IN THE INDIANA COURT OF APPEALS

CASE NO. 49A02-0604-CV-00289

TRAVELERS CASUALTY AND SURETY COMPANY, et al.,	)	Interlocutory Appeal from the Marion Superior Court No. 1
Appellants/Defendants,	)	
v.	)	Trial Court Cause No. 49D01-0409-PL-001745
UNITED STATES FILTER CORPORATION, et al.	)	The Hon. Cale J. Bradford, Judge
Appellees/Plaintiffs.	)	

UNITED POLICYHOLDERS, INDIANA MANUFACTURERS ASSOCIATION, AND DUKE ENERGY INDIANA, INC.'S BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLEE UNITED STATES FILTER CORPORATION

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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 organization exists to help enforce coverage promises 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, 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. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have 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 more than 35 *amicus* briefs since it was founded. Recently, its brief was considered and discussed by the California Supreme Court in *Julian v. Hartford Underwriters Insurance Co.* 110 P.3d 903 (Cal. 2005). United Policyholders' *amicus* brief also was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999). 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*, 538 U.S. 408, (2003), *cert denied*, 543 U.S. 874 (2004). In June 2006, United Policyholders appeared as *amicus curiae* in *Pilkington North America, Inc. v. Travelers Casualty & Surety Co.,* to address

virtually identical issues to those presented in this case. *See Pilkington*, 830 N.E.2d 379 (Ohio 2005).

Indiana Manufacturers Association ("IMA") is an Indiana not-for-profit organization formed in 1901. It is the second oldest organization of its kind in the United States. IMA devotes itself to enhance the ability of Indiana manufacturers to compete effectively and profitably in a local, national and global economy. IMA is the primary representative of Indiana manufacturing interests before state and federal legislative and regulatory bodies. IMA has approximately 1800 members at 2000 locations who directly employ approximately 600,000 Indiana residents and contribute indirectly to the employment of 675,000 others. IMA provides member companies with consulting services and informs them about issues affecting the manufacturing environment. IMA's members have purchased commercial general liability policies for many years. IMA is concerned about the positions advocated by Appellants in this action which if accepted by the Court would significantly chill business transactions in Indiana and have adverse effects on the Indiana economy.

Duke Energy Indiana, Inc. ("Duke Energy") is an Indiana corporation originally formed in 1941. Duke Energy is the largest electric utility in Indiana. The company generates, transmits, and distributes electricity to provide electric utility service to over 700,000 customers in 69 Indiana counties. Duke Energy and its predecessor companies purchased commercial general liability insurance policies for decades with the reasonable expectation that its insurers would continue to cover and defend them from liabilities arising from past occurrences. Duke Energy believes Appellants seek to undermine long-settled principles of Indiana insurance law and adversely affect business transactions essential to the efficient operation of our economy.

Appellants are insurers challenging a trial court's order finding that an asset purchaser acquired the rights to and is entitled to seek coverage under insurance policies acquired as part of the asset purchase. United Policyholders, IMA, and Duke Energy share fundamental interests in seeing that insurance companies do not attempt to shift back risks the insurers accepted through methods unsupported by their own standard-form insurance policies, Indiana law, or public policy.

II. SUMMARY OF ARGUMENT

This case involves occurrence-based insurance policies that the various insurance company defendants (collectively, the "Insurers") sold to U.S. Filter's predecessor, which require that the Insurers defend and indemnify U.S. Filter for losses that occurred prior to U.S. Filter's succession to the policy.

This Court should affirm the trial court's ruling in favor of coverage for U.S. Filter under the insurance policies at issue because:

1. The right to defense and indemnity for incurred but not yet reported losses constitutes a freely transferable chose in action.
2. The parties reasonably expected and intended that the right to coverage for already-incurred losses would be transferable without the insurance company's consent.
3. Allowing assignments of accrued policy benefits does not expose insurance companies to the possibility of insuring riskier or additional entities because the risk being covered remains the same, regardless of assignment.
4. Denying an assignment of accrued policy benefits will convert an occurrence-based policy into a claims-made policy, which would allow insurance companies to unilaterally impose a "claims-made" cut-off date to unfairly deny coverage.
5. The custom of both the insurance industry and merging corporations is to treat the assignment of a policy after a loss has taken place as not requiring the insurance company's consent.

6. The surviving corporation of a merger inherits all assets, liabilities and benefits, including accrued policy benefits, of the acquired corporation by operation of law.

Furthermore, the trial court's decision should be affirmed for the reasons set forth herein and in U.S. Filter's brief.

III. ARGUMENT

A. The Right to a Defense and Indemnity for "Incurred But Not Yet Reported Losses" Constitutes a "Chose In Action"[1]

One of the main benefits of purchasing occurrence-based liability insurance is that it provides lasting protection. 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, no matter when those claims are filed.

Insurance companies are well aware that they may be called upon to defend or indemnify their policyholders for IBNR losses. The insurance industry often has reiterated its common understanding of the nature of "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. *See* 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)

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[1] This Court has previously explained that a "chose in action" constitutes "rights that can be enforced by legal action (e.g., debts or cause of action in tort)." *Ratliff v. Citizens Bank of W. Indiana*, 768 N.E.2d 964, 970 (Ind. Ct. App. 2002).

[2] ISO is an association of approximately 1,400 domestic property and casualty insurance companies. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) ("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.").

(stating that future claims can "arise decades after the policy expires"). 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 that occurred during their policy periods.

The decision of the California Supreme Court in *Henkel Corp. v. Hartford Acc. & Indem. Co.*, 62 P.3d 69 (2003), which forms the mainstay of Insurers' arguments here, does not alter the outcome. In *Henkel*, the California Supreme Court found that the purchaser had not been assigned a "chose in action" because the claims against the seller "had not been reduced to a sum of money due or to become due under the policy," and therefore, the insurance company had to consent to any assignment of benefits under the policies. *Id* at 72.

Whatever a "chose in action" may be under California law, it is clear that in Indiana, a <u>right of action</u> to claim insurance proceeds, even if not reduced to a sum of money due, constitutes a "chose in action" and may be assigned without the consent of the insurance company. The trial court duly noted that it is consistent with Indiana law that IBNR liabilities are an assignable chose in action. *See U.S. Filter Corp. v. Allstate Ins. Co.*, No. 49D01-0409-PL-001745 (Marion Sup. Ct. Jan. 2006); *Essex v. Ryan*, 446 N.E.2d 368, 375 (Ind. Ct. App. 1983); *Mack v. Am. Fletcher Nat'l Bank & Trust Co.*, 510 N.E.2d 725, 735 (Ind. Ct. App. 1987); *Indianapolis Natural Gas Co v. Pierce*, 56 N.E. 137, 138 (1900) (stating that a right of action under a contract is a chose in action); *New v. German Ins. Co. of Freeport,* 5 Ind. App. 82, 31 N.E. 475, 476 (1892) (right to recover under insurance policy is an assignable chose in action). More recently, this Court reiterated that unliquidated claims are choses in action and are considered personal property. *See Ratcliff v. Citizens Bank of Western Ind.*, 768 N.E.2d 964, 970 (Ind. Ct. App. 2002). The insurance company's duty to defend and indemnify constitutes one

element of the policyholder's assignable personal property. *See Essex*, 446 N.E.2d at 375 (Ind. Ct. App. 1983). Because *Henkel* is based on a different – and much narrower – definition of a chose in action than has been applied in Indiana, this Court should not follow that California decision.

B. Allowing the Right to Make Claims Under Insurance Policies to be Transferred is Necessary to Effect the Intent and Reasonable Expectations of the Parties

The primary purpose in construing an insurance policy, like any other contract, is to give effect to the intent of the parties. *See Carter v. Property Owner's Ins. Co.*, 846 N.E.2d 712, 716 (Ind. 2006); *Employers Ins. of Wausau v. Stopher,* 155 F.3d 892, 896 (7th Cir. 1998); *see also River v. Commercial Life Ins. Co.*, 160 F.3d 1164, 1168 (7th Cir. 1998). Here, the purpose of insurance contracts generally, and anti-assignment clauses specifically, is furthered by allowing the right to make claims under occurrence-based insurance policies to be transferred by contract and by operation of law. Similarly, the long-standing practices of both insurance companies and corporate policyholders in the transfer of liabilities covered by insurance, and the treatment of IBNR losses, demonstrate both groups' reasonable expectation that insurance coverage follows the transferred right to coverage for already-incurred losses without the need for the insurance companies' prior consent.

Insurance policies make clear that insurance companies agreed to undertake the risk of having to defend more than just the original policyholder. It is common for insurance companies to agree to provide coverage not only for entities specifically identified in the declarations and endorsements, but also for "any subsidiary, associated, affiliated companies or owned and controlled companies as now or hereafter constituted." *See* John H. Mathias, Jr., John D. Shugrue & Thomas A. Marrinson, INSURANCE COVERAGE DISPUTES § 3.03(1)(a) (2005 Law Journal Press). The risks of mergers, acquisitions, sales of assets, and other corporate

restructurings were present when the policies were written, which demonstrates that insurance companies do not believe that increasing the number of insured entities materially increases the risks to be covered. The parties intended for coverage of occurrences arising from insured operations to be available to multiple entities, including ones not identified in the policies. Therefore, the fact that insurance companies may have to provide a defense for multiple entities – even those that were not in existence at the time the policy was issued – cannot be a ground for avoiding coverage.

C. The Majority of Courts Hold – As a Matter of Law – That Anti-Assignment Clauses Do Not Apply to the Transfer of Coverage Rights After a Loss Has Taken Place

The majority of courts have concluded as a matter of law that anti-assignment clauses in insurance policies do not apply where the policyholder assigns its chose in action, and the "occurrence" happened prior to the assignment. *See, e.g., Guaranty Nat'l Ins. Co. v. McGuire*, 192 F. Supp. 2d 1204, 1208 (D. Kan 2002). Further, notwithstanding the supposed anti-assignment clause in the policy, the majority of courts nationwide have found that the right to recover for pre-transaction liabilities is assignable without the insurance company's consent.[3] The Insurers argue that the anti-assignment clause in their policies prohibits the transfer of

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[3] *See, e.g., St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.*, 543 P.2d 147, 149 (Ariz. App. Ct. 1976); *Antal's Res.t, Inc. v. Lumbermen's Mut. Cas. Co.*, 680 A.2d 1386, 1388 (D.C. 1996); *In Re San Juan Dupont Plaza Hotel Fire Litig.*, 789 F. Supp. 1212 (D.P.R. 1992); *Santiago v. Safeway Ins. Co.*, 396 S.E.2d 506, 507-07 (Ga. 1990); *Williams v. Mayflower Ins. Co., Ltd.*, 519 S.E.2d 506, 508 (Ga. 1999); *Serv. Adjustment Co. Inc. v. Underwriters at Lloyd's London*, 562 N.E.2d 1046, 1049 (Ill. App. 1990); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231 (Iowa 2001); *First Union Nat. Bank v. New York Life Ins. and Annuity Corp.*, 152 F. Supp. 2d 850, 856 (D. Md. 2001); *Gopher Oil Co. v. Am. Hardware Mutual Ins. Co.*, 588 N.W.2d 756, 763 (Minn. Ct. App. 1999); *Elat, Inc. v. Aetna Cas. & Sur. Co.*, 654 A.2d 503 (N.J. Super. A. D. 1995); *SR Int'l. Bus. Ins. Co., Ltd. v. World Trade Center Props., LLC*, 375 F. Supp. 2d 238, 247 (S.D.N.Y. 2005); *Imperial Enter., Inc. v. Fireman's Fund Ins. Co.*, 535 F.2d 287, 293 (5th Cir. 1976); *Pacific Coast Cas. Co. v. Gen. Bonding & Cas. Ins. Co.*, 240 F. 36 (9th Cir. 1917); *Henning v. Cont'l Cas. Co.*, 254 F.3d 1291, 1294 (11th Cir. 2001); *Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 152-53 (D.N.H. 1994); *Brunswick Corp. v. St. Paul Fire & Marine Ins. Co.*, 509 F. Supp. 750, 753 (E.D. Pa. 1981).

insurance rights without their consent. Not only is this argument contrary to the overwhelming majority of case law nationwide, it is also inconsistent with the nature of occurrence-based liability insurance.

It is well-established Indiana law that an occurrence-based policy provides coverage for injury during the policy period. *See, e.g., Paint Shuttle, Inc. v. Continental Cas. Co.*, 733 N.E.2d 513, 522 (Ind. Ct. App. 2000) (stating that "occurrence policies protect the policyholder from liability for any act done while the policy is in effect," even if the occurrence is not reported until after policy expiration); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Baker & McKenzie*, 997 F.2d 305, 306 (7th Cir. 1993) ("[Occurrence policies] insure against a negligent or other liability-causing act or omission that occurs during the policy period regardless of when a legal claim arising out of the act or omission is made against the insured."). In *Paint Shuttle*, this Court recognized that insurance companies typically charge high premiums for occurrence policies because they are exposed to future indefinite liability. *Paint Shuttle*, 733 N.E.2d at 522.

Further, Indiana courts repeatedly have recognized that insurance coverage is transferable after a loss has occurred. *See Ratcliff*, 768 N.E.2d at 970 (unliquidated claims are choses in action and considered personal property); *Mack v. Am. Fletcher Nat'l Bank & Trust Co.*, 510 N.E.2d 725, 735 (Ind. Ct. App. 1987) (treating contract rights like personal property); *Essex v. Ryan*, 446 N.E.2d 368, 375 (Ind. Ct. App. 1983); *Indianapolis Natural Gas Co v. Pierce*, 56 N.E. 137, 138 (1900) (holding that a right of action under a contract is a chose in action); *New v. German Ins. Co. of Freeport*, 5 Ind. App. 82, 31 N.E. 475, 476 (1892) (right to recover under insurance policy is an assignable chose in action); *see also* RESTATEMENT (2D) OF CONTRACTS, § 320 (1981); E. Allan. Farnsworth, III FARNSWORTH ON CONTRACTS § 11.5 (2001); CORBIN ON CONTRACTS (Interim Edition, 2002) §§ 875, 450. Accordingly, Indiana

courts and courts nationwide strongly support a policyholder's right to bring claims under historical occurrence-based liability policies.

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

The primary purpose of an 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.*, 965 F.Supp. 654, 659 (E.D.Pa. 1992); *St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co.*, 543 P.2d 147 (Ariz. Ct. App. 1975) ("*St. Paul Fire*"). The need to protect the insurance company no longer exists, however, after the policyholder sustains the loss, because the insurer's liability is essentially fixed. *See Fiorentino v. Lightning Rod Mutual Insurance Co.*, 682 N.E.2d 1099, 1102 (Ohio Ct. App. 1996).[4] The liability resulting from a pre-merger occurrence is precisely the liability that the insurance company agreed to insure.

(a) An Insurance Company is Not Forced to Insure Riskier Entities

The identity of the entity making the claim under an insurance policy is irrelevant once the liabilities forming the basis of that claim have been established. *See Northern*

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[4] In *Fiorentino*, the Ohio Court of Appeals held that the policy's anti-assignment clause did not invalidate the assignment of claims under the policy:

> 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, 682 N.E.2d at 1102 (emphasis added) (citations omitted).

Insurance Co. of New York v. Allied Mutual Insurance Co., 955 F.2d 1353, 1358 (9th Cir. 1982). The risk the insurer agreed to cover is not altered once the loss has occurred. *See Elat*, 654 A.2d at 505-06; *Gopher Oil Co.*, 588 N.W.2d at 763; 3 Lee R. Russ & Thomas F. Segalla, COUCH ON INSURANCE § 35:7 (3d Ed.) (Nov. 2004) ("[A]fter events giving rise to the insurer's liability have occurred, the insurer's risk <u>cannot</u> be increased by a change in the insured's identity.") (emphasis added); 1 Jeffrey Stempel, LAW OF INSURANCE CONTRACT DISPUTES § 3.15(c) (hereafter "LAW OF INSURANCE CONTRACT DISPUTES") ("a post-loss assignment does not implicate the adverse selection and moral hazard concerns prompting pre-loss restrictions on liability."). Indeed, because the transferee simply stands in the shoes of the original policyholder, "any valid defense which the insurer might have had against the insured could be set up against the [transferee]." *Georgia Coop. Fire Ass'n. v. Borchardt & Co.*, 51 S.E. 429, 430 (Ga. 1905); *see also Leber v. Buckeye Union Ins. Co.*, 708 N.E.2d 726 (Ohio Ct. App. 1997). In other words, a change in the identity of the entity asserting a claim has no effect on the intent of the parties to transfer a set amount of risk from the policyholder to the insurance company.

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. *Indianapolis Natural Gas Co v. Pierce*, 56 N.E. 137, 138 (1900) (holding that a right of action under a contract is a chose in action); *St. Paul Fire*, 543 P.2d at 149. At this point, the insurance company-policyholder 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.*, 680 A.2d 1386, 1389 (D.C. 1996).

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

> 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 INSURANCE § 35:7 (3d Ed.) (Nov. 2004).

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. The fundamental flaw in the Insurers' position is that they wrongly focus on the identity of the insured rather than the identity of the risk. As the trial court correctly recognized, because insurance companies are required to cover only pre-transfer losses that occurred during the policy periods, the identity of the entity or entities making claims is of no consequence. Here, U.S. Filter is facing liability for conduct that the Insurers long ago

agreed to cover. Therefore, allowing U.S. Filter to obtain coverage for liability arising out of this conduct fulfills the intent of the contracting parties.

(b) An Insurance Company Does Not Increase Its Risk by Having to Defend Additional Entities

Insurers argue that corporate transactions may result in a situation where they would have to defend and indemnify multiple entities. To support this argument, Insurers cite *Henkel*, in which the California Supreme Court held that an assignment of the right to make claims under insurance policies increases the risk to insurance companies because the insurance companies may have to defend more than one policyholder in the event there are disputes over which party has the right to make claims. *Henkel*, 62 P.3d at 75. However, this approach erroneously focuses on the identity of the policyholder as opposed to the identity of the risk the insurance company is required to cover. The Ninth Circuit rejected this argument in *Northern Ins. Co. of New York v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1358 (9th Cir. 1982), explaining that "[a]spects of the successor firm could affect the defense, but the shape of the defense will be determined largely by the characteristics of the risk originally insured."

Thus, where the risk being covered is the same because the loss has already occurred, the insurer is required to do no more than it agreed to do in its policy, regardless of any changes in the identity of the party claiming coverage. Insurers' 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 spelled out in every standard comprehensive general liability policy. Further, the "increased risk" argument ignores the fact that the risks of corporate transactions were already present when the policies were written. In other words, the conclusion that a corporate transaction will "increase the risk" of additional 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.

2. Enforcing an Anti-Assignment Clause After a Loss Has Taken Place is Fundamentally Inconsistent with the Nature of Occurrence-Based Liability Insurance

It is well-established that the anti-assignment clause in an insurance policy does not prevent an assignment *after a loss has occurred. See Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 450, 48 N.E. 265, 266 (1897).[5] 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 INSURANCE § 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); *see also, Fairview Hospital v. Fortune*, 750 N.E.2d 1203 (Ohio Ct. App. 2001) (holding that Ohio public policy favors assignments); *Gopher Oil Co. v. American Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 761-64 (Minn. Ct. App. 1999) (holding that transfer of "all assets" did not impermissibly change nature of policy's covered activities, but rather provided right to collect insurance for claim arising out of covered activities that occurred during the policy period).

Here, Insurers are attempting to impose a "claims-made" cut-off date to unfairly deny U.S. Filter coverage under the policies. This Court has previously explained that an occurrence-based policy provides coverage for *injury during the policy period. Paint Shuttle*,

[5] *See also SR Int'l. Business Ins. Co., Ltd. v. World Trade Center Properties, LLC*, 375 F. Supp. 2d 238, 247 (S.D.N.Y. 2005); *Guaranty Nat'l Ins. Co v. McGuire*, 192 F. Supp. 2d 1204, 1208 (D. Kan 2002); *First Union Nat. Bank v. New York Life Ins. &Annuity Corp.*, 152 F. Supp. 2d 850, 856 (D. Md. 2001); *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 237-38 (Iowa 2001); *Continental Cas. Co. v. Diversified Indus.*, 884 F. Supp. 937, 945-48 (E.D. Pa. 1995).

733 N.E.2d at 522 (discussing difference between "claims made" and "occurrence" insurance policies).[6] If Insurers are permitted to effectively 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 Indiana law and runs contrary to the functioning of liability insurance.

3. The Custom and Practice in Corporate Transactions is that Insurance Company Consent is Not Required in Order to Effect a Transfer of Rights Under Insurance Policies

Currently, corporate transactions do not involve paying for the transfer of rights under insurance policies. The reactions of commentators and insurance industry professionals, including lawyers for insurance companies, to the *Henkel* decision show that it would require a revolutionary change in the way corporate transactions are structured. Prior to *Henkel*, it was widely assumed that insurance benefits automatically followed the transfer of corporate assets and liabilities, and transactions were structured accordingly:

- Professor Jeffrey Stempel, author of a treatise on insurance coverage law, states that *Henkel* "changed the rules regarding insurance policy assignment in a way that benefits insurers without admitting that it has departed from what appeared to be settled law." *See* 1 LAW OF INSURANCE CONTRACT DISPUTES § 3.15[d].
- The editorial staff of the Mergers and Acquisitions Journal stated that "[t]raditionally, buyers have counted on the targets' insurance policies to pay damage claims that materialize after the deals are completed but spring from developments that began under the sellers' prior owners. . . . These buyers have learned that their targets' insurance policies . . . may not be automatically transferred to them when the transactions are completed." *See* Editoral Staff, *Buyers Face Threat of Losing Targets' Insurance Policies: California Court Ruling May Jeopardize a Traditional Post-Deal Protection*, Mergers and Acquisitions Journal (July 1, 2003).

[6] *See also, Cent. Illinois Light Co. v. Home Ins. Co.*, 821 N.E.2d 206, 224 (Ill. 2004); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Baker & McKenzie*, 997 F.2d 305, 306 (7th Cir. 1993); *see also, P.R. Mallory & Co. Inc. v. Am. States Ins. Co.*, No. 54C01-0005-CP-00156, 2004 WL 1737489 at *1 (Ind. Cir. Ct. July 29, 2004) (stating that an "occurrence-based policy" covers "any occurrence that resulted in injury or damage during the policy period, regardless of when any claim asserting such damage or injury ultimately is asserted").

- Several law firms that represent policyholders in insurance coverage litigation sent out bulletins to their clients warning them of the impact of the *Henkel* decision. For example, the Bryan Cave law firm reported "[b]efore *Henkel*, when a party purchased a business' assets it would also expect to acquire the benefits of that business's existing insurance policies. . . . [Anti-assignment] provisions were traditionally overlooked because it was assumed that insurance policies were effectively transferred by virtue of the language in the transaction documents, regardless of the provisions in the policies." *See* Bryan Cave, *California Supreme Court Rules That In Asset Acquisitions Liability Insurance Benefits Do Not Automatically Transfer*, Transactions Bulletin (June 30, 2004) *available at* http://www.bryancave.com/FILES/tbl_s7Publications/Details33/1056/CA-AssetAcquistionTransfer6-30-04.pdf.

- The most succinct appraisal of the situation perhaps came from commentators Lesser, Tracy & McKitterick, who noted that "[i]t seemed pretty clear cut before. One company buys another and the liability insurance coverage is part of the deal. Then along came Henkel." *See* Henry Lesser, Mike Tracy, & Nathaniel McKitterick, *Will the Insurance Follow?: A look at M&A in the light of California's Henkel case*, Business Law Today, Mar./Apr. 2004.

Counsel for insurance companies also viewed the *Henkel* decision as altering the landscape of corporate transactions. As one prominent insurance industry lawyer wrote:

> Insurers sometimes seem less than enthusiastic about litigating coverage issues related to corporate succession. . . . The reason for this may be that, notwithstanding their ability to point out some "i" that wasn't dotted or some "t" that wasn't crossed during a complex corporate transaction, insurers deep-down believe that, when all is said and done, they will be unable to escape liability for a claim that they would have had, but for the corporate transaction. In other words, insurers may avoid litigating assignments for the various reasons given by Justice Moreno in a vigorous dissent in Henkel, which can be summarized in a sentence: "The majority's decision is contrary to well-settled law and provides an unfair windfall to insurers."

See Randy J. Maniloff, *2003: The Year's Ten Most Significant Insurance Coverage Decisions*, 18 Mealey's Litig. Rep.: Insurance 10, No. 9 (Jan. 7, 2004). The author even predicted that insurers might view *Henkel* as "an aberration." *Id.*

Many more such reactions to *Henkel* are easily found. *See, e.g.*, Henry Lesser, Mike Tracy & Nathaniel McKitterick, *M&A Acquirors Beware: When You Succeed to the Liabilities of a Transferor, Don't Assume (At Least in California) That the Existing Insurance*

Transfer Too, Deal Points (Fall 2003); Thomas C. Klein, *Recent California Decision Impedes Assigning Product Liability Insurance Coverage in Asset Acquisitions*, Insights (May 2003); ShawPittman, Alert, *Policy Benefits May Not Extend to Successor Corporations* (Feb. 2003); Alan S. Rutkin, *Loss/Risk Management Insight: Movable Coverage* (May 2003) *available at* http://www.rivkinradler.com/rivkinradler/Publications/newformat/200305rutkin.shtml. The flurry of publications in response to the *Henkel* decision indicates awareness that it represented a significant change that materially affects how corporations must conduct themselves in transferring assets and liabilities.

4. The Custom and Practice of Insurance Companies is that Insurance Company Consent is Not Required in Order to Effect a Transfer of Rights Under Insurance Policies

As discussed above, insurance companies are well aware of the existence of IBNR liabilities and take them into account in their everyday business operations. Insurance companies establish reserves for IBNR liabilities, setting aside sums of money against the possibility of future claims. IBNR reserves are so common and necessary that the American Institute of Certified Public Accountants, the Financial Accounting Standards Board, and the National Association of Insurance Commissioners all have developed accounting standards for such reserves. Veed, 34 TORT & INS. L. J. at 168; Rebecca C. Meriwether, *The Contingent Liability Abyss: Tensions for Insurers and Reinsurers*, 22 T. MARSHALL L. REV. 1, 12 (1996).

Indeed, insurance companies have found ways to profit from IBNR reserves, making much more money from invested reserves than from initial profits from underwriting:

> Insurance companies invest the bulk of premiums collected as reserves against [IBNR] claims. It often surprises insurance consumers to learn that interest income earned on such investments typically dwarfs actual underwriting profits (i.e., premiums collected less claims payments and other expenses) in generating the earnings of an insurance company, and that many insurance companies prosper for years on end while consistently producing underwriting losses. Indeed, the affinity of

> financial sage Warren Buffet for insurance company investments is entirely attributable to his recognition that IBNR reserves generate a substantial "float" that can be positively arbitraged through prudent investing.

Sean M. Fitzpatrick, *Fear Is the Key: A Behavioral Guide to Underwriting Cycles*, 10 CONN. INS. L.J. 255, 261 (2003-2004); *see also U.S. v. Gen. Dynamics Corp.*, 481 U.S. 239, 246 (1987) (noting that Internal Revenue Code permits insurance companies to deduct IBNR loss reserves).

If a transfer of IBNR liabilities without insurance company consent destroyed the policyholder's ability to recover insurance for such liabilities, insurance companies would be able to release their IBNR reserves and report it as income. Given the importance of IBNR liabilities and reserves to insurance companies, one would expect to find a well-developed procedure for requiring policyholders to obtain consent to transfers of such liabilities if insurance companies truly believed that consent was necessary. Not surprisingly, such procedures are lacking.

A book published in 2000 by the Chartered Property Casualty Underwriters ("CPCU") Society[7] designed to "aid those in the insurance and risk management businesses to understand not only the insurance issues involved, but also other, broader aspects of mergers and acquisitions," is utterly silent on the need to seek out an acquisition target's historical insurance companies to obtain their consent to the transfer of rights under closed occurrence policies. *See* INSURANCE ISSUES IN MERGERS & ACQUISITIONS, at 3 (Peter D. Kensicki ed. 2000). In fact, the

[7] The CPCU Society describes itself as "a community of credentialed insurance professionals who promote excellence through ethical behavior and continuing education. The Society's 30,000 members in 154 chapters hold the Chartered Property Casualty Underwriter (CPCU) designation, which requires passing 10 rigorous undergraduate and graduate level examinations, meeting experience requirements, and agreeing to be bound by a strict code of professional ethics." *See* INSURANCE ISSUES IN MERGERS & ACQUISITIONS, at 2 (Peter D. Kensicki ed. 2000).

book states that generally, insurance coverage is transferred along with IBNR liabilities in a corporate sale notwithstanding anti-assignment clauses in insurance policies:

> U.S. courts have generally held that a corporation deemed liable for a predecessor's products or pollution is entitled to coverage under the predecessor's applicable insurance policies. . . . Even when the insurance policy contains a "no assignment" clause, courts have granted successor corporations coverage under policies sold to the acquired corporation.

Sheila Mulrennan, *The Evolving Art of Insurance Archaeology: A Strategic Tool for Due Diligence*, INSURANCE ISSUES IN MERGERS AND ACQUISITIONS, at 59 (Peter D. Kensicki ed. 2000). If insurance professionals believed that insurance company consent was required to transfer IBNR insurance benefits, that fact should and presumably would have been reflected in this textbook.

The only conclusion that follows is that insurance companies and policyholders do not believe that prior consent of insurance companies was either desirable or necessary to complete a successful transfer of the right to coverage for already-incurred losses under occurrence-based insurance policies. The custom and practice is that a corporation which is assigned the rights to make claims under a predecessor's insurance policies for pre-assignment losses, or is liable as a matter of law for the predecessor's conduct, has a reasonable expectation that it will be covered by the predecessor's policies without the consent of the insurance companies. To conform to the custom and practice in the industry and the parties' intent in obtaining coverage, including their reasonable expectations with respect to coverage for transferred IBNR liabilities, this Court should hold that the right to make claims under occurrence-based policies can be transferred either by contract or by operation of law.

D. 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 surviving corporation of a merger inherits all assets, liabilities and benefits of the acquired corporation by operation of law. *E.g.*, *Rodriguez v. Tech Credit Union Corp.*, 824 N.E.2d 442, 447 (Ind. Ct. App. 2005). Accordingly, the insurance rights of the predecessor flow by operation of law to the surviving corporation. *See Knoll Pharm. Co v. Auto. Ins. Co. of Hartford*, 167 F. Supp. 2d 1004, 1010-11 (N.D. Ill. 2001). Since the surviving corporation stands in the place of the acquired corporation, the insurance company is not exposed to additional risk. *Brunswick Corp. v. St. Paul Fire & Marine Insurance Co.*, 509 F. Supp. 750, 752-53 (E.D. Pa. 1981). Where an insurance company has agreed to cover liability for property damage at a specified location during a specified period of time, the mere fact that a successor corporation has purchased the property does not increase the risk insured, and should not entitle insurance companies to a windfall by avoiding their coverage obligations for a loss for which they received and accepted premiums. *See, e.g., B.S.B. Diversified Co.*, 947 F. Supp. at 1481 (insurance company's risk does not increase when coverage relates to events occurring prior to transfer).

Courts have concluded that because the alleged damage occurred prior to the transfer of assets, the insurance company is not exposed to any greater or lesser risk than the one it bargained for when it evaluated the risk it initially insured. *See Knoll Pharm. Co.*, 167 F. Supp. 2d at 1010-11 (N.D. Ill. 2001). Therefore, the benefit of the insurance policies is transferred by operation of law irrespective of whether the physical policies were actually transferred. This is simply how occurrence-based liability insurance works. Insurers would

probably prefer to collect a second set of premiums for this risk which they already insure. This Court should reject such a result.

The majority rule that coverage transfers by "operation of law" is entirely consistent with the insurance industry's own understanding of how insurance works. Indeed, the "operation of law rule," like standard form comprehensive general liability insurance policies, is meant to cover IBNR losses. The "operation of law" rule first was recognized in a 1982 Ninth Circuit decision, *Northern Insurance Co. of New York v. Allied Mutual Insurance Co.*, 955 F.2d 1353 (9th Cir. 1982). 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 insurer. 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 Management. Corp. v. Commercial Union Insurance Co.*, 857 F. Supp. 140 (D.N.H. 1994), 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 subsequently was sued for pre-sale 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.*, 947 F. Supp. 1476 (W.D. Wash. 1996), 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.*, 588 N.W.2d 756, 763 (Minn. Ct. App. 1999) (holding that a successor corporation could look to the predecessor's insurance policies to cover that liability); *P.R. Mallory & Co. Inc. v. Am. States Ins. Co.*, No. 54C01-0005-CP-00156, 2004 WL 1737489 at *5 (Montgomery Cty. Ind. Circuit Ct. July 29, 2004).[8] The *Northern Insurance* ruling and the well-reasoned decisions it follows ensure 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, Indiana Manufacturers Association, and Duke Energy Indiana, Inc., respectfully request the Court to accept the arguments of Appellee U.S. Filter Corporation and affirm the trial court's judgment.

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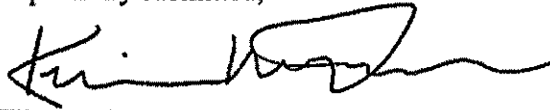
[8] In *P.R. Mallory*, an Indiana trial court applied the operation of law rule, holding that "[i]t has been well-settled for decades that the right to recover under an insurance policy transfers by operation of law ...." *Id.* (emphasis added). The court held that there was "sufficient corporate succession to support the transfer of liability and rights to coverage by operation of law." *Id.* at *10. Reasoning that to hold otherwise would result in a windfall to the insurance companies, the court held that the right to recover under an insurance policy followed the liability that the insurance company underwrote. Further, the decision resoundingly rejected the conclusion in *Henkel* and reaffirmed the operation of law doctrine as set out in the line of cases following *Northern Insurance*. *Id.* at *6.

Respectfully submitted,



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