93-7314(L)

(For Continuation of Docket Numbers See Reverse Side of Cover)

United States Court of Appeals

for the

Second Circuit

STONEWALL INSURANCE COMPANY,

Plaintiff-Appellant/Cross-Appellee,

– against –

ASBESTOS CLAIMS MANAGEMENT CORPORATION,

Defendant-Appellee/Cross-Appellant,

– and –

LIBERTY MUTUAL INSURANCE COMPANY, UNDERWRITERS AT LLOYDS, CONTINENTAL CASUALTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, AFFILIATED FM INSURANCE COMPANY, REPUBLIC INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, HOUSTON GENERAL INSURANCE COMPANY, TWIN CITY FIRE INSURANCE COMPANY, OLD REPUBLIC INSURANCE COMPANY, AMERICAN CENTENNIAL INSURANCE COMPANY, THE CONSTITUTION STATE INSURANCE COMPANY, EMPLOYERS INSURANCE OF WAUSAU, and COMMERCIAL UNION INSURANCE COMPANY,

Defendants-Appellants/Cross-Appellees,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AMICI CURIAE OF UNITED POLICYHOLDERS AND HOECHST CELANESE CORPORATION IN SUPPORT OF DEFENDANT-APPELLEE-CROSS-APPELLANT NATIONAL GYPSUM COMPANY

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93-7380, 93-7382, 93-7386, 93-7388, 93-7390, 93-7392, 93-7394, 93-7396, 93-7400, 93-7402, 93-7404, 93-7406, 93-7408, 93-7412, and 94-7030, 94-7032, 94-7034, 94-7036, 94-7038, 94-7040, 94-7042, 94-7044, 94-7046, 94-7048, 94-7050, 94-7052, 94-7054, 94-7056, 94-7058, 94-7060, 94-7062, 94-7064, 94-7066, 94-7068, 94-7070, 94-7072, 94-7074, 94-7076, 94-7078, 94-7080, 94-7082

—and—

THE TRAVELERS INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, ZURICH INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, THE HOME INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, HARTFORD INSURANCE COMPANY, HIGHLANDS INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, PURITAN INSURANCE COMPANY, LUMBERMANS MUTUAL CASUALTY COMPANY, PINE TOP INSURANCE COMPANY, AIU INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PA., HOLLAND-AMERICAN INSURANCE COMPANY OF NEW YORK, SECURITY INSURANCE COMPANY OF HARTFORD, THE FIDELITY & CASUALTY COMPANY OF NEW YORK and TRANSIT CASUALTY INSURANCE COMPANY AND THE RECEIVER OF TRANSIT CASUALTY INSURANCE COMPANY,

Defendants.

ASBESTOS CLAIMS MANAGEMENT CORP.,

Third-Party Plaintiff-Appellee/Cross-Appellant,

—against—

INTERNATIONAL INSURANCE COMPANY,

Third-Party Defendant-Appellant/Cross-Appellee,

—and—

H.S. WEAVERS (UNDERWRITING) AGENCIES, LTD.,

Third-Party Defendant.

STATEMENT OF ISSUE ADDRESSED BY AMICI[1]

Whether this Court should grant a rehearing, reconsider and reverse its December 13, 1995 Opinion, to the extent it adopted a "pro rata" mechanism for allocating to policyholders damages covered by general liability insurance policies continuously triggered by gradual bodily injury or property damage?

STATEMENT OF CASE

The Amici accept the statements of the parties, adding that the December 13, 1995 Opinion misconstrued the facts surrounding the history of the insurance program of appellee's predecessor, National Gypsum Company ("National Gypsum"). This Court assumed that lower general liability policy limits in the earlier years of this program indicated National Gypsum's conscious decision to "underinsure" itself, thereby excusing this Court's transfer of liabilities from insurance company appellants to National Gypsum. Rather, these lower limits reflect only the historic value of the dollar, the conditions of the insurance market, and the litigation climate of the United States, and are comparable to the limits purchased by similarly-situated large policyholders like Amicus Hoechst Celanese Corporation ("HCC") during the same time period. In no way do lower limits in early policy years of such policyholders indicate a decision to "go bare"; thus, in no way do such limits justify foisting the liability of insurance companies on to policyholders, in direct contradiction to the provisions of the standard-form insurance policies at issue.

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1. This brief is conditionally filed with the Motion of Amici United Policyholders and Hoechst Celanese Corporation for Leave To File an Amici Brief, filed on this date pursuant to Fed. R. App. P. 29.

This Court's misapprehension will drastically reduce the amount of available general liability insurance for policyholders nationwide with insurance programs similar to that of National Gypsum -- like Amicus HCC -- who also are being held liable for massive continuing injuries.

SUMMARY OF ARGUMENT

Appellant insurance companies and their insurance company brethren previously have argued that a policyholder is entitled to determine and designate[2] how general liability insurance policies continuously triggered by gradual bodily injury or property damage shall pay for those damages. Although inconsistent with their arguments to this Court, 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, now to assert litigation positions 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

2. This concept, frequently labelled "pick and choose" allocation, is more accurately labelled "determine and designate." It was promised by the "all sums" language in the policies.

also diminishes the benefit of the insurance for which policyholders -- large and small -- contracted over the decades.

Moreover, appellant insurance companies' arguments, and this Court's decision implementing a "pro rata" allocation mechanism, misapprehend the historical nature of general liability insurance programs. National Gypsum, like Amicus HCC and other corporate policyholders large and small, did not "purchase[] insufficient insurance" or decide to "go bare" in the 1930's, 1940's, 1950's and 1960's. Rather, such policyholders purchased appropriate amounts of general liability insurance given the litigation climate, insurance market, and value of the dollar at the time. This Court's allocation scheme punishes good corporate citizens like National Gypsum and Amicus HCC for historically purchasing appropriate amounts of insurance coverage and for failing, in the 1940's, 1950's, and 1960's, to foresee the legal and litigation climate in the 1980's and 1990's, a risk they transferred to their insurance companies.

It is precisely this type of unfairness which has rendered unworkable any but the "determine and designate" allocation scheme. The insurance industry has recognized this truth, refusing to add allocation provisions to its general liability insurance policies. This Court should not, in the face of the insurance industry's contrary representations, reward it by, in effect, retroactively adding a "pro rata" allocation clause to its standard-form policies which allows insurance companies to shift massive liabilities to policyholders like National Gypsum and Amicus HCC. The Amici thus respectfully submit that this Court reconsider its December 13, 1995 Opinion; reverse its adoption of "pro rata" allocation unsupported by

the "all sums" policy language or the insurance industry's contemporary discussion regarding proper construction of the standard-form language, and allow National Gypsum to determine and designate which continuously-triggered policies shall pay for the injuries for which National Gypsum is held liable.

ARGUMENT

I. The Insurance Company Appellants' "Pro Rata" Allocation Arguments Are Inconsistent with the Insurance Industry's Prior Judicial Representations and with Its Drafting History

A. Historically, the Insurance Industry Has Judicially Represented that Policyholders Are Entitled To Determine and Designate Which General Liability Insurance Policies Are Liable To Respond to a Continuing Injury

Members of the insurance industry -- including insurance company appellants and their affiliated companies -- have confirmed to other courts that the policyholder is entitled to determine and designate which general liability insurance policies are liable to respond to a continuous injury. They furthermore have confirmed that in no event are liabilities to be allocated to the policyholder. Needless to say, these litigation positions are absolutely inconsistent with the "pro rata" allocation position pressed before this Court:

- The North River Insurance Company -- a sister company of insurance company appellants International Insurance Company and United States Fire 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) ("Keene"), 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