IN THE SUPREME COURT OF OHIO

Pilkington North America, Inc., Petitioner,	)	Case No. 2005-0378
v.	)	On Issues of State Law Certified By The United States District Court, Northern District of Ohio, Western Division
Travelers Casualty & Surety Co., et al., Respondent,	)	United States District Court Case No. 3:01CV7617 (Judge James G. Carr)
and	)	
Aeroquip-Vickers, Inc. and Eaton Corporation, Respondents.	)	

BRIEF OF *AMICUS CURIAE*, UNITED POLICYHOLDERS, IN SUPPORT OF PETITIONER, PILKINGTON NORTH AMERICA, INC.

Drew A. Carson (0037641) (Counsel of Record)
Sarah H. Kostura (0077781)
GOODMAN WEISS MILLER LLP
100 Erieview Plaza, 27th Floor
Cleveland, OH 44114-1882
(216) 696-3366
Fax: (216) 363-5835

William G. Passannante
Cathleen Cinella Tylis
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020-1182
(212) 278-1000
Fax: (212) 278-1733

Amy Bach, Esq.
Law Office of Amy Bach
42 Miller Avenue
Mill Valley, CA 94961
(415) 381-7627
Fax: (415) 381-5572

Counsel for *Amicus Curiae*
United Policyholders

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

II. STATEMENT OF THE CASE AND FACTS 2

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 2

A. Proposition of Law No. I: The Right To A Defense and Indemnity For "Incurred But Not Yet Reported Losses" Constitutes A "Chose In Action" 2

B. Proposition of Law No. II: The Majority of Courts, Including Ohio Courts, Hold That Anti-Assignment Clauses Do Not Apply To the Transfer of Coverage Rights or "Choses In Action" After A Loss Has Taken Place. 5

1. The "Increased Risk" Myth: An Anti-Assignment Clause Does Not Prevent a Policyholder From Assigning Accrued Policy Benefits 8

2. Enforcing An Anti-Assignment Clause After A Loss Has Taken Place Is Fundamentally Inconsistent With The Nature of Occurrence-Based Liability Insurance 11

C. Proposition of Law No. III: The Operation of Law Rule Is Fundamentally Consistent With The Nature of Occurrence-Based Liability Insurance 12

IV. CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

Aetna Ins. Co. v. Aston (1918), 123 Va. 327, 96 S.E. 772 .... 6 n. 3

Akron Square Chiropractic v. Creps, No. 21710, 2004 WL 840131 (Ohio Ct. App. Apr. 21, 2004) 6

Andrade v. Credit General Ins. Co., No. 2000CA00002, 2000 WL 1751304 (Ohio Ct. App. Nov. 20, 2000) 6

Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co. (D.C. 1996), 680 A.2d 1386 .... 5 n. 3, 9

B.S.B. Diversified Co. v. American Motorists Ins. Co. (W.D. Wash. 1996), 947 F. Supp. 1476 12

Brunswick Corp. v. St. Paul Fire & Marine Ins. Co. (E.D. Pa. 1981), 509 F. Supp. 750 .... 5 n. 3

C.V. Perry & Co. v. West Jefferson (Ct. App. 1996), 110 Ohio App. 3d 23, 673 N.E.2d 613 11

Conrad Bros. v. John Deere Ins. Co. (Iowa 2001), 640 N.W.2d 231 .... 5 n. 3

Elat, Inc. v. Aetna Cas. & Sur. Co. (Super. Ct. App. Div. 1995), 280 N.J.Super. 62, 654 A.2d 503 .... 6 n. 3

Fairview Hospital v. Fortune (Ct. App. 2001), 141 Ohio. App. 3d 314, 750 N.E.2d 1203 .... 5, 11

Fiorentino v. Lightning Rod Mut. Ins. Co. (Ct. App. 1996), 114 Ohio. App. 3d 188, 682 N.E.2d 1099 .... 6, 7, 8, 9

Geddes & Moss Undertaking & Embalming Co. v. Metropolitan Life Ins. Co. (La. Ct. App. 1936), 167 So. 209 .... 5 n. 3

The Glidden Company v. Lumbermens Mutual Casualty Co., et al., No. 81782, 2004 WL 2931019, at *1 (Ohio Ct. App. Dec. 17, 2004) 13, 14

Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co. (2002), 95 Ohio St. 3d 512, 769 N.E.2d 835 11

TABLE OF AUTHORITIES

PAGE

Gopher Oil Co. v. American Hardware Mutual Ins. Co., (Minn. Ct. App. 1999), 588 N.W.2d 756 ......6 n. 3, 12

Hartford Fire Ins. Co. v. California (1993), 509 U.S. 764, 113 S. Ct. 2891, 125 L.Ed.2d 612 ......3 n. 2

Henkel Corp. v. Hartford Accident & Indemnity Co. (2003), 29 Cal.4th 934, 29 Cal.Rptr.2d 828, 62 P.3d 69 2

Humana Inc. et al v. Mary Forsyth (1999), 525 U.S. 299, 119 S. Ct. 710, 142 L.Ed.2d 753 1

Imperial Enter., Inc. v. Fireman's Fund Ins. Co. (C.A.5, 1976), 535 F.2d 287, 293, rehearing denied by (C.A.5, 1976), 540 F.2d 1085 ......5 n. 3

Julian v. Hartford Underwriters Ins. Co. (2005), 27 Cal. Rptr.3d 648, 110 P.3d 903 1

Kintzel v. Wheatland Mut. Ins. Ass'n (Iowa 1973), 203 N.W.2d 799 5

Ligon v. Metropolitan Life Ins. Co. (1951), 219 S.C. 143, 64 S.E.2d 258 ......6 n. 3

Max L. Bloom Co. v. United States Casualty Co. (1926), 191 Wis. 524, 210 N.W. 689 ......6 n. 3

Metropolitan Life Ins. Co. v. Lanigan (1924), 74 Colo. 386, 222 P. 402 ......5 n. 3

Miller-Wohl Co. v. Commissioner of Labor & Indus. (C.A.9, 1982), 694 F.2d 203 1

Missouri State Life Ins. Co. v. Robertson Banking Co. (1931), 223 Ala. 13, 134 So. 25 ......5 n. 3

Mominee v. Scherbarth (1986), 28 Ohio St. 3d 270, 503 N.E.2d 717 11

Morticians' Acceptance Co. v. Metropolitan Life Ins. Co. (App. Ct. 1944), 321 Ill.App. 277, 53 N.E.2d 30, affirmed (1945), 389 Ill. 81, 58 N.E.2d 854 ......5 n. 3

Mueller v. Taylor Rental Ctr. (Ct. App. 1995), 106 Ohio App. 3d 806, 667 N.E.2d 427 11

National Life & Acc. Ins. Co. v. Lucas Funeral Home (Tex. Civ. App. 1935), 89 S.W.2d 468 ......6 n. 3

TABLE OF AUTHORITIES

PAGE

National Memorial Serv., Inc. v. Metropolitan Life Ins. Co. (Super. Ct. 1946), 159 Pa.Super. 292, 48 A.2d 143, aff'd (1946), 355 Pa. 155, 49 A.2d 382....................6 n. 3

National Mut. Casualty Co. v. Cypret (1944), 207 Ark. 11, 179 S.W.2d 161.............5 n. 3

Northern Ins. Co. of New York v. Allied Mutual Ins. Co. (C.A.9, 1992), 955 F.2d 1353...12

Ocean Acc. & Guarantee Corp. v. Southwestern Bell Tel. Co. (C.A.8, 1939), 100 F.2d 441, certiorari denied by (1939), 306 U.S. 658, 59 S. Ct. 775, 83 L. Ed. 1056...5 n. 3

Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co. (C.A.9, 1917), 240 F. 36...5 n. 3

Prince v. Jordan, No. 97CA006906, 1998 WL 668254 (Ohio Ct. App. Sept. 30, 1998)...2

Progressive Life Ins. Co. v. Bohannon (Ct. App. 1946), 74 Ga.App. 617, 40 S.E.2d 564...5 n. 3

St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co. (App. Ct. 1976), 25 Ariz.App. 309, 543 P.2d 147...5 n. 3, 9

State Farm Mut. Auto Ins. Co. v. Campbell (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585...2

Total Waste Mgmt. Corp. v. Commercial Union Ins. Co. (D.N.H. 1994), 857 F. Supp. 140..6 n. 3, 12

Vandenburg v. Superior Court (1999), 21 Cal.4th 815, 88 Cal.Rptr. 366, 982 P.2d 229..2

Viola v. Fireman's Fund Ins. Co. (E.D.Pa. 1992), 965 F. Supp. 654..............................9

Watts Industries, Inc. v. Zurich American Ins. Co. (Ct. App. 2004), 121 Cal.App.4th 1029, 18 Cal.Rptr.3d 61...2

Windey v. North Star Farmers Mut. Ins. Co. (1950), 231 Minn. 279, 43 N.W.2d 99...6 n. 3

TABLE OF AUTHORITIES continued

PAGE

OTHER AUTHORITIES

3 Couch on Ins. § 35:7 (3d Ed.) (Nov. 2004) 10

3 Couch on Ins. § 35:8 (3d Ed.) (Nov. 2004) 11

17 Williston on Contracts, § 49:126 (4th Ed.) (July 2003) 10

44 Am. Jur. 2d Insurance § 787 (May 2004) 10

Ennis, *Effective Amicus Briefs,* 33 Cath. U.L. Rev. 603 (1984) 1

Insurance Services Office, Inc. (ISO), Positions On Major Issues Raised At The July 25 Forum, Commercial General Liability Insurance, ISO Makes The Case For The CGL (Aug. 1985) 4

James J. Markham, et al., *The Claims Environment* (Insurance Institute of America, 1st Ed. 1993) 4

R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice* (1986) 1

Rubin, *Dictionary of Insurance Terms* (Barron's Business Guides 1987) 4

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

United Policyholders is a non-profit charitable organization founded in 1991 as a resource for buyers of all types of insurance products. The financial security insurance policies provide is an integral part of the fabric of our society and economy. Our organization exists to help enforce coverage promises that are made at the point of sale. Donations, grants and volunteer labor support United Policyholders' work. In addition to serving as a resource on insurance claims for disaster victims and commercial policyholders, United Policyholders provides pre and post loss claims education, files *amicus* briefs in cases involving coverage and claim disputes, and is an information clearinghouse on consumer issues related to commercial and personal lines insurance products.

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.* (C.A.9, 1982), 694 F.2d 203, 204. 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 broader 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. Most recently, our brief was considered and discussed by the California Supreme Court in *Julian v. Hartford Underwriters Ins. Co.* (2005), 27 Cal. Rptr.3d 648, 110 P.3d 903. United Policyholders' *amicus* brief also was cited in the U.S. Supreme Court's opinion in *Humana Inc. et al v. Mary Forsyth* (1999), 525 U.S. 299, 119 S. Ct. 710, 142 L.Ed.2d

753. We have been invited by several divisions of the California Court of Appeal, to participate in oral argument as amicus curiae. Arguments from our amicus curiae brief were cited with approval by the California Supreme Court in *Vandenburg v. Superior Court* (1999), 21 Cal.4th 815, 88 Cal.Rptr. 366, 982 P.2d 229 and contributed to *Watts Industries, Inc. v. Zurich American Ins. Co.* (Ct. App. 2004), 121 Cal.App.4th 1029, 18 Cal.Rptr.3d 61. United Policyholders was the only national consumer organization to submit an *amicus* brief in the landmark case of *State Farm Mut. Auto Ins. Co. v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae United Policyholders adopts the Statement of Facts contained in the Merit Brief of Petitioner, Pilkington North America, Inc. ("Pilkington").

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

A. Proposition of Law No. I: The Right To A Defense and Indemnity For "Incurred But Not Yet Reported Losses" Constitutes A "Chose In Action."

The Insurance Company Respondents argue that Pilkington's right to a defense and indemnity under the policies does not constitute a "chose in action." In support of this position, they cite to the heavily-criticized California Supreme Court decision of *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003), 29 Cal.4th 934, 29 Cal.Rptr.2d 828, 62 P.3d 69. In *Henkel*, the court restricted the definition of chose in action to a claim "reduced to a sum of money due or to become due." *Henkel*, 29 Cal.4th at 948. This confined definition of chose in action is inconsistent with Ohio law. *See, e.g., Prince v. Jordan*, No. 97CA006906, 1998 WL 668254, at *4 (Ohio Ct. App. Sept. 30, 1998) (defining a chose in action as a "right of bringing an action or a right to recover a debt or money . . . not reduced into possession but recoverable by a suit at law").

Moreover, this restrictive definition is also at odds with the insurance industry's own understanding of how occurrence-based liability insurance policies work.[1] One of the main benefits of purchasing occurrence-based liability coverage is that it provides lasting protection. The benefits of insurance last as long as there is a possibility that someone might allege that the policyholder caused harm during the policy period. This protection against future claims is fundamental and basic to the occurrence form of coverage. In insurance speak, this protection is referred to as protection against incurred but not yet reported ("IBNR") losses. It means that an entity can purchase liability insurance protection at the time it engages in a potentially loss-causing operation and be assured that, as long as the amount of insurance purchased is adequate, it will have protection against future claims relating to that activity. Protection for IBNR claims is the essence of the protection provided by an occurrence policy.

Insurance companies are well aware that they may be called upon to defend or indemnify their policyholder for IBNR losses. At the same time that the 1986 corporate transaction was taking place, representatives of the insurance industry reiterated what everyone always knew about "occurrence" based liability insurance policies. The Insurance Services Office, Inc. ("ISO")[2] told insurance regulators and the public that it intended to cover damage caused during the policy period regardless of when the claim materialized and when the policyholder learned of the damage:

---

[1] The policies at issue here are either "occurrence-based" or "accident-based" liability policies, but any such distinction is immaterial because the essential promise in all of the policies is the same.

[2] ISO is an association of approximately 1,400 domestic property and casualty insurers and operates as the "almost exclusive source of support services in this country for CGL insurance." *Hartford Fire Ins. Co. v. California* (1993), 509 U.S. 764, 772, 113 S. Ct. 2891, 125 L.Ed.2d 612. "ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms." *Id.* at 772.

> An "occurrence" policy covers bodily injury and property damage that occurs during the policy period. When that policy period ends, all the injury and damage ultimately to be covered by the policy will have already occurred, but only some of it will be known and under handling by the company. Future claims may also come in for injury or damage unknown to the company when the policy expires, and these will also be covered if the injury or damage occurred during the policy period. These claims are called (incurred but not reported); they may come in many years --even decades -- after the policy expires, and they may arise from causes and tort theories neither known nor predictable when the policy was issued.

Insurance Services Office, Inc. (ISO), Positions On Major Issues Raised At The July 25 Forum, Commercial General Liability Insurance, ISO Makes The Case For The CGL at 8 (Aug. 1985). It is a basic principle that IBNR losses are covered by general liability policies well after the end of the policy period.

> The actuarial department must also project the ultimate payout on reported open losses that continue to develop and must determine the amount of losses that have already happened but have not yet been reported to the insurance company. The latter are known as incurred but not yet reported (IBNR) losses.

James J. Markham, et al., *The Claims Environment* (Insurance Institute of America, 1st Ed. 1993) at 8; Rubin, *Dictionary of Insurance Terms* (Barron's Business Guides 1987) at 141-42. Given the insurance industry's familiarity with the concept of IBNR losses, insurance companies cannot argue that they did not expect to pay, years after the fact, for injuries which occurred during their policy periods.

As discussed more fully in Section B below, the transfer of IBNR insurance benefits with the alleged IBNR liabilities: (1) furthers the public policy of risk spreading; and (2) furthers the public policy against forfeitures. First, it furthers the public policy of risk spreading, which occurs when liability insurance covers products liability claims. The courts that recognized strict

products liability explicitly mentioned the ability of manufacturers to obtain liability insurance as a basis for this expansion of tort law. Retroactively separating alleged IBNR liability from the IBNR insurance benefits would prevent liability insurance from fulfilling its risk-spreading role.

Second, transferring IBNR insurance benefits with the alleged IBNR liabilities that they cover also furthers the public policy against forfeitures. In a typical sale of a business division, the seller transfers to the purchaser both the assets and certain liabilities relating to the operations of that business division. If a Court were to require insurer consent, there would be a significant forfeitures of insurance benefits, because there has not been a custom in the corporate deal market of obtaining insurance company consent for the transfer of accrued IBNR benefits.

B. Proposition of Law No. II: The Majority of Courts, Including Ohio Courts, Hold That Anti-Assignment Clauses Do Not Apply To the Transfer of Coverage Rights or "Choses In Action" After A Loss Has Taken Place.

The Insurance Company Respondents argue that the anti-assignment clause in their policies prohibits the transfer of insurance rights without their consent. Not only is this argument contrary to the overwhelming majority of case law nationwide (including Ohio), but it is inconsistent with the nature of occurrence-based liability insurance. The majority of courts nationwide have found that the right to recover for pre-transaction liabilities may be freely assigned without the insurance company's consent notwithstanding the supposed anti-assignment clause in the policy.[3] Ohio courts also follow the majority rule. *See Fairview Hospital v.*

---

[3] *See, e.g., Missouri State Life Ins. Co. v. Robertson Banking Co.* (1931), 223 Ala. 13, 134 So. 25; *National Mut. Casualty Co. v. Cypret* (1944), 207 Ark. 11, 179 S.W.2d 161; *St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.* (App. Ct. 1976), 25 Ariz.App. 309, 311, 543 P.2d 147, 149; *Metropolitan Life Ins. Co. v. Lanigan* (1924), 74 Colo. 386, 222 P. 402; *Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co.* (D.C. 1996), 680 A.2d 1386, 1388; *Progressive Life Ins. Co. v. Bohannon* (Ct. App. 1946), 74 Ga.App. 617, 40 S.E.2d 564; *Morticians' Acceptance Co. v. Metropolitan Life Ins. Co.* (App. Ct. 1944), 321 Ill.App. 277, 53 N.E.2d 30, affirmed (1945), 389 Ill. 81, 58 N.E.2d 854; *Conrad Bros. v. John Deere Ins. Co.* (Iowa 2001), 640 N.W.2d 231; *Kintzel v. Wheatland Mut. Ins. Ass'n* (Iowa 1973), 203 N.W.2d 799; *Geddes & Moss Undertaking & Embalming Co. v. Metropolitan Life Ins. Co.*

Fortune (Ct. App. 2001), 141 Ohio.App.3d 314, 750 N.E.2d 1203 (statute requiring an insurance company to accept and honor an assignment of benefits applied despite the existence of an anti-assignment clause in the policy); *Andrade v. Credit General Ins. Co.*, No. 2000CA00002, 2000 WL 1751304, at *5 (Ohio Ct. App. Nov. 20, 2000) (anti-assignment clause did not apply to a post-loss assignment); *Fiorentino v. Lightning Rod Mut. Ins. Co.* (Ct. App. 1996), 114 Ohio.App.3d 188, 682 N.E.2d 1099 (holding that provision in policy prohibiting assignment did not preclude the policyholder from assigning claims under that policy). Recently, in the case of *Akron Square Chiropractic v. Creps*, No. 21710, 2004 WL 840131, at *1 (Ohio Ct. App. Apr. 21, 2004), the Court of Appeals reinforced Ohio's well-established rule when it noted that: "the assignment of a claim merely vests the assignee with the ability to pursue a claim; it does not alter the contract between the insurer and the insured." *Id.* at *3. Accordingly, both Ohio

---

(La. Ct. App. 1936), 167 So. 209; *Windey v. North Star Farmers Mut. Ins. Co.* (1950), 231 Minn. 279, 43 N.W.2d 99; *Gopher Oil Co. v. American Hardware Mutual Ins. Co.*, (Minn. Ct. App. 1999), 588 N.W.2d 756, 763 ("The purpose of a non-assignment clause is to protect the insurer from an increase to the risk it has agreed to insure. . . . But when events giving rise to an insurer's liability have already occurred, the insurer's risk is not increased by a change in the insured's identity"); *Elat, Inc. v. Aetna Cas. & Sur. Co.* (Super. Ct. App. Div. 1995), 280 N.J.Super. 62, 67, 654 A.2d 503 (agreeing with "most insurance law reporters and commentators" that anti-assignment provisions do not apply to assignment after loss); *National Memorial Serv., Inc. v. Metropolitan Life Ins. Co.* (Super. Ct. 1946), 159 Pa.Super. 292, 48 A.2d 143, aff'd (1946), 355 Pa. 155, 49 A.2d 382; *Ligon v. Metropolitan Life Ins. Co.* (1951), 219 S.C. 143, 64 S.E.2d 258; *National Life & Acc. Ins. Co. v. Lucas Funeral Home* (Tex. Civ. App. 1935), 89 S.W.2d 468; *Aetna Ins. Co. v. Aston* (1918), 123 Va. 327, 96 S.E. 772; *Max L. Bloom Co. v. United States Casualty Co.* (1926), 191 Wis. 524, 210 N.W. 689; *Imperial Enter., Inc. v. Fireman's Fund Ins. Co.* (C.A.5, 1976), 535 F.2d 287, 293 ("the no-assignment clause should not be applied ritualistically and mechanically to forfeit coverage"), rehearing denied by (C.A.5, 1976), 540 F.2d 1085; *Ocean Acc. & Guarantee Corp. v. Southwestern Bell Tel. Co.* (C.A.8, 1939), 100 F.2d 441, certiorari denied by (1939), 306 U.S. 658, 59 S. Ct. 775, 83 L. Ed. 1056; *Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co.* (C.A.9, 1917), 240 F. 36; *Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.* (D.N.H. 1994), 857 F. Supp. 140, 152-53 (finding that although the anti-assignment clause is intended to protect the insurance company, the transfer of policy benefits to cover risks that have already occurred impose no additional burden on the insurance company); *Brunswick Corp. v. St. Paul Fire & Marine Ins. Co.* (E.D. Pa. 1981), 509 F. Supp. 750, 753 ("[T]he insurer can claim no prejudice from [refusing to apply a 'no assignment' clause] for [it] will be liable only on those claims against [the successor] arising out of covered acts of [the predecessor] which occurred during the period of [the insurer's] coverage").

appellate authority and the vast majority of cases nationwide unanimously support a policyholder's right to bring claims under historical occurrence-based liability policies.

In *Fiorentino*, the Ohio Court of Appeals held that an anti-assignment clause in the policy did not preclude the assignment of claims under that policy. *Fiorentino* involved an accident victim who was injured in the course of his employment. The employer settled with the victim and included, as part of the settlement, an assignment of the employer's claims against its insurance company. The victim then brought suit against the insurance company. The insurance company denied coverage on the basis of the policy's anti-assignment clause, which stated that the "policy is void if it is assigned without [the insurance company's] written consent." *Fiorentino,* 114 Ohio.App.3d at 191. The trial court granted summary judgment for the insurance company on the grounds that the policy's anti-assignment prohibited the assignment of the employer's claim because the insurance company's consent was not obtained.

The Ohio Court of Appeals reversed and held that the policy's anti-assignment clause did not invalidate the assignment of claims under the policy. Specifically, the *Fiorentino* court held that:

> The assignment of a particular claim under the policy in question would not change the essential risks involved, *i.e.*, the insured party would remain the same, and the risks and benefits bargained for between insured and insurer would not change. [The employer] merely assigned a *claim* under the policy, that is, the right, if indeed one existed, to collect or demand payment under the policy based upon an incident which had already occurred and for which a claim would thus have already accrued. This action did not alter the bargain between [the employer] and [the insurance company]; rather, it simply empowered [the victim-assignee] to pursue an alleged claim in [the employer's] stead.

Fiorentino, 114 Ohio.App.3d at 192-193. (emphasis added) (citations omitted). Furthermore, *Fiorentino* rejected the insurance company's argument that the assignment of the "policy"

necessarily included the assignment of all rights to "claims" under the policy. Instead, the court found that the terms "policy" and "claim" were not coextensive and that these terms should be given their "plain and ordinary meaning." *Fiorentino*, 114 Ohio.App.3d at 193. *Fiorentino* further held that even if there were any ambiguity regarding the meaning of the anti-assignment clause (which there was not), that ambiguity would be resolved against the insurance company and in the policyholder's favor:

> At most, the prohibition against assignment of the policy is ambiguous as to whether assignment of a claim constitutes assignment of the policy. As a general matter, doubt or ambiguity in the language of a contract is strictly construed against the party who prepared it. Language in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer. If the wording, typography, and punctuation selected by the insurer make a contract provision ambiguous, that provision must be construed strictly against the insurer and liberally in favor of the party asserting the claim. The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect.

Fiorentino, 114 Ohio.App.3d at 195. (citations omitted) (emphasis added). Likewise here, if the Court were to find any ambiguity in the policies at issue, that ambiguity must be construed in Pilkington's favor. *Id.*

1. The "Increased Risk" Myth: An Anti-Assignment Clause Does Not Prevent a Policyholder From Assigning Accrued Policy Benefits

Insurance companies' favorite mantra is that the transfer of insurance rights or "choses in action" will "increase their risk" under the policy. They argue that corporate transactions may result in a situation where they would have to defend and indemnify multiple entities. This argument mistakenly assumes that insurance companies would never owe defense obligations to

multiple policyholders. To the contrary, the possibility of defending and indemnifying multiple policyholders is a risk inherent in standard comprehensive general liability policies.

The "increased risk" argument also ignores the fact that the risks of corporate transactions already were present when the policies were written. In other words, the conclusion that a corporate transaction will "increase the risk" of the defense costs depends entirely on the false assumption that an organization cannot sell off the assets and liabilities of a business unit without the permission of its insurance company.

The primary reason for the anti-assignment clause is to protect the insurance company against increased risks of loss resulting from an assignment of coverage to a new policyholder. *See Viola v. Fireman's Fund Ins. Co.* (E.D.Pa. 1992), 965 F.Supp. 654, 659; *St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.* (Ct. App. 1975), 25 Ariz.App. 309, 311, 543 P.2d 147. The assignee may present a greater risk of loss to the insurance company than the original policyholder. The need to protect the insurance company no longer exists, however, after the policyholder sustains the loss because the insurance company's liability is essentially fixed. *See Fiorentino*, 114 Ohio.App.3d at 192 ("The assignment of a particular claim under the policy in question would not change the essential risks involved, *i.e.,* the insured party would remain the same, and the risks and benefits bargained for between insured and insurer would not change"). Furthermore, once the loss has triggered the liability provisions of the insurance policy, an assignment is no longer regarded as a transfer of the actual policy. Instead, it is a transfer of a "chose in action" under the policy. *St. Paul Fire & Marine Ins. Co.*, 25 Ariz.App. at 311. At this point, the insurer-insured relationship is more analogous to that of a debtor and creditor, with the policy serving as evidence of the amount of debt owed. *Antal's Restaurant, Inc. v. Lumbermen's Mut. Cas. Co.* (D.C. 1996), 680 A.2d 1386, 1389.

Commentators all agree that the anti-assignment clause does not apply to a post-loss assignment:

> Antiassignment clauses in insurance policies are strictly enforced against attempted transfers of the policy itself before a loss has occurred, because this type of assignment involves a transfer of the contractual relationship and, in most cases, would materially increase the risk to the insurer. Policy provisions that require the company's consent for an assignment of rights are generally enforceable only before a loss occurs, however. As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy--consisting of the right to receive the proceeds of the policy--after a loss has occurred. The reasoning here is that once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer. After a loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.

17 Williston on Contracts, § 49:126 (4th Ed.) (July 2003) (emphasis added).

> General stipulations in policies prohibiting their assignment except with the insurer's consent or upon giving notice, or like conditions, apply only to assignments before loss, and accordingly do not prevent an assignment of a claim or an interest in insurance money then due. Indeed, a specific provision against an assignment after loss is generally held unenforceable, as inconsistent with the covenant of indemnity or the right to assign a claim for money due, and as contrary to public policy.

44 Am. Jur. 2d Insurance § 787 (May 2004) (emphasis added).

> The purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity.

3 Couch on Ins. § 35:7 (3d Ed.) (Nov. 2004) (emphasis added). Thus, the argument that a transfer of a chose in action relating to pre-transaction activities somehow "increases" an insurance company's risk is a myth perpetrated by the insurance industry to avoid paying claims.

2. Enforcing An Anti-Assignment Clause After A Loss Has Taken Place Is Fundamentally Inconsistent With The Nature of Occurrence-Based Liability Insurance

Insurance benefits relating to alleged IBNR claims should, as a matter of good public policy, be transferred with the sale of business units potentially subject to liability for those claims. *See* 3 Couch on Ins. § 35:8 (3d Ed.) (Nov. 2004) ("a specific provision against assignment after loss has been held null and void, as being inconsistent with the obligation of the insurer. . . and as accordingly being contrary to public policy") (emphasis added). Moreover, this approach is consistent with this Court's conclusion that "the public policy in Ohio is to favor assignments." *See Fairview Hospital v. Fortune* (Ct. App. 2001), 141 Ohio.App.3d 314, 318, 750 N.E.2d 1203.

Here, the Insurance Company Respondents are attempting to impose a "claims-made" cut-off date to unfairly deny Pilkington coverage under the policies. It is well-established Ohio law that an occurrence-based policy provides coverage for injury during the policy period. *See, e.g., Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St.3d 512, 516, 769 N.E.2d 835; *C.V. Perry & Co. v. West Jefferson* (Ct. App. 1996), 110 Ohio App. 3d 23, 25-26, 673 N.E.2d 613; *Mueller v. Taylor Rental Ctr.* (Ct. App. 1995), 106 Ohio App. 3d 806, 667 N.E.2d 427; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 298 n. 24, 503 N.E.2d 717. If the Respondent Insurance Companies were able effectively to convert their "occurrence" and "accident" policies into "claims-made" policies, they would enjoy a windfall reduction in coverage without any change to the premiums they collected. This result is a radical departure for Ohio law, and runs contrary to the functioning of liability insurance.

C. Proposition of Law No. III: The Operation of Law Rule Is Fundamentally Consistent With The Nature of Occurrence-Based Liability Insurance

The guiding principle of the "operation of law" rule is straightforward: coverage rights follow the alleged liabilities under liability insurance policies. The "operation of law" rule was first recognized in a 1992 Ninth Circuit decision, *Northern Ins. Co. of New York v. Allied Mutual Ins. Co.* (C.A.9, 1992), 955 F.2d 1353. In that case, Brown-Forman purchased California Cooler, a beverage company, pursuant to an asset purchase agreement. Brown-Forman was subsequently sued by the family of a child born with fetal alcohol syndrome and sought coverage for defense costs from Northern Insurance, California Cooler's insurance company. The Ninth Circuit applied a rule of product-line successor liability and found that even though the asset purchase agreement excluded the predecessor's liability insurance policies, the benefits of those policies transferred anyway by operation of law.

Several courts have extended this doctrine beyond product-line successor liability. For example, in *Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.* (D.N.H. 1994), 857 F. Supp. 140, the court extended the *Northern Insurance* doctrine to an environmental liability case. In that case, the seller sold certain assets, but continued its corporate existence after the asset sale. The purchaser was subsequently sued for presale environmental liabilities and sought coverage under the seller's historical policies. The court concluded that the insurance benefits transferred to the purchaser by operation of law under a theory of corporate succession. Likewise, in *B.S.B. Diversified Co. v. American Motorists Ins. Co.* (W.D. Wash. 1996), 947 F. Supp. 1476, the court extended the product-line rule to a successor responsible for environmental cleanup where the events creating the liability occurred prior to the transfer of liability. *See also Gopher Oil v. American Hardware Mutual Ins. Co.* (Minn. Ct. App. 1999), 588 N.W.2d 756, 763

(court held that successor corporation, which was held strictly liable under CERLA based on its predecessor's activities, could look to predecessor's insurance policies to cover that liability).

More recently, the Ohio Court of Appeal reaffirmed the well-accepted operation of law rule in the case of *The Glidden Company v. Lumbermens Mutual Casualty Co.*, et al., No. 81782, 2004 WL 2931019, at *1 (Ohio Ct. App. Dec. 17, 2004)[4]. In that case, the Ohio Court of Appeals reversed the lower court's ruling and held that, although the rights and benefits to the historical liability policies did not transfer pursuant to the applicable corporate transactions, Glidden obtained rights to coverage under those policies as a matter of law. Specifically, the *Glidden* court held that "a corporation which succeeds to liability for pre-acquisition operations of another entity acquires rights to coverage by operation of law." *Id.* at *9

The Insurance Company Respondents urge this Court to follow the *Henkel* ruling and allow them to avoid their obligations based on the existence of a corporation transaction. *Henkel* rejected the well-established "operation of law" approach and concluded that a successor corporation was not entitled to a defense or indemnity from its predecessor's insurance companies for lawsuits alleging bodily injury as a result of exposure to the predecessor's chemical products. The recent *Glidden* decision resoundingly rejected the conclusion of the *Henkel* court, and reaffirmed the earlier well-accepted operation of law doctrine, in holding that:

> We believe the better-reasoned authority applies the operation of law theory. Courts applying this theory have continued to extend its application to more general successor liability situations. We find that a corporation which succeeds to liability for pre-acquisition operations of another entity acquires rights of coverage by operation of law. This theory applies even where the acquisition was a purchase of assets or only part of a predecessor corporation.

---

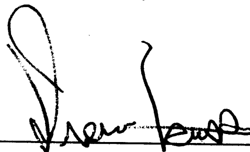
[4] This Court has accepted the *Glidden* decision for review, and the case is now currently pending before this Court.

Glidden, 2004 WL 2931019 at *9. The *Glidden* ruling, and the well-recognized decisions it follows, ensures that the insurance rights of corporate policyholders are protected regardless of the type of corporate transaction involved. It also prevents insurance companies from receiving an unfair windfall for a risk they promised to insure against and for which they were paid.

IV. CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully submits that the Court, in its answers to the questions of state law certified by the United States District Court for the Northern District of Ohio, should accept the arguments of Petitioner Pilkington North America, Inc.

Respectfully submitted,



DREW A. CARSON (0037641)
SARAH H. KOSTURA (0077781)
GOODMAN WEISS MILLER LLP
100 Erieview Plaza, 27th Floor
Cleveland, OH 44114-1882
(216) 696-3366
(216) 363-5835 (fax)
carson@goodmanweissmiller.com
kostura@goodmanweissmiller.com

WILLIAM G. PASSANNANTE
CATHLEEN CINELLA TYLIS
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000
(212) 278-1733 (fax)
wpassannante@andersonkill.com
ctylis@andersonkill.com

Counsel for *Amicus Curiae*
United Policyholders

Dated: June 6, 2005

CERTIFICATE OF SERVICE

A copy of the Brief of *Amicus Curiae*, United Policyholders, in Support of Petitioner, Pilkington North America, Inc. was sent by first-class mail, postage prepaid, to each of the following this 6th day of June, 2005:

Counsel for Petitioner
Pilkington North America, Inc.

Steven R. Smith (0031778) (Counsel of Record)
Tammy Geiger Lavalette (0071533)
CONNELLY, JACKSON & COLLIER LLP
405 Madison Avenue, Suite 1600
Toledo, Ohio 43604
Telephone: (419) 243-2100
Facsimile: (419) 243-7119
Email: ssmith@cjc-law.com
tlavalette@cjc-law.com

Mitchell F. Dolin
Seth A. Tucker
Ann-Kelley Kemper
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-2000
Facsimile: (202) 662-6291
Email: mdolin@cov.com
stucker@cov.com

Counsel for Respondent Travelers
Casualty & Surety Company

Arthur M. Kaufman (0017724)
HAHN LOESER & PARKS, LLP
BP Tower, Suite 3300
200 Public Square
Cleveland, OH 44114-2301
Telephone: (216) 621-0150
Facsimile: (216) 241-2824

Counsel for Respondent Aeroquip-
Vickers, Inc. and Eaton Corporation

Joseph P. Thacker (0013039)
John K. Nelson (0013055)
COOPER & WALINSKI
900 Adams Street
Toledo, OH 43624
Telephone: (419) 241-1200
Facsimile: (419) 242-5675
Email: nelson@CooperWalinski.com

Thomas E. Birsic
James E. Scheuermann
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
535 Smithfield Street
Pittsburgh, PA 15202
Telephone: (412) 355-6500
Facsimile: (412) 355-6501
Email: tbirsic@klng.com
jscheuermann@klng.com

Attorneys For Onebeacon America
And Northern Assurance Co. Of America

David A. Schaefer (0014297)
McCarthy, Lebit, Crystal
& Liffman Co., LPA
Midland Building, Suite 1800
101 Prospect Avenue, West
Cleveland, OH 44115
Telephone: (216) 696-1422
Facsimile: (216) 696-1210

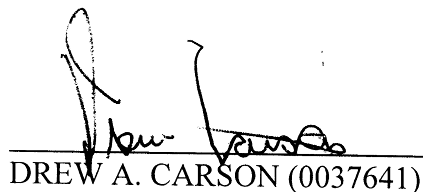
Gary L. Justice
Andrew Z. Edelstein
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-6446
Email: gjustice@gibsondunn.com

Joseph M. Kuffler
Peter F. Rosenthal
Patricia B. Santelle
White and Williams, LLP
One Liberty Place, Suite 1800
1650 Market Street
Philadelphia, PA 19103-7395
Telephone: 215-864-7000
Facsimile: 215-864-7123
Email: rosenthalp@whiteandwilliams.com

Counsel for Respondent Liberty Mutual Insurance Co.

Stephen E. House (006876)
MANAHAN, PIETRYKOWSKI,
BAMMAN & DELANEY
414 N. Erie Street
P.O. Box 2328
Toledo, OH 43603-2328
Telephone: (419) 243-6148
Facsimile: (419) 241-7759

Kenneth C. Newa
PLUNKETT & COONEY
Buhl Building, Suite 2400
535 Griswold Street
Detroit, MI 48226
Telephone: (313) 965-3900
Facsimile: (313) 983-4350
Email: knewa@plunkettcooney.com



DREW A. CARSON (0037641)