STATE OF CONNECTICUT
APPELLATE COURT

SECURITY INSURANCE COMPANY OF HARTFORD,	)	
Appellants,	)	
v.	)	**Court of Appeals Case No. AC 21960**
LUMBERMAN'S MUTUAL CASUALTY CO.,	)	
Appellees.	)	

BRIEF OF AMICUS CURIAE,
UNITED POLICYHOLDERS

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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.

By Order dated January 31, 2002, United Policyholders, was granted permission to appear as Amicus Curiae and file an Amicus Curiae brief in support of ACMAT Corporation.

STATEMENT OF THE CASE AND FACTS

United Policyholders adopts the Statement of Facts, including the Case History, contained in the Brief of Appellants, ACMAT Corporation dated November 30, 2001.

ARGUMENT

The trial court's decision (the "Trial Court Decision") to apply a "pro rata" theory of allocation for multiple years of insurance coverage was in error:

- Pro-rata allocation schemes, like that proposed in the Trial Court Decision, are unfair, unworkable and lead to endless complications and unnecessary allocation litigation.
- The Trial Court Decision is inconsistent with the insurance industry's prior judicial representations;
- The Trial Court Decision is inconsistent with the insurance industry's own drafting history of standard-form general liability insurance policies; and

I. PRO-RATA ALLOCATION SCHEMES, LIKE THAT PROPOSED BY THE TRIAL COURT DECISION, ARE UNFAIR AND UNWORKABLE AND LEAD TO ENDLESS COMPLICATIONS AND UNNECESSARY ALLOCATION LITIGATION.

The case which first applied "pro-rata" allocation recognized that its methodology might prove impossible to implement.[1] 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. The allocation of defense costs, such as those at issue here, raise a complicated issue in that the allegations of the underlying complaint might not match exactly with the facts as proven at trial, and the allocation formula adhered to for an entire case can come completely undone and need to be reworked. For that reason, various courts have recognized that to the extent that allocation of defense costs to a policyholder is *permitted*, such allocation (if any) is more properly deferred until the policyholder's defense has been secured and the

[1] Owens-Illinois v. United Ins. Co., 138 N.J. 437, 478, 650 A.2d 974, 995 (1994) (adopting "pro-rata allocation" under New Jersey law, and stating that "[w]e realize that many complexities

underlying cases have developed sufficiently to demonstrate that some bodily injury or property damage in fact occurred during an uninsured period. See Continental Cas. Co. v. Rapid-American Corp., 80 N.Y.2d 640, 655-56, 609 N.E.2d 506, 514, 593 N.Y.S.2d 966, 974 (1993) (". . . the insured should not be denied initial recourse to a carrier merely because another carrier may also be responsible." ". . . [any allocation of defense costs] is appropriately deferred at least until such time as the underlying lawsuits are shown to involve 'occurrences' during self-insured periods.").

Indeed, there are many other complications with applying a "pro-rata" allocation scheme. A short list of other potential complexities – not all present here but certain to arise in future cases –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. This is inconsistent with the insurance industries' representations that allocation approach should maximize insurance coverage for the policyholder. See section I, supra.

- Availability: 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.

- 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

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encumber the solution that we suggest," and that, "[i]f, after experience, we are convinced that our solution is inefficient or unrealistic, we will not hesitate to revisit the issue").

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?

- Pre-Acquisition Coverage: Insurance companies also argue that, where damage or injury was caused solely by a previous entity, the current policyholder/owner is responsible for the earlier years in which damage took place. At the same time, insurance companies argue that the policyholder did not have any insurable interest and therefore cannot access policies issued to the policyholder during those earlier years.

- Insolvency. Insurance companies argue that policyholders are responsible for periods of coverage in which they were sold insurance policies by now-insolvent insurance companies. See, e.g., Princeton Gamma Tech, Inc. v. Hartford Ins. Group, No. SOM-L-1289-91 (N.J. Super. Sept. 4, 1996). Thus, the policyholder is penalized in having to pay both the original premium and the pro-rata share assigned to the insolvent insurance company.

All of these complexities – and others that insurance industry lawyers will devise – so complicate any 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. That is, 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."[2] 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

[2] Eugene R. Anderson, et al., Environmental Insurance Coverage in New Jersey: A Tale of Two Stories, 24 Rutgers L.J. 83, 203 (1992) (quoting Richard A. Schmalz, The New Comprehensive General Liability and Automobile Program, Presentation Before the Mutual

Connecticut policyholders of coverage they would have in under the majority rule of other states, and under other previous Connecticut court decisions, enforcing the promise to pay all sums.

II. THE TRIAL COURT'S "PRO RATA" ALLOCATION DECISION IS INCONSISTENT WITH THE INSURANCE INDUSTRY'S PRIOR JUDICIAL REPRESENTATIONS

The insurance industry has argued that policyholders are entitled to designate which general liability insurance policies are liable to respond fully to a continuing operation and continuing injury. 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 litigation positions are absolutely inconsistent with the "pro rata" Trial Court Decision.

For instance, insurance companies have 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). North River Insurance Company, a large general liability insurance company, 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]

Insurance Technical Conference 6 (Nov. 15-18, 1965). The authors of this Article represent Amicus Curiae.

[3] Brief of the North River Insurance Company in Support of Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment at 15 (filed Apr. 2,

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 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.

United States 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.[4]

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 [policyholder] contracts with his [insurance company] 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

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1986) in Madsen & Howell, Inc. v. Sentry Ins. Co., (N.J. Super. Ct.), No. L-021632-85 (emphasis added). Counsel for Amicus Curiae has copies of all briefs, drafting history documents and insurance company manuals to which this Memorandum refers, and will provide copies of same to the Court or counsel for any of the parties upon request.

[4] Memorandum of Points and Authorities in Opposition to Motion of Great American Surplus Lines Insurance Company To Dismiss USF&G's Third Amended Third-Party Complaint at 2, 5 (filed Mar. 15, 1988) in Hobart Bros. Co. v. United States Fidelity & Guar. Co., (D.D.C.), No. 86-518.

> 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.[5]

III. THE TRIAL COURT DECISION 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 appellees, 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 Connecticut policyholders — large and small — contracted over the decades.

Indeed, the drafters of the general liability standard forms[6] clearly understood that the promise to indemnify "all sums" required insurance companies to pay the whole of a

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[5] 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 Ins. Co., No. 89 CH 09741 (Ill. Cir. Ct.), (undated) (emphasis added).

[6] 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

policyholder's liability, even if only a portion of the continuous injury took place during the policy period.[7] 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."[8] 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.[9]

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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), aff'd as modified, 748 F.2d 760 (2d Cir. 1984); Montrose Chem. Co. of Cal. v. Admiral Ins. Co., 10 Cal.4th 645, 670, 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, (Del. Super. 1992), 1129, 1129 n.1 (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.

[7] 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.

[8] Id. (quoting Richard A. Schmalz, The New Comprehensive General Liability and Automobile Program, Presentation Before the Mutual Insurance Technical Conference 6 (Nov. 15-18, 1965); see also Owens-Illinois v. United Ins. Co., 650 A.2d 974, 990 (N.J. 1994), (quoting Messrs. Bean and Katz); Eugene R. Anderson, et al., Liability Insurance Coverage for Pollution Claims, 59 Miss. L.J. 699, 729-30 (1989) (quoting Mr. Bean). The authors of this article are counsel to policyholders and represent Amicus Curiae.

[9] Eugene R. Anderson, et al., Environmental Insurance Coverage in New Jersey: A Tale of Two Stories, 24 Rutgers L.J. 83, 203-04 (1992) (citing Gilbert L. Bean, New Comprehensive 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 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.[10]

Thus, the drafting history, like the insurance industry's prior judicial representations, is absolutely inconsistent with the "pro rata" Trial Court Decision. 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 appellee is barred by Restatement (Second) of Contracts § 205 from controverting, in this case, its

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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. J. 411, 415 (1991). Again, the authors of Anderson articles represent Amicus Curiae.

[10] Eugene R. Anderson, et al., Environmental Insurance Coverage in New Jersey: A Tale of Two Stories, 24 Rutgers L.J. 83, 199 (1992) (citing Memorandum of Meeting of Discussion Group re: Asbestosis 987, 85 John Street, New York, New York (April 21, 1977), at 1 (emphasis added). The authors of this Article are policyholder counsel and represent Amicus Curiae; Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis, 97 Harvard Law Rev. 739, 745 (1984). See also Owens-Illinois, 650 A.2d at 990.

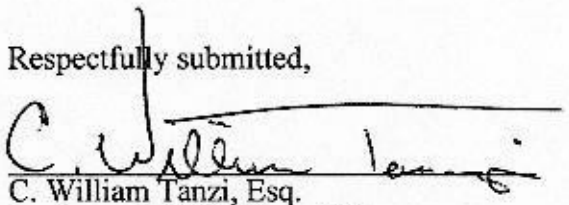
understanding of the language in policies that it sold as chronicled in the drafting history cited above.

CONCLUSION

For the foregoing reasons, Amicus Curiae, United Policyholders, respectfully requests this Court to reject the Trial Court Decision and its proposed pro-rata allocation scheme in favor of insurance industries' promise to pay "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.

Dated: February 21, 2002

Respectfully submitted,



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It is certified that, on this 20th of February, 2002, the original and 15 copies of this Application were filed with the Connecticut Appellate Court and a copy was mailed postage prepaid to each of the following:

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