COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

NO. 2002-CA-371

NORFOLK SOUTHERN CORPORATION, NORFOLK SOUTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, SOUTHERN REGION INDUSTRIAL REALTY, INC., CENTRAL OF GEORGIA RAILROAD COMPANY, and THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY

Plaintiffs/Appellees

VERSUS

CIGNA SPECIALTY INSURANCE COMPANY; and CERTAIN UNDERWRITING MEMBERS OF LLOYD'S, *ET AL.*,

Defendants/Appellants

APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, LOUISIANA, THE HONORABLE JANICE CLARK

ORIGINAL BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS/APPELLEES

A CIVIL PROCEEDING

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders, a not-for-profit educational organization granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code, is dedicated to educating policyholders about their rights and duties under their insurance policies. Specifically, United Policyholders engages in educational activities by promoting greater public understanding of insurance issues and consumer rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus Curiae, United Policyholders, has a vital interest in seeing that the standard-form liability insurance policies sold to countless policyholders are interpreted properly by insurance companies and the courts. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights.[1]

STATEMENT OF THE ISSUE PRESENTED

Where more than one insurance policy is triggered by a particular loss, did the court below properly adopt the "joint and several" approach to allocation

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[1] United Policyholders has previously appeared as *amicus curiae* in cases throughout the United States, including numerous cases in the state and federal courts in Louisiana. For example, the Louisiana Supreme Court has granted United Policyholders and/or its counsel admission as *amicus curiae*. *See Craig Ducote, Sr. v. Koch Pipeline Co.*, No. 98-C-0942 (La. Sept. 8, 1998); *South Central Bell Telephone Co. v. Ka-Jon Food Stores of Louisiana*, No. 93-CC-2926 (La. Jun. 21, 1994). United Policyholders has also previously appeared as *amicus curiae* in cases before the United States Supreme Court. *See Humana, Inc. v. Humana Health Insurance of Nevada, Inc. v. Mary Forsyth*, No. 97-303 (U.S. Sept. 18, 1998); *FL Aerospace v.*

among the triggered insurance policies and determine that a policyholder could "pick and choose" the insurance policies to which to apply a loss caused by long term environmental contamination, when the insurance policy contained the insurance company's promise to pay "any and all sums" incurred by the policyholder.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

United Policyholders adopts the Statement of the Case and Proceedings Below contained in the Briefs of Appellees.

ARGUMENT

The trial court's decision (the "Trial Court Decision") to apply a "joint and several" theory of allocation was correct because:

- Louisiana has already adopted the "joint and several" approach, which is the majority approach;
- Pro rata allocation schemes are inconsistent with the insurance industry's prior judicial representations;
- Pro rata allocation schemes are inconsistent with the insurance industry's own drafting history of standard-form general liability insurance policies; and
- Pro-rata allocation schemes, like that proposed by the insurance company defendants and their *amicus curiae*, are unfair, unworkable and lead to endless complications and unnecessary allocation litigation.

A. Louisiana Has Already Adopted The Joint And Several Approach.

1. Courts Have Taken Two Approaches To Allocation.

Courts have taken two approaches to allocation. Some courts have adopted a "pro rata" approach, which allocates liability for a particular claim among all triggered insurance policies in the first instance. Under the "pro rata" approach, the policyholder can recover only a share of its over-all loss from any one of its insurance companies, and that share may be determined in a number of ways, including calculation of the insurance company's proportionate share of time on the risk or proportionate share of total policy limits. *See Stonewell Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1203 (2d Cir. 1995), *modified and reh'g denied*, 85 F.3d 49 (2d Cir. 1996); *United States Fid. & Guar. Co. v. Treadwell Corp.*, 58 F. Supp. 2d 77, 96 (S.D.N.Y. 1999). Additionally, under the "pro rata" approach, all "uninsured" time periods – namely, all periods during which there is no insurance because none is purchased, because that which is purchased has been exhausted, or because the insurance company has filed for bankruptcy – are allocated on a pro rata basis to the policyholder. *See e.g., Stonewall*, 73 F.3d at 1202-1203; *Treadwell Corp.*, 58 F. Supp. 2d at 96-97.

Other courts, utilize a "joint and several" scheme, holding that each triggered policy is jointly and severally liable for the policyholder's liability. Under this approach, the policyholder "picks and chooses" which triggered policy pays for a given loss, subject only to the limits of liability under the policy chosen. After the "picked and chosen" insurance company pays the claim, it is free to seek contribution/setoff from other insurance companies or the policyholder standing in

and the policyholder is not allocated any portion of liability for periods during which it was uninsured. *See, e.g., J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440 (3d Cir. 1996); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1 (Cal. Ct. App. 1996). Moreover, under the "joint and several" approach, in the contribution proceeding among the various insurance companies, liability is allocated pro rata among the various insurance companies in a number of ways, which are quite similar to allocation schemes used under the "pro rata" approach. *See, e.g., Armstrong World Indus.*, 45 Cal. App. 4th 1; *American Cas. Co. v. Phico Ins. Co.*, 702 A.2d 1050 (Pa. 1997); *Koppers Co. v. Certain Underwriters at Lloyd's*, No. 85-2136, 1997 U.S. Dist. LEXIS 16123 (W.D. Pa. June 23, 1997).

Thus, under either approach, an insurance company is usually ultimately only liable for its allocable share, however calculated, of the entire loss. The difference between the approaches involves when such allocation occurs. Under the "pro rata" approach, allocation occurs at the same time the loss is paid so all primary policies will exhaust simultaneously. Under the "joint and several" approach, in contrast, allocation occurs in a second proceeding, when the loss becomes the subject of contribution among policies and insurance companies.

Although allocation occurs under both approaches, the particular approach selected does have some serious economic consequences. In particular, the risk of insurance company insolvency is borne by the policyholder under the "pro rata" approach and by the insurance companies under the "joint and several" approach. Thus, under the "joint and several" approach, an insurance company might be responsible for more than its allocable share in the event that one of its co-insurers

2. "Joint And Several" Allocation Is The Majority Rule.

The majority rule is "joint and several" allocation. *See Monsanto Co. v. C.E. Health Comp. & Liab. Ins. Co.*, 652 A.2d 30, 35 n.6 (Del. 1994) (stating that "joint and several" approach is majority rule); Paul Rose and Rajesh Bagga, "The Law Of Allocation – Who's Winning The Battle Anyway," Coverage, v.12, no. 4, at 12 & n.2 (ABA Jul./Aug. 2002) (stating that 14 jurisdictions have adopted "joint and several," 8 have adopted a "pro rata" variant, and 29 are undecided or unclear).

Additionally, the recent trend favor "joint and several" allocation. Indeed, the most recent decisions on the issue are supporting the "joint and several" approach. *See* Paul Rose and Rajesh Bagga, "The Law Of Allocation – Who's Winning The Battle Anyway," Coverage, v.12, no. 4, at 12 (ABA Jul./Aug. 2002). *See also Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835 (Ohio 2002); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1057-58 (Ind. 2001); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489-91 (Del. 2001); *Dow Corning Corp. v. Continental Cas. Co.*, Nos. 200143-200154, 1999 WL 33435067, at *6-8 (Mich. Ct. App. Oct. 12, 1999) (*per curiam*), *appeal denied*, 617 N.W.2d 554 (Mich. 2000); *American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 253-57 (Wash. 1998); *Aerojet-General Transp. Corp. v. Transport Indem. Co.*, 948 P.2d 909 (Cal. 1997).

3. A Louisiana Intermediate Appellate Court Has Already Implicitly Adopted "Joint And Several" Allocation.

The Louisiana Third Circuit Court of Appeal has already implicitly adopted the "joint and several" approach to allocation. *See Wilks v. Allstate Ins. Co.*, 195

and the garage had a separate policy providing coverage for accidents in which its employees were involved. The claimant sued the garage, which joined Allstate. The garage's liability insurance company was not joined, although its policy was assumed to be triggered. At trial, claimant obtained a judgment against the garage and Allstate.

Because Allstate had a pro rata other insurance provision in its policy, it raised by affirmative defense, a "pro rata" allocation argument, seeking to have the judgment reduced in half to account for the garage's separate liability insurance policy that was assumed to be triggered and to contain an identical pro rata other insurance provision as well. Even assuming that the garage's liability insurance policy provided coverage for the accident and had a similar "pro rata" other insurance provision, the trial court entered summary judgment in favor of claimant and against Allstate on Allstate's "pro rata" affirmative defense. On appeal, the Louisiana Court of Appeal affirmed, refusing to reduce the verdict in half, based upon the language of the policy promising to reimburse the policyholder for "all sums" despite pro rata other insurance provisions in both triggered policies. The Court based its decision upon the "all sums" language in the insuring agreement, finding and concluding that the insurance companies whose policies are triggered have a single obligation to "all sums" the policyholder is obligated to pay, not a proportionate share of "all sums." The Court also found that the "other insurance" allocation approach was better handled in a separate proceeding among the various insurance companies whose policies are triggered.

The Court wrote as follows:

instant case, the question of whether the insurers' obligations would be termed 'joint' or 'several' by the common law judges is irrelevant.

The ultimate test of whether the obligor could be held for the whole or for only a proportionate part of the obligation is essentially whether the two obligors each promised the same (i.e., the full) performance or else whether each had promised only a different performance (i.e., to pay only its proportionate part of the liability). In this regard, decision of this essential question is determined by an interpretation of the intention of the parties in the light of the language used and of the surrounding circumstances.

Under the insuring agreement, the defendant Allstate agreed 'to pay on behalf of the insured all sums which the insured shall be legally obligated to pay as damages * * * arising out of the ownership, maintenance, or use of the owned automobile * * *.' **This insuring agreement creates a solidary obligation with the insured, although the insured and the insurers are bound differently to perform the same obligation. Under the respective insuring clauses, each of the insurers are solidarily bound for the same debt, namely the tort liability of the insured, although of course the policy provisions limiting liability limit respectively the recovery against each insurer.**

Allstate persuasively argues that the pro rata clause limits the solidary liability of the insurer to and for the insured, just as the policy limits do. Allstate in effect contends that, where there is other valid and collectible insurance, the pro rata clause, where applicable, has the effect of converting its liability to its insured into joint Or several (i.e., only for the insured's proportionate share of the insured's liability) rather than joint And several (i.e., solidary with its insured's tort liability up to policy limits).

We must reject this forceful argument. We hold instead that by reason of the solidary liability of each of the two insurers with the insured, the policyholder may collect the full amount from either insurer, leaving the latter to its right of contribution from the other insurer, in accord with what Appleman, Section 4913, and Clow v. National Indemnity Co., 54 Wash.2d 198, 339 P.2d 82 (1959) state is the majority rule. **We thus conclude that the liability of each insurer with the insured continues to be solidary, and is not transmuted by the pro rata clause into only partial coverage which may be less than the policy limits for which premiums were charged**.

We so conclude by reason of our interpretation of the presumed intent of the parties to the insurance contract. In doing so, we take into consideration that otherwise the insured may be forced to pay a portion of the recovery against him even though (as here)

Wilks is still the law in Louisiana. Thus, under Louisiana law, where more than one insurance policy is triggered by a particular loss, a policyholder may pick and choose from whom to recover the whole loss, and the chosen insurance company may seek contribution from the non-chosen one or ones. Accordingly, Louisiana has effectively adopted the "joint and several" approach to allocation.

B. A "Pro Rata" Allocation Scheme Is Inconsistent With The Insurance Industry's Prior Judicial Representations.

The insurance industry has often argued in favor of "joint and several" allocation schemes and that policyholders are entitled to designate which general liability insurance policies are liable to respond fully to a continuing operation and continuing injury. For years members of the insurance industry have confirmed to other courts that, when multiple general liability insurance policies are triggered to respond by a continuous injury, a policyholder is entitled to determine and designate the general liability insurance policies from which it is entitled to full relief. Needless to say, the insurance industry's prior litigation positions are absolutely inconsistent with the "pro rata" allocation scheme sought by Lloyd's of London and its *amicus* here.

For instance, First State Insurance Company, along with an underwriter at Lloyds of London -- an appellant here, in arguing for adoption of the continuous trigger, stated "[o]nly by applying the continuous and multiple trigger theories are [policyholders] in this case and future potential [policyholders] assured of complete redress for their damages and injuries."[2] As argued by First State, the

[2] Plaintiffs-Appellees' Brief on Appeal at 47 (filed Nov. 6, 1987) in *Upjohn Co. v. New Hampshire Insurance Co.*, 444 N.W.2d 813, (Mich. Ct. App. 1989), *modified on other grounds*, 461 N.W.2d 486, (Mich. 1990) *rev'd on other grounds*, (Mich. 1991), 476 N.W.2d 392

purpose of the continuous trigger is to assure policyholders "complete redress." A "pro rata" allocation of insurance coverage effectively negates any attempt to provide policyholders complete redress, which can be accomplished only by holding each insurance company jointly and severally liable for its promise to pay "all sums" of the policyholder's loss.

Likewise, the North River Insurance Company has confirmed that each insurance company on the risk during a long-term injury is "fully liable" for the whole of the policyholder's liability, citing the "determine and designate" allocation mechanism of the court in *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982). North River affirmed or recognized that a policyholder is entitled, under the standard-form policy language at issue here, to "full indemnification" from each insurance company:

> [E]ach insurer on the risk from initial exposure to manifestation of the injury is fully liable to the insured for indemnification and defense costs incurred in connection with the underlying personal injury litigation. That is, the insured can secure full indemnification and defense costs from any insurer whose coverage is triggered.[3]

According to *North River*, to the extent that the standard-form general liability insurance policies of more than one insurance company are triggered, liability may be allocated only among these insurance companies so as to "maximize" insurance

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74; Stacy Gordon, Vanishing Precedents, Bus. Ins., June 15, 1992, at 1. Indeed, fifty percent of the pro-policyholder judicial decisions are wiped off the law books by the insurance industry. *See* Phillip Carrizosa, Making the Law Disappear: Appellate Lawyers Are Learning To Exploit the Supreme Court's Willingness to Depublish Opinions, Cal. Law., Sept. 1989, at 65. This astonishing manipulation of our judicial system — probably our most precious heritage — has been discovered only by commentators in the last decade. *See, e.g.*, Jill E. Fisch, The Vanishing Precedent: Eduardo Meets Vacatur, 70 Notre Dame L. Rev. 325 (1994); Jill E. Fisch, Rewriting

coverage for the policyholder: "[t]he *Keene* approach maximizes coverage for the insured and renders each of the carriers on the risk from initial exposure to manifestation of injury jointly and severally liable to the insured." *Id.*

Republic Insurance Company has also argued that each insurance company on the risk during a continuing injury is jointly and severally liable for the whole of the policyholder's loss:

> [I]f one has a continuing loss which occurs during two or more insurance policy periods, then all policies are triggered and will be liable up to their policy limits for repair of the loss.[4]

Centennial Insurance Company and Atlantic Mutual Insurance Company have cited *Keene*'s continuous trigger and "determine and designate" allocation holding with approval, noting "[t]he *Keene* court went on to hold that any policy in force and effect either at the start, duration, or end of the injurious process would be triggered to defend and indemnify."[5]

CNA Insurance Company and Valley Forge Insurance Company have argued in favor of *Keene*'s "determine and designate" allocation ruling:

> A clear statement of law in the Keene case is that where more than one policy of insurance is applicable to the acts of an assured committed over a period of time, some of which acts fall within one policy period, some within another policy period, and some within the policy coverage of more than one carrier, and where those acts give rise to losses that occur over a period of time, which also may occur during the coverage period of one or more of the policies, <u>each policy fully indemnifies the insured for that loss up to the limits of the policy</u> and subject to the "Other Insurance" provisions of each policy.[6]

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4 Appellant's Opening Brief at 18 (filed Feb. 15, 1989) in *Republic Insurance Co. v. Great Pacific Insurance Co.* (Cal. Ct. App.) No. A043151.

CNA and Valley Forge quoted the precise passage in *Keene* rejecting "pro rata" allocation:

> Our starting point is the interpretation of the policies as the insurers' promises of certainty to Keene. The policies that were issued to Keene relieve Keene of the risk of liability for latent injury of which Keene could not be aware when it purchased insurance. Keene did not expect, nor should it have expected, that its security was undermined by the existence of prior periods in which it was uninsured, and in which no known or knowable injury occurred. If, however, an insurer were obligated to pay only a pro-rata share of Keene's liability, as the District Court held, those reasonable expectations would be violated. Keene's security would be contingent on the existence and validity of all the other applicable policies. Each policy, therefore, would fail to serve its function of relieving Keene of all risk of liability. The logical consequence of this is that the policies must require that once an insurer's coverage is triggered, the insurer is liable to Keene to the full extent of Keene's liability up to its policy limits. . . .[7]

United Stated Fidelity & Guaranty Company requested a court to follow *Keene* and "hold that an insurer with a policy in effect at any point in time between a claimant's initial exposure to a toxic substance and a manifestation of injury is liable in the full amount of indemnity due":

> Under the doctrine of [*Keene*], each insurer whose coverage is "triggered" is liable in the full amount of indemnity due, subject only to the provisions in the policies that govern the allocation of liability when more than one policy covers an injury. 667 F.2d, at 1050. The Keene Court intended that the burden be taken off the insured and placed on the insurer.[8]

Hartford Fire Insurance Company previously has expressly rejected "pro rata" allocation, and argued that a policyholder "may place the entire loss upon the carrier of its choice who is then jointly and severally liable for the total indemnity and defense costs":

> The insured contracts with his insurer and should have the right to seek or not seek the insurer's participation in a claim as the insured chooses. The Illinois Supreme Court has recognized this principle by refusing to order pro rata allocation of defense and indemnity obligations among the various insurance policies applicable to the risk. Zurich Ins. v. Raymark Industries (1987) 118 Ill.2d 23, 57, 514 N.E.2d 150) Hence, in Zurich Ins. v. Raymark Industries (1987) 118 Ill.2d 23, 56-57, 514 N.E.2d 150, the court implicitly ruled that the insured may place the entire loss upon the carrier of its choice who is then jointly and severally liable for the total indemnity and defense costs.[9]

In litigation against Aetna Casualty & Surety Company, Fireman's Fund Insurance Company urged the court to follow: *Lac D'Amiante du Quebec, Ltee. v. American Home Assurance Co.*, 613 F. Supp. 1549, 1562-63 (D.N.J. 1985), *vacated as to one party due to insolvency*, 864 F.2d 1033 (3d Cir. 1988), noting that "based upon the fact that the injury to property was continuous and progressive in nature, the court concluded that all carriers on the risk from the time of installation were jointly and severally liable for such damage";[10] and *California Union Insurance Co. v. Landmark Insurance Co.*, 193 Cal. Rptr. 461 (Cal. Ct. App. 1983) because "[t]herein, the exposure theory was utilized to hold each of the successive carriers jointly and severally liable for property damage which continued during each of the carrier's respective policy periods."[11]

As shown below, the insurance industry's prior litigation positions are entirely consistent with its intent for these forms expressed in the contemporaneous statements written when the standard-form policy language was drafted. The appellant insurance companies should not be permitted to take positions in this litigation inconsistent from those set forth above that the industry has previously

[9] Memorandum in Support of Hartford's Cross-Motion for Summary Judgment and in Response to Plaintiff's Motion for Summary Judgment at 8, filed in *Institute of London Underwriters v. Hartford Fire Insurance Co.*, (Ill. Cir. Ct.), No. 89 CH 09741 (emphasis added).

taken. Indeed, Section 205 of the Restatement (Second) of Contracts prohibits the appellant insurance companies from asserting a position in this litigation regarding allocation that is contrary to the understanding they have expressed before other courts:

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

Restatement (Second) of Contracts § 205, cmt. e (1981).

C. A Pro Rata Allocation Scheme Is Inconsistent With The Insurance Industry's Drafting History For Standard-Form General Liability Insurance Policies.

Drafting history sanctions the policyholder's right to designate which general liability insurance policies are liable to respond fully to a continuing injury. The insurance industry's previous litigation postures are consistent with the statements and analyses made by the insurance industry at the time the policy language was written discussing how the policy language should apply. These contemporaneous statements and analyses — sometimes called "drafting history" — emphasize the intentional omission of any allocation provision in standard-form general liability insurance policies. Allowing the insurance industry, including insurance company appellants, to benefit from a decision inconsistent with its understanding — reflected by its previous litigation positions and its own drafting history — undermines the basic tenets of fairness and consistency crucial to proper working of, and public confidence in, the judicial system. It also diminishes the benefit of the insurance for which Louisiana policyholders — large and small —

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

> [I]f the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.
>
> The policy limits are renewed every year, so the underwriter of a manufacturing risk may have his limits pyramid under this new contract.[15]

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[12] In the 1960's, domestic insurance companies, acting through industry trade associations, including the National Bureau of Casualty Underwriters, the Insurance Rating Board, and the Mutual Insurance Rating Board (all predecessors of the Insurance Services Office, Inc. ("ISO"), formed by merger in 1971), established several committees which engaged in the process of revising the standard-form general liability policy. These committees developed a revised standard-form general liability insurance policy. *See Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 810-12; (7th Cir. 1992), *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1500-03, (S.D.N.Y. 1983), *cert. Denied*, 507 U.S. 1005 (1993); *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984); *Montrose Chem. Co. of Cal. v. Admiral Ins. Co.*, 913 P.2d 878, 891 (1995), ("Most courts and commentators have recognized, however, that the presence of standardized industry provisions and the availability of interpretive literature are of considerable assistance in determining coverage issues"). The policy language at issue here was likely based upon these standard provisions. *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, 623 A.2d 1128, 1129, 1129 n.1 (Del. Super. Ct. 1992), (noting "most if not all insurers use ISO standard-form language in their policies" and "most insurers do in fact use ISO language nearly or completely verbatim"). The result was the 1966 standard-form general liability policy, the insuring agreement of which remained unaltered in the subsequent 1973 standard-form general liability policy.

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

[14] *Id.* (quoting Richard A. Schmalz, The New Comprehensive General Liability and Automobile Program, Presentation Before the Mutual Insurance Technical Conference 6 (Nov.

At an April 21, 1977 insurance-industry meeting devoted to discussing the insurance industry's response to claims for coverage for asbestos-related claims, the "majority" of the insurance company representatives present "contended" that, for continuing injuries, "each carrier on risk during any part of that period" could be "fully responsible" for the entire loss:

> The majority view [held by the insurance industry representatives] was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, i.e. from the first exposure through the discovery and diagnosis. The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss. The majority relied on Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076, U.S. Court of Appeals, Fifth Circuit [sic] (applying Texas law).
>
> The majority was cognizant of the fact that Borel was not a coverage case. Despite this, however, the majority believed that the essential holding of Borel, i.e. that the injury was cumulative and that with each exposure the plaintiff suffered an injury, would lead to the courts holding that each carrier covered the loss and would be liable for the full defense and possibly the full loss as well.[16]

Thus, the drafting history, like the insurance industry's prior judicial representations, is absolutely inconsistent with a "pro rata" allocation scheme. One would have to rewrite the policy to put a "pro rata" provision in it. As with the industry's prior judicial representations that policyholders are permitted to designate any general liability insurance policy triggered by a continuing loss to pay for the whole loss, the insurance company appellant is barred by Restatement (Second) of Contracts § 205 from controverting, in this case, its understanding of

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General and Automobile Program: The Effect on Manufacturing Risks, Presentation before the Mutual Insurance Technical Conference 6 (Nov. 15-18, 1965); *see also Owens-Illinois*, 650 A.2d at 990 (*quoting* Mr. Bean); Eugene R. Anderson, *et al.*, Liability Insurance Coverage for Pollution Claims, 59 Miss. L.J. 699, 729-30 (1989) (*quoting* Mr. Bean); Thomas Baker & Eva Orlebeke, The Application of Per-Occurrence Limits from Successive Policies, 3 Envt'l Claims.

the language in policies that it sold as chronicled in the drafting history cited above.

D. Pro-Rata Allocation Schemes Are Unfair And Unworkable And Lead To Endless Complications And Unnecessary Allocation Litigation.

Even the case which first applied "pro-rata" allocation recognized that its methodology might prove impossible to implement.[17] Experience has proved that court prophetic, as insurance companies, aiming to minimize or eliminate their liability for losses stemming from claims of gradual injury, have so exploited the complexities inherent in pro-rata allocation as to make it completely unworkable. A short list of these complexities includes the following:

- Exclusions: What if certain primary policies triggered by the continuing loss exclude it, while others do not? Insurance companies obviously argue that the policyholder is responsible for paying the share that otherwise would be attributed to policies with such exclusions.

- Availability: Relatedly, what about categories of claims that the insurance industry as a whole has excluded, for instance through the "total" pollution exclusions or "asbestos exclusions" that have been in every general liability insurance policy since the mid-1980s? Insurance companies argue that coverage for the excluded losses was "available," that continuing losses must be pro-rated across the entire period of injury, and that the policyholder must bear responsibility for paying the share that is allocated to policies with exclusions in them. Coverage is not truly available, however, when a policyholder must pay $1,500,000 in

premium for $1,000,000 in asbestos coverage; rather, "availability" must refer to the ability to transfer a meaningful degree of risk.

- Exhaustion: Who must pay the share of primary policies that are exhausted by other claims? Insurance companies argue that the policyholder must bear the share of responsibility pro-rated to such policies, until all primary policies are exhausted, at which time the policyholder can access umbrella coverage, as no other rule would be consistent with the requirement of "primary first" exhaustion. This is the apparent position of appellants and their *amicus curiae* as well. But if the policyholder purchased umbrella coverage in a year in which the primary policy is exhausted, the policyholder should be able to access that umbrella coverage.[18]

- Differences in Primary Limits: What about where a policyholder buys primary policies with different limits in different years? For instance, assume a policyholder buys 10 years of primary insurance with $100,000 annual limits, and 10 subsequent years of primary policies with $1,000,000 annual limits, and then the policyholder is held liable for a $5,000,000 injury which triggers all 20 years of coverage. Is more than $100,000 per year allocated to the first 10 years, entitling the policyholder to access $150,000 per year in umbrella coverage? Thus, should the first 10 policies be allocated $100,000 per year, and the second 10 policies be allocated $400,000 per year?

[18] It is quite common for a policyholder's insurance policies in the 1930's, 1940's and 1950's to be exhausted. This is for several reasons. First, the insurance industry offered, and

- Self-Insurance and Retained Limits: What if the policyholder has certain policies with retained limits, or years in which it purchased no primary insurance policies? Most courts agree that self-insured retentions and retained limits are not "insurance," but the insurance industry argues that liability for continuing loss should be allocated to self-insured periods or to years with retained limits. If such action is taken, how is the court to determine the "terms and conditions" of such "insurance"? In other words, what if a policyholder did not buy primary insurance in a year because its primary exposure was asbestos, and asbestos risks are excluded as a whole by the insurance industry; should the "self insurance" be deemed to include an asbestos exclusion?

- Deductibles: What about primary programs where the policyholder has significant deductibles? For instance, if a policyholder is responsible for a $20,000,000 injury which took place over 25 years, in which the policyholder purchased $5 million primary insurance policies with $1 million deductibles, it will have no insurance coverage under the rule proposed by the insurance company appellants: the pro-rated amount of liability – $800,000 – distributed to each of the policy periods would be less than the $1 million deductible. Unless the deductibles are pro rated, something the insurance industry wholeheartedly opposes, this imposes a $19 million penalty on a Louisiana policyholder that it would not pay in the majority of other states.

- Pre-Acquisition Coverage: Insurance companies also argue that, where

policyholder did not have any insurable interest and therefore cannot access policies issued to the policyholder during those earlier years. *See* Certain Defendants' Joint Brief in Opposition to Plaintiff's Motion for a Protective Order filed in *Stearns & Foster Bedding Co. v. Continental Ins. Co.*, MID-L-1105-97 (N.J. Super. Ct. Aug. 14, 1997); Defendants' Briefs in Support of Motion for Partial Summary Judgment in *Alco Indus., Inc. v. Liberty Mut. Ins. Co.*, No. L-905376 (N.J. Super. Ct. Jan. 16, 1998).

- "Lost" policies: Insurance companies argue that liability for damages should be allocated to the policyholder for years in which the policyholder can prove that it purchased insurance coverage but the policies themselves have been "lost," often because insurance companies themselves have destroyed them. *See, e.g., Gold Fields Am. Corp. v. Aetna Cas. & Sur. Co.*, 661 N.Y.S.2d 948, 951 (Super. Ct. 1997). Insurance companies thus have it both ways, refusing to provide coverage under the policies they destroyed, thereby reducing the available coverage, and then allocating damage to those policies anyway.

- Non-cumulation Clauses: Insurance companies typically argue that the policyholder is responsible for coverage periods in which insurance coverage is reduced or exhausted by so-called "non-cumulation of limits" provisions, which state that a policy's limits of liability are reduced by any amounts due the policyholder by any other insurance policy sold before the inception date of the policy in question. *See, e.g., O-I*

provision represent a gap in coverage that must be absorbed by the policyholder before the policyholder's higher-level policies respond to the loss.

All of these complexities – and others that clever insurance industry lawyers will devise – so complicate any "primary-first" or "pro-rata" "allocation" rule as to make it completely unworkable. Indeed, these complications arise in the first place because general liability policies do not contain any provision detailing how a court is to construct its primary-first allocation scheme; a purposeful omission because, as the insurance industry has admitted, it proved "impossible to develop[] a formula which would handle every possible situation with complete equity."[19] Rather, the policies contain only the promise that they will pay "all sums" the policyholder becomes obligated to pay. Further, the end result of these complications is to deprive Louisiana policyholders of coverage they would have in under the majority rule of other states, and other previous Louisiana court decisions, enforcing the promise to pay all sums.

CONCLUSION

For the foregoing reasons, *Amicus Curiae*, United Policyholders, respectfully requests this Court to affirm the Trial Court Decision and its "joint and several" approach. United Policyholders further requests this Court to reject appellants' proposed pro-rata allocation scheme in favor of insurance industries' promise to pay "any and all sums" which a policyholder becomes liable to pay and which was the result which the insurance industry intended and for which it has lobbied other courts.

Respectfully submitted,

October 11, 2008
Date

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VERIFICATION

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, a Notary Public in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified and therein residing, personally came and appeared:

PERRY STAUB, JR.

who, being by me first duly sworn did depose and say:

That he is the attorney for *Amicus Curiae* in this case; that the allegations contained in this brief are true and correct; and that copies of this brief and all attachments and appendices have been served upon the following by United States mail, properly addressed and postage affixed, or by hand delivery:

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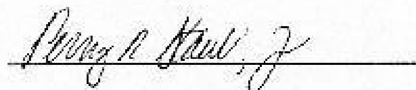

Sworn to and subscribed
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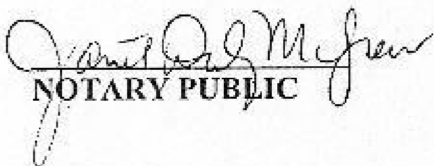

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