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Court of Appeal, Second Appellate District, Division Three - No. B134742

IN THE SUPREME COURT OF CALIFORNIA

HENKEL CORPORATION,
Plaintiff and Appellant,

v.

LLOYD'S OF LONDON, ETC., et al.,
Defendants and Respondents.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF and APPELLANT HENKEL CORPORATION

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PRELIMINARY STATEMENT

This petition for review seeks to reverse a simple, equitable pronouncement by the appellate court: When a successor corporation spends money on its predecessor's behalf to defend and settle liability claims, the predecessor's general comprehensive liability insurance companies must reimburse the successor. The insurance company petitioners would have the court believe that this case is about a predecessor corporation's right to transfer its comprehensive general liability insurance policies to its successor. Petitioners argue that the Court of Appeal's decision adds the successor as an insured on the policy without permission from the insurance company or without compensation to the insurance company for the additional risk. This characterization of the case by the petitioners is misleading. The facts of the case are simple:

Two corporations, the Henkel Corporation and Amchem Products, Inc. ("Amchem No. 1"), were sued in various products liability claims. By means of the following transaction, Henkel was a successor corporation to Amchem No. 1: On December 31 1979, Henkel, through a subsidiary, acquired a corporation called Amchem No. 2, which, until April 1, 1979, had been not a separate corporation but merely a line of business of Amchem No. 1. In the products liability action, Henkel retained counsel for itself and for Amchem No. 1, and in 1995 ultimately settled the claims for $7,650,000. Henkel had notified all appropriate insurers of the litigation and requested defense and indemnification. After the litigation was settled, Henkel attempted to recoup its settlement monies from its insurance companies and from Amchem No. 1's insurance companies.

Henkel successfully argued in the court below that any injury to third parties allegedly caused prior to April 1, 1979, by Alodine, a chemical manufactured by the division of Amchem No. 1's business eventually purchased by Henkel, triggered the general comprehensive liability insurance policies of Amchem No. 1. The insurance

companies which sold those general comprehensive liability policies to Amchem No. 1 from 1959 to 1977, and which collected premiums on those policies, now refuse to reimburse Henkel for the funds it expended to defend and settle claims against Amchem No. 1 for pre-1977 liability to third parties. The insurance companies would much prefer that the court grant them a windfall by allowing them to keep the premiums they collected from 1959 to 1977, but relieving them of the obligation to defend or indemnify Amchem No. 1 for injuries to third parties caused by the line of business that was ultimately purchased by Henkel.

INTEREST OF AMICUS CURIAE

United Policyholders is incorporated as a not-for-profit educational organization and was granted tax-exempt status under §501(c)(3) of the Internal Revenue Code. United Policyholders' mission is to educate the public on insurance issues and consumer rights. United Policyholders provides educational materials, provides speakers at community and government forums, organizes meetings in disaster areas, and acts as a clearinghouse for information on insurance issues.

United Policyholders also provides assistance in large catastrophes. For example, after a disastrous firestorm in 1991 that destroyed over three thousand structures in Oakland and Berkeley Hills, California, United Policyholders sponsored meetings, workshops, and seminars for the victims, and worked with local officials, insurance companies and relief agencies to facilitate claim settlements. United Policyholders has repeated this process in Florida for victims of Hurricane Andrew, in Texas, for victims of the Northridge Earthquake, and for Northern California victims of a wildfire.

United Policyholders also files amicus curiae briefs in insurance coverage

cases of public importance. United Policyholders' amicus curiae briefs have been accepted by courts throughout the country. See, e.g., Humana, Inc. v. Forsyth, 525 U.S. 299, 313-14 (1999) (citing to pages 19-23 of Brief for United Policyholders as Amicus Curiae); Vandenberg v. Superior Court, 21 Cal. 4th 815, 88 Cal. Rptr. 2d 366 (Cal. 1999).

United Policyholders' activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds. This brief has been prepared *pro bono* by United Policyholders' counsel with no contributions from any source.

United Policyholders has a vital interest in seeing that insurance companies do not attempt to shift risk assumed in insurance policies back to their policyholders through allocation schemes unsupported by insurance policies or public policy. United Policyholders has an interest in ensuring that insurance companies live up to their promises to their policyholders.

The issues addressed in the Henkel decision will affect policyholders throughout the State of California and nationwide. United Policyholders seeks to appear as amicus curiae to address certain questions of law presented by this appeal that are of significance well beyond the application of law to the specific facts of this case.

I.

BECAUSE OCCURRENCE POLICIES NEVER EXPIRE, THE INSURANCE COMPANIES ARE SEEKING A WINDFALL

The fundamental characteristic of a general liability policy providing coverage on the basis of an occurrence is that the policy never expires. Claims that are made years after the expiration of the policy period are covered. In the jargon of the insurance industry, occurrence-based policies provide coverage for "long tail claims." To use a familiar example, an occurrence policy issued for the period 1957-59 will provide

coverage for a claim made in 2002 provided the claimant alleges that there was injury during 1957-59. The policy period (1957-59) has expired, but the policy has not. The policy provides coverage in perpetuity. Occurrence-based policies are often contrasted with claims-made policies. A claims made policy would typically provide coverage only for claims made in 1957-59. Insurance companies have long recognized that in issuing occurrence policies, they are issuing policies that will provide coverage in perpetuity, for "occurrences" taking place during the policy period–regardless of when claims are actually filed. Therefore, insurance companies have every reason to expect that an occurrence policy issued to a company like Amchem No. 1 will continue to provide coverage for the liabilities of that company in perpetuity. Coverage will be provided for injury occurring during the policy period, regardless of whether the ownership of the company changes.

The insurance companies here seek a windfall by invoking the "anti-assignment clause." That clause cannot be interpreted to cut-off coverage simply because there has been a change in ownership of the company in question.

II.

ENFORCEMENT OF THE INSURANCE COMPANIES' OBLIGATIONS TO DEFEND AND INDEMNIFY AMCHEM No. 1 COMPORTS WITH THE REASONABLE EXPECTATIONS OF BOTH PARTIES

It is a well-settled principle of insurance law that insurance policies should be enforced so as to comport with the objective reasonable expectations of the parties. AIU Ins Co. v. Superior Court, 51 Cal.3d 807, 822, 274 Cal. Rptr.820, 821 (1990). That is, in cases where the insurance policy language is ambiguous, it is to be interpreted in accordance with the policyholder's objectively reasonable expectations. Id. In the present case, to require the defendant insurance companies to indemnify Amchem No. 1 for its litigation and settlement costs would comport not only with the policyholder's

reasonable expectations but with the insurance companies' expectations as well.

Amchem No. 1 had every reason to believe that it, or anyone expending funds on its behalf, would be reimbursed by its insurance companies for the cost of defending and settling claims arising out of continuous or progressively deteriorating bodily injury which occurred during the period of the policies. Undeniably, this belief was reasonable, given the holding of the California Supreme Court in Montrose Chemical Corp. v. Admiral Ins. Co., 10 Cal.4th 645, 42 Cal.Rptr.2d 324 (1995). In Montrose this Court applied the "continuous injury trigger of coverage," which provides that bodily injury such as that allegedly caused by Alodine - injury which is continuous or progressively deteriorating throughout several policy periods - is potentially covered by all policies in effect during those periods. 10 Cal.4th at 689.

Thus, the general comprehensive liability insurance policies covering Amchem No. 1 from 1959 to 1977 were triggered by injuries which began, continued or deteriorated during the 1959 to 1977 time period. This is the case regardless of when those claims were asserted, and regardless of who subsequently owned the line of business that had produced Alodine. It was reasonable for Henkel to believe that Amchem No. 1's insurance companies would pay the cost of defending and settling claims against Amchem No. 1 arising out of in injuries which began, continued or deteriorated during the period of the policies. The obligations of the insurance companies should not be affected by Henkel's subsequent purchase of the line of Amchem No. 1's business that produced the injury-causing chemical. It was similarly reasonable for Henkel to believe that, if it expended funds on Amchem No. 1's behalf, Henkel would be reimbursed by Amchem No. 1's insurers.

Amchem No. 1's and Henkel's expectations in these circumstances are no different from the insurance companies' expectations. Insurance companies are all aware that they may be called upon to defend and indemnify their policyholders for losses that

have been incurred but have not yet been reported. These losses are referred to in the insurance industry as I.B.N.R. ("Incurred, But Not Reported). Insurance companies deal every day with I.B.N.R. and even deduct I.B.N.R. from their federal and state income taxes. Standard insurance reference works define and discuss I.B.N.R. as follows:

> Incurred but not reported (IBNR) losses-An estimate of the amount of an insurer's (or self-insurer's) liability for claim-generating events that have taken place but have not yet been reported to the insurer or self-insurer. The sum of IBNR losses plus incurred losses provide an estimate of the insurer's eventual liabilities for losses during a given period. [***Risk Financing*** **Appendix F.F4]**
>
> **Incurred But Not Reported.** This refers to losses which have occurred during a stated period, usually a calendar year, but have not yet been reported to the insurer as of the date under consideration. For instance, insurance company statements prepared after the end of the calendar year would have to include an estimate of losses that occurred during that year but have not yet been reported.
>
> **INCURRED BUT NOT REPORTED LOSSES (IBNR)** Insured losses that have occurred but have not been reported to a PRIMARY INSURANCE company. These types of claims have a tremendous effect on a REINSURANCE treaty, which may be showing a healthy profit when in reality it is losing money. Hence, under this false security, the reinsurer will continue operating under a rating plan that is totally inadequate for the losses. This explains why a provision for incurred but not reported losses should be made in a rating plan. Also, the reinsurer must establish an adequate reserve for IBNR claims to make a correct analysis of its business. If such a reserve is not established, overly optimistic evaluation of the real loss may not be revealed for several years. A method of deriving the reserve for IBNR claims is to calculate a percentage of the *Claims Paid and Outstanding*.

Given the insurance industry's familiarity with the concept of incurred but not reported losses, insurance companies cannot argue that they did not expect to have to pay, years after the fact, for injuries which occurred during the policy period.

In fact, this case does not concern a policyholder's right to transfer its policy to a successor corporation. What the defendant insurance companies actually seek is a ruling that would void policies in effect at the time that Alodine allegedly caused injury (or the progression or deterioration of an injury) merely because, years after the policy periods ended, the line of business that produced Alodine was incorporated and sold to Henkel. The court should not so hold.

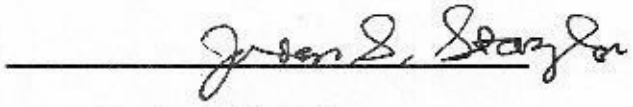
CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated: March 19, 2002

Respectfully submitted,

STANZLER FUNDERBURK & CASTELLON LLP



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CERTIFICATE OF WORD COUNT

I, JORDAN S. STANZLER, am appellate counsel to United Policyholders. I certify that the attached Amicus Curiae brief of United Policyholders in support of plaintiff/appellant Henkel Corporation was produced on a computer and is 8002 words long.

Executed on March 19, 2002 at San Francisco, California.

Jordan S. Stanzler

PROOF OF SERVICE BY MAIL

I, Sharran L. Rodd, declare:

1. I am over the age of eighteen of years and not a party to this action. I am employed in the County of San Francisco, State of California, by the law firm of Stanzler Funderburk & Castellon LLP. My office address is 180 Montgomery Street, Suite 1700, San Francisco, California. I have first-hand personal knowledge of the following facts, and if called upon, could and would testify competently thereto.

2. On March 20, 2002, I served by mail the following documents entitled:

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IN SUPPORT OF PLAINTIFF and APPELLANT
HENKEL CORPORATION

on the interested parties in this action by placing true copies thereof enclosed is a sealed envelope with postage thereon fully prepaid, placed for collection and mailing following ordinary business practices, addressed as follows:

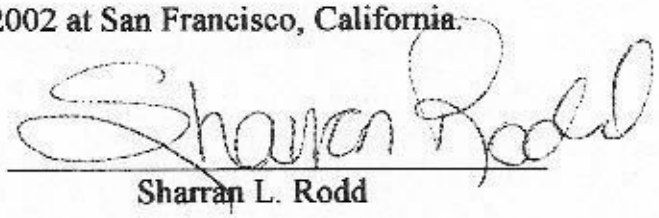
SEE ATTACHED SERVICE LIST

3. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice the envelope would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing is this Declaration.

I declare under penalty of perjury under the laws of the State of California that I am employed in the office of a member of the Bar of the Court at whose direction

the service was made, and that the foregoing is true and correct.

Executed on March 20, 2002 at San Francisco, California.



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