No. 17-41050

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADI WORLDLINK, LLC,

Plaintiff-Appellant

v.

RSUI INDEMNITY COMPANY,

Defendant-Appellee

On Appeal from
The United States District Court for the Eastern District of Texas
Civil Action No. 4:16-cv-00665-ALM-CAN
Hon. Amos L. Mazzant, United States District Judge

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5TH CIR. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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STATEMENT OF IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE

Amicus Curiae United Policyholders ("UP") submits this brief in support of the position of Plaintiff-Appellant, Adi WorldLink, LLC ("WorldLink"), the insured under a policy issued by RSUI Indemnity Company ("RSUI"). Counsel hopes that its efforts will assist both the attorneys and this Court, by focusing on controlling precedent and public policy considerations surrounding the analysis of whether an insurer may rely on an interrelatedness condition similar to those found in virtually any policy of business insurance to deny coverage for dozens of lawsuits that were first-filed and timely-reported during the applicable policy period, by imputing to these timely-reported lawsuits late notice from a separate lawsuit filed during an earlier policy period. Indeed, similar interrelated provisions are typically found not only in D&O and E&O policies, but also in environmental liability and professional liability policies. Particularly given Texas' position at the epicenter of the oil, gas and petrochemical industries, among others, the panel's decision is likely to have widespread ramifications for Texas policyholders, falling squarely within UP's advocacy interests.

UP is a non-profit public interest advocacy organization dedicated to helping preserve the integrity of the insurance system. UP is a voice and source of help for insurance consumers throughout the United States. UP's work is supported by

donations, grants, and volunteer labor. UP does not sell insurance or accept funding from insurance companies.

UP's Executive Director has been an official representative to the National Association of Insurance Commissioners for over a decade. We hear from a diverse range of individual and commercial policyholders throughout the U.S. This input allows UP to submit informed amicus curiae briefs to assist state and federal courts decide cases involving important insurance principles. UP has filed amicus curiae briefs in approximately 450 cases throughout the United States since the organization's founding in 1991. Arguments from UP's *amicus curiae* briefs have been cited with approval by numerous state and federal appellate courts. See: https://www.uphelp.org/resources/amicus-briefs.

UP files simultaneously with this brief, a motion pursuant to Fed. R. App. P. 27(a)(1) and Fed. R. App. P. 29(a)(2) for leave to file this brief.

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), Amicus Curiae states that a party's counsel authored this brief in whole or part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person, other than Amicus Curiae, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

Most policies of business insurance contain general interrelatedness provisions which state that related claims are treated as a single claim deemed to have been made on the date of the earliest claim made against the policyholder. The interrelatedness provision at issue here is no different. Insurance companies often use such interrelatedness provisions to aggregate similar claims from different policy years into a single policy. Insurers argue that the purpose of such interrelatedness provisions is to avoid double payment on the same claim.

Here, RSUI has gone much further than simply aggregating similar claims from different policy years into a single policy to avoid double payment on the same claim. Rather, it has denied coverage for dozens of lawsuits that were first-filed and timely-reported during the applicable 2015 policy period, by using the interrelatedness provision to impute late notice from *a separate lawsuit* filed in 2014 to the timely-reported 2015 lawsuits. The 2015 lawsuits for which the policyholder seeks coverage were reported at the earliest possible opportunity, and RSUI concedes that it was in no way prejudiced by the timing of notice for these lawsuits. However, a majority of the panel not only accepted that the 2015 lawsuits should be aggregated into the earlier 2014 Policy, but permitted the insurer to take the

apparently unprecedented[1] next step of denying coverage on the basis that the 2015 lawsuits were untimely because they were not reported in 2014. *Because it would have literally been impossible for lawsuits first-filed in 2015 to have been reported in 2014, prior to the time they existed*, this interpretation of the interrelatedness provision effectively deprived the policyholder of any due process by which it could timely report the 2015 lawsuits.

The majority of the panel disregarded the manuscript change made by the Prior and Pending Litigation Endorsement, which specifically prevents RSUI from using a general interrelatedness provision in the policy form to relate back the 2015 lawsuits to the 2014 Policy in the first place. While the general interrelatedness provision purports to relate back 2015 claims to similar claims brought prior to the effective date of the 2015 Policy, the parties specifically agreed to new manuscript language in the Prior and Pending Litigation Endorsement, which eliminated the preclusive effect of the interrelatedness provision. As recognized by Judge James

[1] As described in Plaintiff-Appellant's Opening Brief, "RSUI has not cited to ***a single example in any jurisdiction*** where a court has permitted an insurer to use an Interrelatedness Provision to deny coverage for dozens of timely-reported lawsuits based on their alleged similarities to a late-reported lawsuit, ***let alone where (as here) the lawsuits were separately filed by different plaintiffs in different jurisdictions***. Instead, RSUI's cases simply stand for the unremarkable proposition that, where a policy expressly provides that a pre-complaint demand letter initiates the "claim," late notice for the demand letter bars coverage for the resulting lawsuit filed by the same claimant based on the same allegations made in the demand letter." Opening Brief at 6.

L. Dennis' dissenting opinion, this case is materially indistinguishable from *Gastar Exploration Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577 (Tex. App. 2013) (pet. denied), which similarly held that an insurer could not "relate back" a claim using an interrelatedness provision due to a change made to the Prior and Pending Litigation Exclusion by endorsement. *Gastar* is controlling and directly on point.

Texas has repeatedly and unequivocally asserted a significant interest in regulating insurance involving its policyholders. At a minimum, given its decision's potentially far-reaching implications for commercial policyholders in the state's energy-related industries, the Court should have certified this issue to the Texas Supreme Court before declining to apply *Gastar* and adopting an expansive interpretation of the interrelatedness provision under Texas insurance law.

ARGUMENT

I. UNDER *GASTAR*, THE SPECIFIC CHANGE MADE BY THE PRIOR LITIGATION ENDORSEMENT CONTROLS OVER THE GENERAL INTERRELATEDNESS PROVISION, THUS PREVENTING RSUI FROM RELATING BACK THE 2015 LAWSUITS TO THE 2014 POLICY.

Under *Gastar Exploration Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W. 3d 577 (Tex. App.—Houston [14th Dist.] 2013, pet. denied), the specific change made by the Prior Litigation Endorsement controls over the general interrelatedness provision in the policy form, thus preventing RSUI from relating back the 2015 Lawsuits to the 2014 Policy. Indeed, in a dissenting opinion, Judge James L. Dennis held that *Gastar* was "materially indistinguishable" from the present

case. Applying *Gastar,* Judge Dennis determined that the interrelatedness provision does not operate to relate the 2015 Lawsuit back to the 2014 Lawsuit. Judge Dennis' dissent accurately sets forth the reasons why *Gastar* is on point and requires a finding of coverage for the 2015 Claims.

By way of background, the interrelatedness provision provides that:

> **Limit of Liability; Retention; Payment of Loss**
>
> 3. All Claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions or events, shall be deemed to be a single Claim for all purposes under this policy, shall be subject to the Retention stated in Item 4 of the Declarations Page, *and shall be deemed first made when the earliest of such Claims is first made*, regardless of whether such date is before or during the Policy Period.

ROA.1926 (emphasis added). The interrelatedness provision acts like an exclusion. Without the interrelatedness provision, a lawsuit arising in the 2015 which is timely reported would be covered by the 2015 Policy. However, if the covered lawsuit relates to an earlier lawsuit made prior to 2015, the interrelatedness provision acts to exclude coverage under the 2015 Policy.

The original Prior Litigation Exclusion in the policy form provided that:

> The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any Insured . . . alleging, arising out of, based upon or attributable to, in whole or in part, any litigation involving any Insured that was commenced or initiated prior to, or was pending at the *inception date of this policy*, or arising out of or based upon, in whole or in part, any facts or circumstances underlying or alleged in any such prior or pending litigation.

ROA.1925 (emphasis added). The original Prior Litigation Exclusion was consistent with the interrelatedness provision. Both provisions excluded coverage under the 2015 Policy for lawsuits that were related to litigation that pre-dated the 2015 Policy.

The Insured and RSUI negotiated and agreed upon replacement language for the original Prior Litigation Exclusion. The new manuscript language, which was introduced by way of an endorsement, expressly "deleted and replaced" the original Prior Litigation Exclusion provided:

> **<u>Exclusion – Prior and/or Pending Litigation Backdated</u>**
>
> The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against any Insured . . . alleging, arising out of, based upon or attributable to, in whole or in part, any litigation involving any Insured that was commenced or initiated prior to, or pending as of <u>December 31, 2012</u>, or arising out of or based upon, in whole or in part, any facts or circumstances underlying or alleged in any such prior or pending litigation.

ROA.1902 (emphasis in original). This Endorsement expressly "backdated" the effective date for the prior litigation exclusion to December 31, 2012. In so doing, the Prior Litigation Endorsement restored coverage under the 2015 Policy for lawsuits first made and reported during the policy period that related to lawsuits filed after December 31, 2012, and before the inception of the 2015 Policy. Indeed, *restoring this window of coverage is the sole purpose of the new language*.

Gastar involved materially identical facts and policy provisions, including even a materially identical manuscript change to the prior and pending litigation

exclusion. In *Gastar*, the Texas Appellate Court, considering the exact issues present here, found that the manuscript language modified the policy to narrow the preclusive effect of the prior litigation exclusion and interrelatedness provision to only those matters relating to claims made prior to a negotiated date (in *Gastar*, 5/31/2000). A similar conclusion should have applied here. The negotiated prior litigation endorsement limits those prior related claims that can exclude coverage to the period prior to December 31, 2012. This finding compels the conclusion that the 2015 lawsuits at issue here do not relate back to the 2014 lawsuit, but rather are covered under the 2015 Policy under which they were first-made and timely-reported.

II. IF THE COURT DECLINES TO APPLY GASTAR, AT A MINIMUM, IT SHOULD CERTIFY THIS IMPORTANT ISSUE OF STATE LAW INTERPRETATION TO THE TEXAS SUPREME COURT.

To the extent the Court declines to apply *Gastar* to find coverage for the 2015 lawsuits, at a minimum, it should certify this important issue of state law interpretation to the Texas Supreme Court. "Like California, Texas has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Guardian Royal Exchange Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 232-33 (Tex. 1991). Texas Constitutional Amendment Article V, Section 3-c specifically empowers the Texas Supreme Court to "answer questions of state law certified from a federal appellate court."

In order to ensure "proper deference [is] given to [Texas] state courts in the interpretation of" Texas law, the Supreme Court of Texas has adopted a procedure to "answer questions of law of this state which may be determinative of the cause then pending [in the certifying court when] there is no controlling precedent in the decisions of the Supreme Court of Texas." Tex. R. App. P. 114(a). The Texas Supreme Court has recently approved this process for circumstances where, as here, a federal court believes "there is no controlling Texas Supreme Court authority, and the authority from the intermediate state appellate courts provides insufficient guidance." *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474, 476 (Tex. 2016) ("accept[ing] two certified questions from the Fifth Circuit"). Thus to the extent it declines to apply *Gastar*, the Court should certify the question to the Texas Supreme Court.

Indeed, the Texas Supreme Court has indicated "a strong preference for this approach rather than the alternative—an incorrect federal surmise regarding how we would resolve a matter of disputed Texas law." *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 799 (Tex.,1992) (J. Doggett, concurring). The Supreme Court of Texas has warned "such federal errors would only serve to make our work more difficult by leading to misreliance on federal precedents by both the bench and the bar." *Id.* This concern has particular force here, in light of the Texas Supreme Court's declaration that "the State of Texas has a special interest in regulating certain

areas such as insurance" and "insurance has been delegated to the states by the federal government." *Guardian*, 815 S.W.2d at 229 (Tex. 1991).

Aside from the serious implications for the parties in this litigation and future cases involving D&O coverage, UP submits that this court should also consider the impact of this decision on other types of insurance which involve claims made and first-reported coverage policy forms. More particularly, most Professional Liability and Environmental Liability policies contain similar notice provisions as the one at issue in this case.

According to the most recent statistical data from the State Bar of Texas, there were a total of 103,342 attorney members as of December 31, 2018.[2] Additionally, according to the Greater Houston partnership, Houston is the "Energy Capital of the World," and the headquarters and intellectual capital for virtually every segment of the energy industry including exploration, production, transmission, marketing, supply and technology.[3] This anecdotal data alone demonstrates the breadth and scope of the impact that this court's decision could have on other insurance sectors beyond the D&O coverage at issue in this case.

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[2] Report of State Bar of Texas, Department of Research and Analysis. https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=43800.

[3] Report of Greater Use in Partnership, https://www.texasbar.com/AM/Template.cfm?Section=Content_Folders&Template=/CM/ContentDisplay.cfm&ContentID=43800

UP believes that the majority in the panel opinion misinterpreted *Gastar* as explained by Judge Dennis in his dissent. Nevertheless, for an issue with such broad application to multitudes of policyholders in the State of Texas that the Supreme Court of Texas has never directly addressed, at a minimum, this court should certify the issue to the Supreme Court of Texas.

CONCLUSION

For the foregoing reasons, United Policyholders respectfully requests that the Court rehear this case *en banc*, reverse the panel's decision, and find that under *Gastar*, the 2015 Lawsuits are not barred from coverage based on their relationship to the 2014 Lawsuit. Alternatively, if the Court has any doubt that *Gastar* applies, it should certify this important issue of state law interpretation to the Texas Supreme Court.

Dated: August 27, 2019

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Pursuant to 5TH CIR. R. 27.4, I hereby certify that I have contacted counsel for all other parties and there is no opposition to the granting of leave to United Policyholders to file a Brief in Support of The Petition for Rehearing En Banc filed by Plaintiff-Appellant, Adi Worldlink, LLC.

/s/ George Andrew Veazey

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. 29(b)(4), because this brief contains 2,533 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point characters with Times New Roman font.

3. This Petition was filed electronically, in native Portable Document File (PDF) format, via the Fifth Circuit's CM/ECF system.

4. All required privacy redactions have been made pursuant to 5TH CIR. R. 25.2.13, the electronic submission is an exact copy of the paper document pursuant to 5TH CIR. R. 25.2.1, and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses

Dated: August 27, 2019

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I hereby certify that on August 27, 2019, a copy of the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: August 27, 2019

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USDC No. 4:16-CV-665

Dear Mr. Veazey,

You must submit the 22 paper copies of your brief required by 5th Cir. R. 31.1 **overnight** to be due in our office no later than close of business tomorrow 08/28/19.

Sincerely,

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