STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2008AP333

PLASTICS ENGINEERING COMPANY,

Plaintiff-Appellee/Cross-Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY

Defendant-Appellant/Cross-Appellee.

On Certification From The United States Court Of Appeals For the Seventh Circuit
On Appeal From The United States District Court
For The Eastern District Of Wisconsin,
Case No. 04 C 825
The Honorable Aaron E. Goodstein, Magistrate Judge

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS

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June 23, 2008

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INTEREST OF *AMICUS CURIAE*

United Policyholders ("UP") is a non-profit consumer rights group dedicated to educating insurance buyers on a wide range of insurance-related topics. In addition to serving as an educational resource for policyholders nationwide, UP frequently files *amicus curiae* briefs in courts around the country in cases that are likely to affect large numbers of insurance consumers.

UP submits this brief to present the Court with a policyholder perspective on the first and third questions presented in this case. UP is interested in the Court's resolution of both questions because a one-"occurrence" ruling or *pro rata* allocation decision would adversely affect the insurance protection available to manufacturers, distributors, and retailers who face the specter of mass tort products liability.

ARGUMENT

Liberty Mutual Insurance Company ("Liberty") asserts that asbestos claims arising out of disparate exposures to asbestos-containing products in varying geographical locations over many years constitute one "occurrence" under policies that it sold to Plastics Engineering Company ("Plenco"). Liberty also asserts that, despite promising to pay "all sums" incurred as damages resulting from such exposures, and to "defend any suit" potentially covered by its policies, Plenco should bear a *pro rata* portion of its liability and defense costs.

UP respectfully submits that Liberty is wrong on both points. *First*, regarding the number of occurrences, it would strain the Plenco policy language

beyond recognition to sweep latent injuries sustained by thousands of plaintiffs, as a result of exposure to numerous asbestos products over several decades in unrelated locations, into a single oversized "occurrence." In addition, settled Wisconsin law, which requires a close relationship in time and space to aggregate separate events into one "occurrence," strongly supports a multiple-"occurrence" ruling here. Many other courts have reached the same conclusion, and UP is not aware of a single state Supreme Court that has adopted Liberty's single-"occurrence" theory for mass product liability claims.

Second, regarding allocation of liability, the plain language of the Plenco policies, as well as strong equitable considerations, overwhelmingly favor an "all sums" allocation rule and do not permit proration to the insured.

I. MASS TORT CLAIMS ARISING OUT OF EXPOSURE TO ASBESTOS-CONTAINING PRODUCTS IN MANY DIFFERENT GEOGRAPHICAL LOCATIONS OVER MANY YEARS CONSTITUTE MULTIPLE "OCCURRENCES."

A. The Plain Language of the Plenco Policies Requires a Multiple-"Occurrence" Ruling.

When deciding the meaning of a disputed policy term, this Court begins with an examination of the relevant policy language. *See, e.g., Hull v. State Farm Mut. Auto. Ins. Co.*, 222 Wis.2d 627, 637 (Wis. 1998). Where "the language of the policy is plain and unambiguous," the Court "enforce[s] it as written, without resort to rules of construction or principles in case law." *Danbeck v. Am. Family Mut. Ins. Co.*, 245 Wis.2d 186, 193 (Wis. 2001). If, however, "an insurance policy

is ambiguous, then the policy is to be interpreted against the [insurer] drafter." *State Farm Mut. Auto. Ins. Co. v. Langridge*, 275 Wis.2d 35, 58 (Wis. 2004).

The 1968-1973 Plenco primary policies – which were written on standard industry-wide Comprehensive General Liability ("CGL") forms – define the word "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Plenco App. at 49.[1] This language is not ambiguous when applied in the context of "long-tail" asbestos claims. *Cf. Welter v. Singer*, 126 Wis.2d 242, 249 (Wis. Ct. App. 1985) (there is "no ambiguity" in the terms "accident" or "occurrence"). The plain meaning of this definition naturally points to the injurious "exposure to [asbestos fibers]" – not to the remote business decision to manufacture and sell asbestos-containing products – as the operative "occurrence" that caused each claimant's distinct injuries.

The Plenco policies state that an "occurrence" is an "accident," which in turn is commonly defined as "1. An unexpected and undesirable event" or "2. Something that occurs unexpectedly or unintentionally." *Webster's II New College Dictionary* 7 (3d ed. 2005). Neither definition comports with the strained construction that Liberty urges here. The decision to manufacture and sell molding compounds to third-party companies was not an "unexpected" or

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[1] The other policies at issue contain a substantially similar definition of the word "occurrence." Plenco App. at 50, 53.

"undesirable" event, nor did it occur "unintentionally." *See, e.g., London Market Insurers v. Superior Court*, 53 Cal.Rptr.3d 154, 167 (Cal. Ct. App. 2007) ("Manufacture and distribution of asbestos products is not an unforeseen event, but rather is 'better characterized as [a] business decision[ ].'") (quoting *Flintkote Co. v. Gen. Accident Assurance Co.*, 410 F.Supp.2d 875, 892 (N.D. Cal. 2006)). On the contrary, Plenco routinely incorporated asbestos into certain of its molding compounds for nearly 35 years. Plenco App. at 42.

The word "occurrence" is also defined to include "injurious exposure to conditions," a phrase that readily embraces a plaintiff's exposure to asbestos. As many courts have recognized, trying to match the plain meaning of "exposure to conditions" with the "manufacture and sale" of asbestos-containing products or an alleged failure to warn of their danger is like trying to get a square peg into a round hole. It doesn't fit. *See, e.g., London Market Insurers,* 53 Cal.Rptr.3d at 165 ("It unreasonably strains the plain language of the policies to characterize manufacture and distribution of products as 'conditions' to which claimants were exposed. . . . [W]e conclude that the 'conditions' to which claimants were exposed were the asbestos fibers released from Kaiser's products."); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 900 (Conn. 2001) ("[A]n application of the continuous exposure clause to an allegation of negligent failure to warn places considerable strain on the words 'exposure' and 'conditions.' . . . A plain reading of the policies indicates that the occurrence in this case was the exposure of the claimants to asbestos."); *Appalachian Ins. Co. v. Gen. Elec. Co.*,

863 N.E.2d 994, 1000 (N.Y. 2007) ("[T]he incident that gave rise to liability was each individual plaintiff's 'continuous or repeated exposure' to asbestos," not the business decision to manufacture asbestos products or a failure to protect against their alleged hazards).

In sum, the only plausible way to interpret the word "occurrence" in this context, particularly when viewed from the standpoint of "a reasonable person in [Plenco's] position," *Hull*, 222 Wis.2d at 636-37, is that it refers to the immediate proximate cause of each claimant's injuries, *i.e.,* his/her injurious exposure to the asbestos contained in Plenco's molding compounds, *not* to Plenco's manufacture and sale of those products, or its alleged failure to warn of their danger. Viewed this way, as numerous courts have recognized in similar circumstances, the thousands of bodily injury claims asserted against Plenco, which arise out of many sick individuals' exposure to asbestos in Plenco's and others' products at varying geographic locations over many years, must have resulted from more than one "occurrence." *See, e.g., In re Prudential Lines Inc.*, 158 F.3d 65, 81 (2d Cir. 1998); *Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co.,* 53 F.3d 762, 767-68 (6th Cir. 1995); *Flintkote*, 410 F.Supp.2d at 892; *Fina, Inc. v. Travelers Indem. Co.*, 184 F.Supp.2d 547, 552 (N.D. Tex. 2002); *London Market Insurers*, 53 Cal.Rptr.3d at 165; *Metro. Life*, 765 A.2d at 900; *Cole v. Celotex Corp.*, 588 So.2d 376, 390-91 (La. Ct. App. 1991), *aff'd* 599 So.2d 1058, 1075 (La. 1992); *Appalachian*, 863 N.E.2d at 1000; *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.,* 886 N.E.2d 876, 885-88 (Ohio App. 2007).

That the Plenco policies contain a standard "deemer" clause aggregating into one occurrence injuries caused by "continuous or repeated exposure to substantially the same general conditions," *see* Plenco App. at 50-52, does not alter this conclusion. The plain meaning of this clause is clear in the context of asbestos bodily injury claims: injury sustained by a single plaintiff who is continuously or repeatedly exposed to asbestos will be treated as a single occurrence even though the exposure happens continuously or repeatedly over time. This clause does not transform the concept of an "occurrence" into a black hole that swallows up thousands of disparate asbestos claims. Rather, a single occurrence may encompass multiple plaintiffs only if all are exposed to "substantially the same general conditions,"[2] not to conditions that exist at widely different times and places. As the Connecticut Supreme Court has observed in the same context, this clause "does not combine hundreds of thousands of exposures into one occurrence" where the claimants' injuries "arose from exposures to asbestos at several locations, at different times, and for varying lengths of time." *Metro. Life*, 765 A.2d at 899. Such varied circumstances "clearly do not constitute 'the same general conditions.'" *Id.*

B. Wisconsin Law on Number of Occurrences Strongly Supports a Multiple-"Occurrence" Ruling.

Wisconsin law is clear that temporal and spatial proximity are central factors in deciding whether multiple injuries constitute more than one

[2] An example would be an episodic, Bhopal-type toxic release from a chemical plant that sickens scores of persons in the vicinity of the plant, or a continuous release of pollutants from a single location, such as repeated spills at a facility that seep into groundwater.

"occurrence" under a standard CGL policy. In Wisconsin's leading case on the subject, this Court found that an accident involving a car that collided with two vehicles "almost instantaneously" constituted one "occurrence." *Olsen v. Moore*, 56 Wis.2d 340, 350 (Wis. 1972). There was "virtually no time or space interval between the two impacts," and therefore, under the "cause" theory adopted by the Court, there was clearly just "one accident or occurrence" that caused the injuries. *Id.* Similarly, in *Welter v. Singer*, the Court of Appeals held that an accident constitutes one "occurrence" only "[i]f cause and result are so simultaneous or so closely linked in time and space as to be considered by the average person as one event." *Welter*, 126 Wis.2d at 251; *accord Voigt v. Riesterer*, 187 Wis.2d 459, 467 (Wis. Ct. App. 1994) (multi-vehicle collision constituted multiple occurrences because "[t]he cause of the first impact was interrupted such that the cause and result were not simultaneous or so closely linked in time and space to be considered one event by the average person").

The focus on temporal and spatial proximity in *Olsen* and the cases that follow it strongly supports the conclusion that claims arising out of exposure to asbestos at different locations over many decades constitute more than one "occurrence." Indeed, there is no temporal or spatial relationship at all among the disparate exposures to asbestos in Plenco's products. Plenco incorporated asbestos into its products for over three decades, and the claims against Plenco have been brought by individuals working at different times in different facilities and job sites not owned by Plenco. Plenco App. at 42-43. To aggregate such

disparate claims arising from asbestos exposures at unrelated locations over many decades is both counter-intuitive and contrary to Wisconsin's requirement of temporal and spatial proximity.

II. THE PLENCO POLICIES REQUIRE AN "ALL SUMS" – NOT *PRO RATA* – ALLOCATION OF LIABILITY.

A. The Plain Language of the Plenco Policies Requires an "All Sums" Allocation of Liability.

Each of the Plenco policies provides that Liberty shall pay "all sums" that Plenco becomes "legally obligated to pay as damages because of . . . bodily injury or . . . property damage . . . caused by an occurrence." Plenco App. at 47. They do not state that Liberty will pay "some sums," or a "*pro rata* portion of all sums," of such damages. The same policies require Liberty to "defend any suit" potentially covered by the policy; they do not say Liberty will defend "part of a suit" when injury potentially developed in both insured and uninsured periods. Numerous courts have accordingly recognized that an insurer whose policy is triggered by a continuing injury is liable for all damages and defense costs that result from such progressive injury, even if other policies also are triggered or the injury developed during both insured and uninsured periods. *See, e.g., ACandS, Inc. v. Aetna Cas. & Sur. Co*, 764 F.2d 968, 974 (3d Cir. 1985); *Keene Corp. v. INA*, 667 F.2d 1034, 1050 (D.C. Cir. 1981); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 508 (Pa. 1993).

Liberty's argument for *pro rata* allocation ignores the fundamental distinction between "trigger" and scope of coverage. When injury occurs both

during and outside the policy period, this means that more than one policy will be *triggered*. It does not mean that each triggered policy is only liable for a share of the total injury – because the *scope* of the insurer's obligation, once its policy has been triggered by injury during the policy period, is defined by the unambiguous promise to pay "all sums." *Pro rata* allocation is a *post-hoc* invention urged by insurers to reduce their obligations in continuing injury cases, even though standard CGL policies, like those issued to Plenco, contain no language requiring proration. Any court that undertakes to fashion a *pro rata* allocation formula is necessarily grafting new provisions onto the insurer-drafted CGL policy, not enforcing it as written.

So-called "proration to the insured" is an attempt to insert what is effectively a "coinsurance" requirement that the policyholder maintain continuous coverage by forcing it to bear a portion of any loss attributed to periods when it did not buy "enough" insurance.[3] The proper way to impose a coinsurance requirement is to write it into the policy when it is offered for sale. Liberty did not do that here, and it is too late in the day to read such a sweeping restriction into Liberty's affirmative coverage grant.

B. Equity Does Not Justify Proration to the Policyholder.

To the extent that equitable considerations enter into the analysis, they strongly support enforcing the "all sums" promise as Liberty wrote it. First,

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[3] Coinsurance provisions are used in property insurance policies as a device to require the insured to bear a portion of the loss if the property is underinsured. *See, e.g.*, 7 Lee R. Russ, *Couch on Insurance 3d* § 98:17 (2005).

because the insurance industry drafted the "all sums" language that appears in the standard CGL insurance form, *see, e.g., Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F.Supp. 1485, 1500-03 (S.D.N.Y. 1983), *aff'd as mod.*, 748 F.2d 760 (2d Cir. 1984) (discussing Liberty's role in drafting CGL policy form), this language cannot be construed against Plenco. *See Langridge*, 275 Wis.2d at 58. This is particularly so given that the insurance industry considered – and rejected – the idea of including proration language in the standard insuring agreement. *See* Br. of Plenco at 70; *see also Aerojet-Gen. Corp. v. Transport Indem. Co.,* 948 P.2d 909, 932 (Cal. 1997) (rejecting proration to the insured) ("[T]he pertinent policies provide what they provide. [By using the "all sums" language, the parties] established what was 'fair' and 'just' inter se. We may not rewrite what they themselves wrote.").

Second, Liberty's argument that an "all sums" ruling would give businesses an incentive to "go bare" is an invitation to judicial policymaking without any empirical foundation. Manufacturers naturally have strong incentives to purchase liability insurance without prodding from the judiciary. Plenco, by example, purchased CGL policies every year from at least 1957 to 2003. Liberty does not point to any business that has actually set out to "game" an insurance company by purchasing insurance in one year and then "going bare" for decades, with the goal of funneling all long-tail claims that might later arise into that one policy year. There is no such bogeyman, because the strategy Liberty envisions would be suicidal for policyholders hit with an onslaught of long-tail claims. First, it is

notoriously difficult to predict what tort liabilities a company might face decades into the future. Therefore, there is no practical way to decide *when* to "go bare." Moreover, no rational business would forego insurance for all of the other everyday liability risks it faces, including the risk of a catastrophic event during any given year. In addition, most businesses are routinely required to carry insurance by third parties – for example, their landlords, lenders, and regulatory authorities. Enforcing Liberty's "all sums" language cannot change these existing incentives to purchase liability insurance.

Third, enforcing the "all sums" promise as written will not ordinarily leave a single insurer "holding the bag." Asbestos disease typically develops over many years, triggering multiple successive policies written by multiple insurers. Thus, although each insurer has an independent obligation under its policies to indemnify the policyholder, each may seek contribution from other insurers whose policies are also triggered. *See, e.g., Keene Corp.*, 667 F.2d at 1050 n.37; *J.H. France*, 626 A.2d at 509. There is nothing inequitable about this.

At bottom, there is no fundamental difference, from a "fairness" standpoint, between the situation here and a situation in which a business goes for many years with no losses, then experiences a catastrophic loss in a single year. The insurer in that unlucky year must pay "all sums," up to its limit, and cannot prorate that loss to the other years – even if the business chose to "go bare" in those other years. Nobody would call this a windfall to the policyholder or unfair to the insurer. This is simply how insurance works.

CONCLUSION

For the foregoing reasons, UP respectfully submits that this Court should (1) conclude that each underlying claimant's exposure to asbestos constitutes a separate "occurrence," and (2) hold that each CGL policy triggered by an asbestos claim must pay "all sums" up to its policy limits, subject to the insurer's right to seek contribution from other insurers whose policies are also triggered.

DATED this 23rd day of June, 2008.

Respectfully submitted,

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CERTIFICATE

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,934 words.

Alan G. B. Kim, Jr.

CERTIFICATE OF SERVICE

I, Marjorie Irving, am a legal secretary at Anderson & Kent, S.C. I hereby certify that I caused a true and correct copy of this **Brief of *Amicus Curiae* United Policyholders** to be served on counsel by placing the same in U.S. mail, first class postage, on this date:

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