurance companies purposefully left out – into the policies at issue.

The Appellee Insurance Companies and IELA lodge every conceivable objection to materials showing their previous positions but the important ones. They do not complain that the prior inconsistent positions do not exist. They do not complain that the prior inconsistent positions were quoted improperly. They do not complain that the drafters of the standard-form

language at issue did not, in fact, intend all triggered policies to be jointly and severally liable, or that legions of insurance companies have not, in fact, made this argument before courts nationwide.

Rather than contest the substance of United Policyholders' argument, the Appellee Insurance Companies and the IELA lodge some rather bizarre objections. First, IELA objects to the drafting history as not representing "mutual intent." IELA Br. at 17. This, of course, is contradicted by IELA's own boasts that its constituent members have sold thousands of identically-worded policies in Ohio. IELA Br. at 1 ("IELA's member companies have issued insurance policies to many policyholders, in Ohio and elsewhere, containing provisions identical or similar to those at issue in this case."). Indeed, as IELA well knows, the insurance industry has historically used standard-form policy language, drafted by insurance industry employees and later approved for use by state insurance departments, to facilitate rate-making and to allow for meaningful price comparison among policyholders. Accordingly, the only relevant intent is that of the drafters, or, occasionally, the regulatory departments. See generally Morton Int'l, Inc. v. General Acc. Ins. Co., 629 A.2d 831 (N.J. 1993) (estopping the insurance industry from relying on purported temporal element to the sudden and accidental pollution exclusion based upon misrepresentations made by insurance industry to regulators). Policyholders have no say in the drafting of the standard-form language they buy on a take-it-or-leave-it basis – if they did, the language would not be standard form – accordingly, IELA's complaint that the materials do not represent mutual intent is nonsensical.

Further, IELA's broad objection to the "extrinsic" nature of the materials cited by United Policyholders is belied by IELA's and Appellee Insurance Companies' own use of such "extrinsic evidence." IELA's brief expounds on the "purpose and role of insurance in our

society" (IELA Br. at 6; see also id. at 19), and the Appellee Insurance Companies' brief discusses and relies upon "the entire underwriting and pricing practices of the insurance industry." Appellee Insurance Companies' Br. at 12. This is "extrinsic evidence" of the "underwriting intent"; it simply is without the benefit of any support but that of the authoring attorney's pen. The true evidence of "underwriting intent" is set forth in the contemporaneous record of the drafting of the standard-form policy language at issue, set forth by United Policyholders. Indeed, if the IELA agrees that "purpose and role" of the insurance policies is at issue, who is a better authority on the "purpose and role" of the insurance policies purchased by Goodyear than the persons that drafted those policies?

Finally, as to complaints about the age of these materials, it is precisely because these materials are old – and reflect what the insurance company drafters and selling companies were saying at the time that the policies were drafted, marketed and sold – that they are important. Such materials are critical because of the peculiarities of the insurance transaction, by which a policyholder purchases (i) a promise set forth in words (ii) the performance of which will take place, if ever, in the future. These characteristics provide enormous temptation to the selling insurance company to "cheat" by promising broad coverage at the point of sale and construing the same coverage narrowly years later at the point of claim.

In other words, purchasing insurance is not like buying a new car. If a customer went to a car dealership and said "I would like to buy a new Super Sports Car for $55,000," and the dealer agreed to provide it for that price, but then brought out a beat-up Econ-O-Box, the buyer would not turn over his check because: (i) he could examine the nature of the product he was buying; and (ii) the transaction was simultaneous. The buyer would reject the tendered Econ-O-Box, and would buy a substitute car at a different dealer. In the insurance context, however,

insurance companies can get away with collecting "Super Sports Car" premiums at the point of sale and providing "Econ-O-Box" coverage at the point of claim because: (i) it is difficult for the policyholder to evaluate the product before it has a claim because the product is a promise and not a tangible product that can easily be inspected; and (ii) the policyholder has no leverage at the point of claim, because it cannot undo the transaction, receive its premium back and buy another policy.[1]

Indeed, the Appellee Insurance Companies are attempting to "sell broadly" and "pay narrowly" in this case. To do so, they conflate the trigger of coverage (property damage during the policy period) with allocation of damages to pay for legal liability imposed because of triggering property damage. For instance, the insurance companies argue that "[e]ach of Goodyear's insurance policies covers only damages incurred during each policy's time period." Merit Brief of Appellees, filed June 11, 2001, at 9. The policies do contain a trigger of coverage: "property damage" must "occur[] during the policy period" for the policy to be triggered. The policies do not contain an allocation provision; rather, the policies promise to pay "all sums which the Insured shall become legally obligated to pay as damages because of ... property damage to which this policy applies." Property damage happening during the policy period "triggers" the policy, or obligates it to respond. Once obligated to respond, the policy must pay "all sums" incurred by the policyholder "as damages."

The policies do not contain an allocation provision obligating the insurance companies to pay "only those sums imposed as damages for the property damage that occurred during the policy period." As the previous sentence demonstrates, such an allocation provision would have

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[1] IELA argues at length that this Court can serve the "public interest" by construing the policies in an anti-policyholder manner, by giving parties "the proper incentive to enter private agreements." IELA Br. at 1. The insurance policies were all sold years ago; the promises have already been made. There essentially is no coverage available for purchase today for historic pollution damage. What IELA wants is this court to give the stamp of approval to its aim to sell broadly and pay narrowly.

been easy enough to draft. It is not in the policies the Appellee Insurance Companies sold. Their effort to insert it retroactively amounts to "post loss underwriting": the wrongful practice of insurance companies trying to justify a denial of coverage of "waiting until a claim has been filed to obtain information and make underwriting decisions which should have been made when the application was made, not after the policy was issued."[2] To permit the insurance companies, retroactively, to add an allocation provision would be to permit them to collect premiums for a risk, and when that risk materializes, rewrite the policy to exclude it, without refunding the premium.

Indeed, the insurance companies want to enlist the judges in this Court to be their post-loss underwriters – or underwriters by hindsight – urging this Court to "look back" when it already knows the answer. They argue that, in hindsight, any fool would know that the insurance industry in the 1960s and 1970s did not want to insure environmental losses occasioned by the retroactive, strict-liability Superfund statute passed decades later in 1980, just as, in hindsight, every fool knows that no underwriter would insure a ship full of oil captained by an alcoholic captain. Permitting the Appellee Insurance Companies to avoid losses by including hindsight provisions like the allocation provision suggested by the Appellee Insurance Companies would conflict with the basic purpose of insurance: to protect policyholders against the unknown.

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[2] Lewis v. Equity Nat'l Life Ins. Co., 637 So. 2d 183, 186 (Miss. 1994); see also White v. Continental Gen. Ins. Co., 831 F. Supp. 1545 (D. Wyo. 1993).

B. IELA Is No "Friend of the Court," It Is a Friend of the Insurance Companies

Further, United Policyholders notes that the putative "amicus curiae" IELA is not a true "friend of the Court." IELA, routinely described in the trade press as being as insurance industry-backed,[3] does nothing here other than make arguments identical to those of Appellee Insurance Companies; it does not discuss issues otherwise overlooked by the litigants. In contrast, United Policyholders, by limiting itself to subjects outside of precedent and arguments based on case law, has tried to play the role of an amicus curiae. Other courts have rejected IELA's amicus curiae briefs on the ground that it is a markedly partisan organization:

> Having reviewed the IELA's memorandum, the court concludes that the IELA is not appearing as a friend of the court, rather, as their title suggests, the association is a "friend of defendants." Therefore, the court will not permit the IELA to appear as an amicus curiae in this action.

Time Oil Co. v. Cigna Property & Cas. Ins. Co., No. C88-1235R, 1990 WL 515585 (W.D. Wash. April 2, 1990). Indeed, here, IELA's brief includes a Statement of Facts which does not comply with the Supreme Court Practice Rules, which require "[a] statement of facts with page references, in parentheses, to supporting portions of both the original transcript of testimony and any supplement filed in the case . . . ." Rule VI (3)(A). Rather than include a fact section with such citations, IELA includes a highly-charged section that could double as an opening statement. IELA has previously been taken to task for identical conduct:

> [A]n entity identifying itself as the "Insurance Environmental Litigation Association" ("IELA") moved for, and received, leave from this court to file an *amicus curiae* brief in support of [the insurance company]. Describing itself as a "trade association of major property and casualty insurance companies which was formed, in part, to appear in environmentally related insurance coverage cases, and to assist courts in determining important insurance coverage questions," IELA proclaimed it sought "to provide a broad perspective on the environmental insurance coverage questions by highlighting to this Court the important issues at stake, as well as the public policy considerations that reinforce the sound legal

[3] See, e.g., Dave Lenckus, Louisiana Reversal in Pollution Dispute: Court Curbs Exclusion's Scope, Business Insurance, Jan. 8, 2001.

principle that an insurance contract, like any other contract, must be construed according to its terms." Eager for guidance in this bewildering area of the law, this court opened IELA's brief and espied a statement of facts without any page reference to the legal file or transcript. When [the underlying claimants] attacked IELA's brief by pointing out that Rule 84.04(i) requires that all statements of fact have specific page references to the legal file or transcript, IELA responded (without citation of authority) that Rule 84.04(i) "specifically applies to appellants' and respondents' briefs." Without deciding whether IELA is correct in apparently believing *amicus curiae* briefs are immune from Rule 84.04(i), this court humbly observes that where – as in IELA's brief – facts are misstated (as henceforth spelled out), the author of the brief might have gotten the facts straight by examining the record and citing, in the brief, the specific pages where the statements of fact could be verified. IELA's brief declared as a fact that [the policyholder] sued [the insurance company] and the parties "cross-claimed for summary judgment." That assertion was wrong in three respects: (1) [the insurance company] sued [the policyholder and the underlying claimants], (2) no party "cross-claimed" and (3) [the insurance company] sought a declaratory judgment, not summary judgment. When [the underlying claimants] pointed out that litany of errors, IELA – instead of admitting its mistake – curtly replied: "To the extent that [the underlying claimants] disagree with IELA's characterization of the facts, [the underlying claimants] certainly can respond and set forth their characterization in their brief.

Casualty Indem. Exch. v. City of Sparta 997 S.W. 2d 545, 547 n.3 (Mo. 1999).

C. **The Insurance Companies Cannot Be Trusted with Regard to "Case Counting"**

Finally, with regard to Goodyear's statement that "pick and choose" allocation is the "long-standing majority rule throughout the country," IELA claims that "nothing can be further from the truth." IELA Br. at 5. Appellee Insurance Companies refer to "[a]n ever-growing" "majority" of courts rejecting "all sums" allocation. These points are sure to be treated in Goodyear's reply papers; however, United Policyholders notes that the insurance industry simply cannot be trusted with regard to "case counting." Over the past two decades, the insurance industry has attempted to skew the nation's common law in insurance cases by working to vacate unfavorable precedent. Insurance companies often do this by settling with a victorious policyholder for an amount greater than the judgment in exchange for the policyholder's agreement to consent to withdrawal of the opinion.[4] While these policyholders may reap individual bounties, most policyholders are only one-time litigants against insurance companies, and the true benefit is reaped by the IELA's members, institutional litigants who are sued by policyholders hundreds and thousands of times a year:

> Through the use of vacatur, institutional parties, especially insurance companies, have successfully shaped the law in their favor by eradicating pro-policyholder decisions. The process, termed by some "buying and lying," offers attractive settlements to policyholders conditioned upon their agreements to vacate and depublish undesirable opinions. Few insureds can resist such windfall offers and the practice has now become firmly established in some jurisdictions.

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[4] See, e.g., Jill E. Fisch, The Vanishing Precedent: Eduardo Meets Vacatur, 70 Notre Dame L. Rev. 325 (1994); Stacy Gordon, Vanishing Precedents, Business Insurance, June 15, 1992, at 1; Roger Parloff, Rigging the Common Law, American Lawyer, Mar. 1992, at 74; Jill E. Fisch, Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Cornell L. Rev. 589 (1991); Phillip Carrizosa, Making the Law Disappear: Appellate Lawyers Are Learning To Exploit the Supreme Court's Willingness to Depublish Opinions, California Lawyer, Sept. 1989, at 65.

Michael A. Berch. Analysis of Arizona's Depublication Rule and Practice 32 Ariz. St. L.J. 175, 179 n.14 (Spring 2000). United Policyholders simply asks this Court to keep this practice in mind when considering "case counting."

Proposition of Law No. 3: Pro-rata allocation schemes, like that proposed by the Court of Appeals, are unfair and unworkable and lead to endless complications and allocation litigation.

Neither the Appellee Insurance Companies nor the IELA address any of the endless complications which arise when courts attempt to draft allocation schemes and insert them into general liability policies. These complications – which make settling and litigating insurance coverage cases in states which have imposed allocation schemes nearly impossible – are quite real, as opposed to the hypothetical problem identified in Appellee Insurance Companies' Brief, where a policyholder who purchased insurance in only one year out of twenty is treated the same as a policyholder who purchased such coverage in every year. Appellees' Br. at 11. Simply put, such hypothetical policyholders do not exist – corporations like Goodyear buy hundreds of millions of dollars of liability coverageevery year.

Perhaps most instructive as to "scorched earth" tactics to which insurance companies are prone is the following passage, in which IELA argues this Court must impose a retroactively-drafted allocation provision to protect insurance companies from themselves:

> In essence, Goodyear argues that it may pick any one of its insurance policies to cover all damages, and force the chosen insurer to chase after other insurers for reimbursement. Such a joint and several allocation scheme would place unreasonable, and often insurmountable, burdens on the targeted insurer.

IELA Br. at 7. IELA essentially argues that, because insurance companies resist legitimate claims so savagely, it is unfair to require insurance companies to seek contribution from other insurance companies; rather, the "unreasonable" and "often insurmountable" burdens of securing insurance coverage should be borne solely by policyholders like Goodyear.

Proposition of Law No. 4: Travelers should not be permitted to contradict its historic interpretation of its own "expected or intended" pollution exclusion: that the relevant "emission, seepage, release or escape" of waste is not the sending of waste to a landfill but the "emission, discharge, release or escape" of such waste from the landfill.

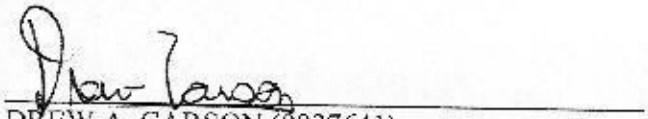
Only IELA objects to United Policyholders' reference to the Travelers Liability Claims Administration Manual and the Travelers Liability Coverage Manual. As with its objections to drafting history and insurance company briefs, it does not attack the substance of United Policyholders' argument: that Travelers told its own claims handlers that the escape of pollutants from a dump site, and not their placement there, was the relevant escape for purposes of its polluter's exclusion. Instead of confronting Travelers' inconsistent positions head on, IELA objects to the claims manuals as "ancient." Of course, the manuals are dated in the mid-1980s, when the underlying claims arose, when Goodyear gave notice of those claims, and when Travelers should have been conducting its investigation of those claims. Furthermore, there is no expiration date on an inconsistent position of Goodyear's party opponent, or of documents which, at a minimum, show alternative reasonable constructions of Travelers polluter's exclusion, necessitating a finding that it is ambiguous, and must be construed against the drafter.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests this Court to reject the Court of Appeals' proposed "primary first" pro-rata allocation scheme, and instead enforce the general liability insurance policy's promise to pay "all sums" which a policyholder becomes liable to pay, the result which the insurance industry intended and for which its constituent members lobbied other courts. Further, Amicus Curiae requests this Court to hold Travelers to its understanding of the policies it sold, expressed in its manuals, reject Travelers' litigation

position, and find that the "release" that must be "expected or intended" to be excluded under Travelers' polluter's exclusion is the release of wastes from where they originally were placed.

Respectfully submitted,



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