STATE OF MICHIGAN
IN THE SUPREME COURT

CELLO-FOIL PRODUCTS, INC., Plaintiff-Appellant/ Cross-Appellee, v. MICHIGAN MUTUAL LIABILITY COMPANY, et al., Defendants-Appellees	Supreme Court No. 104107 Court of Appeals No. 151615 Lower Court 90-1901-C2
GELMAN SCIENCES, INC., et al., Plaintiffs-Appellants, v. FIDELITY AND CASUALTY COMPANY OF NEW YORK, et al., Defendants-Appellees	Supreme Court No. 105981 Court of Appeals No. 164382 Lower Court No. 91-42288-CK
ARCO INDUSTRIES CORPORATION and FREDERICK C. MATTHAEI, JR. Plaintiffs-Appellants, v. AMERICAN MOTORISTS INSURANCE COMPANY, Defendant-Appellee	Supreme Court No. 106678 Court of Appeals No. 187104 Lower Court No. A87-0218-CK

MEMORANDUM OF LAW OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS- APPELLANTS ARCO INDUSTRIES CORPORATION, CELLO-FOIL PRODUCTS, INC., GELMAN SCIENCES, INC., AND FREDERICK C. MATTHAEI, JR.

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STATEMENT OF JURISDICTION

This Court granted the motion of United Policyholders requesting permission to appear as *Amicus Curiae* in these consolidating proceedings on March 12, 1997.

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

Amicus Curiae United Policyholders is a non-profit corporation dedicated to educating policyholders on their rights and duties under their insurance policies. Specifically, United Policyholders engages in charitable and 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.

United Policyholders has a vital interest in seeing that the standard-form commercial general insurance policies sold to countless policyholders throughout the United States are interpreted properly and consistently 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 and to have those rights enforced consistently throughout the country.

In its decisions in Arco Industries Corp. v. American Motorists Insurance Co., 215 Mich. App. 633 (1996) ("Arco"),

Cello-Foil Products, Inc. v. Michigan Mutual Liability Co., No. 151615 (Mich. Ct. App. Aug. 15, 1995) ("Cello-Foil"), and Gelman Sciences, Inc. v. Fidelity & Casualty Co., 214 Mich. App. 560 (1995) ("Gelman Sciences"), the Court of Appeals committed reversible error in holding that only those comprehensive general liability ("CGL") insurance policies in effect when environmental property damage becomes "manifest" or is "first discovered" must respond to a policyholder's liability. These decisions have caused and will continue to cause material injustice to Michigan policyholders who paid valuable consideration for insurance coverage that they will be denied. Indeed, unless this Court reverses the judgments below, Michigan policyholders will receive less liability insurance protection for long-term property damage or bodily injury than policyholders in all but one or two other states.

This is because the "manifestation" theory adopted by the Court of Appeals has been rejected by the overwhelming majority of courts throughout the country, including all but one of the state courts of last resort that have considered the issue. These authorities simply recognize the obvious: The standard-form insurance policy language in issue does not even suggest that property damage or bodily injury must be discovered or become "manifest" to trigger coverage.

This memorandum will show that the failure to include a "manifestation" requirement was not an oversight, but a deliberate decision on the part of the insurance industry. The drafters of the relevant standard-form policy language clearly

intended that CGL policies would be triggered if any portion of the process of continuous bodily injury or property damage took place during the policy period. Moreover, on repeated occasions throughout the 1960s, 1970s, and early 1980s, insurance industry organizations specifically considered and rejected the "manifestation" or "first discovery" approach.

- When the new "occurrence" CGL insurance policy was introduced in 1965 and 1966, members of the insurance industry organizations that drafted the policy gave public presentations and published articles explaining the impact of providing insurance coverage on an "occurrence" basis. The CGL policy drafters repeatedly and unequivocally affirmed that, in cases involving long-term bodily injury and property damage, policyholders could call upon **all** policies in effect during the time that the damage or injury took place to provide coverage for their liabilities, not merely those policies that were "on the risk" when the damage or injury became "manifest" or was "discovered."
- As early as 1961, the insurance industry organizations responsible for drafting the CGL insurance policy expressly declined to approve a policy form that contained a "manifestation" or "first discovery" trigger. These policy drafting organizations reasoned that a "manifestation" or "discovery" trigger would present serious

difficulties in application and also would unfairly impair insurance companies' ability to obtain contribution from other implicated carriers.

- In the 1970s, after the advent of asbestos-related and other "delayed manifestation" claims, the insurance industry's General Rules and Forms Committee expressly stated that existing CGL insurance policies "provide coverage for 'injuries which occur during the policy period, regardless of when the exposure to harmful conditions takes place, or when injury becomes known or manifest.'" Although one policy drafting committee subsequently approved a "manifestation" policy form, the industry's Commercial Lines Committee ultimately disapproved the form, and no further action was taken.
- On several occasions throughout the early 1980s, the insurance industry's General Liability Committee considered a policy form adopting a "manifestation" or "first discovery" trigger. The concept was ultimately rejected, however, in view of the "potential for controversy and litigation among claimants and companies unless 'first discovery' can be unambiguously defined."

Under any view, the policy language and drafting history compel the rejection of the "manifestation" trigger

theory advanced by the appellee insurance companies here. Appellees' assertions to the contrary are both insupportable and shocking. Perhaps even more shocking is that innumerable insurance companies -- including some of the appellees here -- have strenuously and successfully urged courts to reject the "manifestation" or "first discovery" approach as contrary to the controlling policy language and the underwriting intent. This Court has long recognized that policyholders are entitled to the benefit of any "reasonable" interpretation of the policy language. These insurance policy admissions conclusively establish the "reasonableness" of the policyholders' position here.

As importantly, the revisionist interpretation urged by the insurance companies implicates significant concerns for the integrity of the judicial system. There is no reason, in law or equity, why insurance companies should be permitted to contradict their own prior judicial representations concerning the meaning of the standard form policies that they drafted and have sold to countless policyholders. Consequently, the insurance company defendants should be estopped from repudiating their studied, official, and affirmative representations that the standard-form CGL insurance policy does not contain any "manifestation" or "first discovery" limitation.

For all of these reasons, United Policyholders respectfully requests that the Court reverse the judgments below.

ISSUE PRESENTED FOR REVIEW

Should a "manifestation" or "first discovery" trigger of coverage, which restricts a policyholder's recovery to only the primary and excess or umbrella insurance policies in effect at the time the property damage first is "discovered" or "manifests" itself, be applied in cases which involve environmental property damage which actually took place over many years spanning multiple insurance policy periods?

Plaintiff-Appellant answers "No."

Court of Appeals answers "Yes."

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STANDARD-FORM CGL INSURANCE POLICY PROVIDES COVERAGE FOR BODILY INJURY OR PROPERTY DAMAGE WHICH TAKES PLACE DURING THE POLICY PERIOD, REGARDLESS OF WHETHER THE DAMAGE OR INJURY IS "DISCOVERED" OR BECOMES "MANIFEST" DURING THAT PERIOD

The standard-form CGL insurance policy contains a standard "grant of coverage" provision. See, e.g., Montrose Chem. Corp. v. Admiral Ins. Co., 897 P.2d 1, 12-13 (Cal. 1995). This provision provides that the insurance company

> will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> [Coverage]: A. bodily injury or
>
> [Coverage]: B. property damage
>
> to which this [insurance] applies, caused by an occurrence and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . .

S. Miller & P. LeFebvre, Miller's Standard Insurance Policies Annotated 411 (1988).[1]

The CGL policy defines "bodily injury" as "bodily injury, sickness or disease sustained by any person." Id. The 1966 standard-form policy defined "property damage" as "injury to or destruction of tangible property." Id. In 1973, the definition was changed to read as follows:

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1. The relevant excerpts from this volume are attached as Exhibit 1 to the Compendium of Exhibits that accompanies this Memorandum of Law ("Compendium of Exhibits").

> (1) Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Id.

Under either policy form, the sole "triggering" event is bodily injury or property damage that takes place "during the policy period." For instance, in the environmental context, coverage is triggered by a damaging release and the continued migration of or exposure to contaminants.

The CGL policy language does not limit coverage to a single coverage period. Nor does it so much as refer to the "discovery" or "manifestation" of injury or damage, let alone state that coverage is dependent upon these events. Rather, the express policy language provides coverage for damage that results from "continuous or repeated exposure to conditions" which may take place over multiple policy periods, triggering a number of policies. If the insurance companies that drafted these standard form provisions had wished to limit coverage to a single policy period, they could easily have done so. In the absence of such limiting language, the policies are triggered so long as some property damage takes place during the policy period, regardless of whether damage also takes place during other policy periods.

Amicus submits that this interpretation comports with the plain meaning of the insurance policy language and,

therefore, must be applied under settled Michigan rules of insurance policy interpretation. Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 445 Mich. 558, 567-571 (1994) ("Bronson Plating"). At the very least, this is a reasonable interpretation that must be adopted even in the face of any competing reasonable interpretations. Id. As set forth below, this interpretation is also the interpretation intended by the drafters of the insurance policy.

II. THE DRAFTING HISTORY DEMONSTRATES THAT THE INSURANCE INDUSTRY INTENDED THE STANDARD-FORM CGL POLICY LANGUAGE TO PROVIDE CONTINUOUS COVERAGE UNDER MULTIPLE, SUCCESSIVE INSURANCE POLICIES FOR PROGRESSIVE OR CONTINUOUS BODILY INJURY AND PROPERTY DAMAGE.

The insurance company representatives who drafted the standard-form "occurrence" policy language at issue clearly intended that multiple CGL insurance policies would be triggered in cases involving damage or injury taking place over successive policy periods.[2] Moreover, the drafting history proves that the insurance industry specifically considered, and rejected, on at least three separate occasions -- in the 1960s, the late 1970s, and the early 1980s -- the restrictive "manifestation" trigger of coverage that is advocated by the insurance company appellees here.

A. The CGL Policy Drafting Committees Expressly Recognized That Claims Involving Continuous Loss or Damage over Successive Policy Periods Would Trigger Multiple Insurance Policies.

In the 1960s, insurance industry trade associations, including the National Bureau of Casualty Underwriters ("NBCU"), the Insurance Rating Board ("IRB") and the Mutual Insurance Rating Bureau ("MIRB")[3] (all predecessors of the Insurance

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2. Insurance industry trade associations, as part of the industry's limited antitrust exemption, unilaterally drafted the insurance policy language at issue and imposed it upon policyholders, large and small alike.

3. The MIRB, IRB, and NBCU were insurance industry-support organizations. In 1960, these organizations established several committees which engaged in the CGL policy revision process and were composed of the insurance industry's most respected experts and legal counsel. See American Home Prods. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1501 (S.D.N.Y. 1983), aff'd as modified, (continued...)

Services Office, Inc. ("ISO"))[4], developed a revised standard-form CGL insurance policy. The result was the 1966 standard-form CGL "occurrence" form (the "1966 Form") which promulgated the basic insuring agreement and policy definitions that are at issue here. In 1973, the insurance industry revised certain definitions, including "property damage," and exclusions in the 1966 Form (the "1973 Form"). The 1973 Form did not, however, change the insuring agreement promulgated in the 1966 Form.

The insurance company drafters never intended that the 1966 and 1973 standard-form CGL policies would only be triggered at the moment of the "manifestation" or "discovery" of damage. To the contrary, the drafters intentionally incorporated a trigger of coverage into the 1966 Form (and thus the 1973 Form also), under which multiple, successive policies would be implicated in cases involving continuous injury or damage.

One of the insurance industry officials involved in the adoption of the 1966 Form, Gilbert L. Bean, the Assistant

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3.(...continued)
748 F.2d 760 (2d Cir. 1984). In 1971, the IRB and the NBCU, among others, were merged into the ISO, which has continued the work of revising and filing standard form CGL policies. Id. One of the goals of this process is to develop a standardized insurance product, which will be interpreted in the same fashion on a nationwide basis.

4. ISO is the "principal rating, statistical and drafting organization for the general liability insurance industry in the United States, whose primary function is to draft standard-form comprehensive general liability ('CGL') insurance policy language for the industry. . . ." In Re Hoechst Celanese Corporation, 584 N.Y.S.2d 805, 806 (N.Y. App. Div. 1992).

Secretary of Liberty Mutual Insurance Company,[5] explained the trigger of coverage under the 1966 standard-form CGL policy, emphasizing that long-term damage triggers multiple, successive insurance policies:

> This brings into focus one important change in our policy -- the fact that coverage no longer attaches when the accident occurs but rather when the injury or damage takes place. This means that the policy in force when a particular injury or damage takes place is the one which applies, regardless of when the causing accident took place. So if 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.

G.L. Bean, "New Comprehensive General and Automobile Program: The Effect on Manufacturing Risks," Address delivered at the Mutual Insurance Technical Conference (Nov. 15-16, 1965), at 6 (emphasis added).[6]

Mr. Bean's observations were echoed virtually word for word by E.R. Woodworth, the Resident Manager of the Insurance Company of North America ("INA") -- one of the appellee defendants -- in a presentation concerning the new "occurrence" policy. Woodworth, New Comprehensive General Liability Policy,

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5. Mr. Bean served on the Joint Rating Committee. See Insurance Co. Of N. Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), aff'd, 633 F.2d 1212 (6th Cir. 1980), modified, 657 F.2d 814, cert. denied, 102 S.Ct. 686 (1981) ("Forty-Eight Insulations"). The Joint Rating Committee had ultimate approval authority over the Joint Forms Committee.

6. A copy of this address is appended as Exhibit 2 to the Compendium of Exhibits.

The Effect on Contracting Risks, (April 14, 1966).[7] Like Mr. Bean, Mr. Woodworth used the paradigm example of continuous pollution damage to illustrate how multiple policies could apply to a given claim:

> This is particularly true, for an example, if the injury or damage is from waste disposal, or similar operations, should [sic] continue after the waste disposal ceased or operations completed, as it can happen. It could produce losses on each side of a renewal date and, in fact, over a period of years with a separate policy period applying in each year. Policy limits are renewed every year, and the underwriter may find a rather substantial pyramiding of his liability limits under the new contract for the delayed action injuries.

Id. at 9 (emphasis added).

Henry G. Mildrum, an executive with the Hartford Accident and Indemnity Company, also gave a presentation on the new CGL insurance policy. Like Messrs. Bean and Woodworth, Mr. Mildrum expressly recognized that successive insurance policies could be triggered by claims involving continuous pollution damage:

> [C]overage is now triggered by time or injury rather than the time of the accident or exposure which causes the injury or damage. In most cases the injury will be simultaneous with exposure.... In other cases injuries will take place over a period of time. Slow ingestion of foreign matter, inhalation of noxious fumes or the discharge of corrosive material into the atmosphere or water courses are examples of exposure type situations. This means on some kinds of exposure cases more than one policy period may come into play.

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7. A copy of this presentation is appended as Exhibit 3 to the Compendium of Exhibits.

Henry G. Mildrum, Implications of Coverage for Gradual Injury or Damage (Nov. 11, 1965, Sheraton Western Hotel) at 2-3.[8] [9]

Richard H. Elliot, the Secretary of the NBCU and a Forms Committee member, similarly explained that "the definition of occurrence serves to identify the time of loss for the purpose of applying coverage -- the injury must take place during the policy period." Elliot, The New Comprehensive General Liability Policy (Dec. 17, 1965) at 4.[10] Mr. Elliot further observed that, "[i]n some exposure types of cases involving cumulative injuries, it is possible that more than one policy will afford coverage. Under these circumstances, each policy will afford

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8. A copy of this presentation is appended as Exhibit 4 to the Compendium of Exhibits.

9. Prior to 1966, there also was no "manifestation" or "discovery" trigger concept in the standard CGL policies. The policies at that time typically afforded liability coverage for bodily injury and property damage caused by "accident" and, like the subsequent "occurrence" policies, those "accident" policies would provide coverage if injury took place during the policy period. See e.g., Continental Case. v. Diversified Indus. Inc., 884 F. Supp. 937, 957 (ED Pa. 1995) ("Although insurers argued that these policies covered only brief catastrophic events, courts generally construed these policies to cover ongoing events that inflicted injury over an extended period so long as the injury was both unintended and unexpected from the insured's viewpoint... . Therefore, the pre-1966 policies covered injury or damage resulting from extended exposure to pollutants...." The 1966 adoption of the "occurrence" policy form was intended to confirm that coverage exists for injuries that result form an ongoing condition or event as well as from a brief catastrophic event. Id.

10. A copy of this paper is appended as Exhibit 5 to the Compendium of Exhibits.

coverage to the bodily injury or property damage which occurs during the policy period." Id.

In an address to the American Society of Insurance Management, Lyman J. Baldwin, Jr., INA's Secretary of Underwriting, also used the example of pollution damage to illustrate the application of CGL policies to claims for long-term and continuous damage or injury:

> Although, it is most common that the injury takes place simultaneously with the exposure, there are many instances of injuries taking place over a period of time before they become evident. For example, slow ingestion of foreign substances or inhalation of noxious fumes. In cases such as these, the definition of occurrence serves to identify the time of loss for the purpose of applying coverage -- the injury must take place during the policy period.
>
> In some exposure types of causes involving cumulative injuries, it is possible that more than one policy will afford coverage.

L.J. Baldwin, Address (presentation to American Society Insurance Management, New Orleans, LA.) (Oct. 20, 1965)) at 6.[11]

Norman Nachman, the Manager of the Casualty Insurance and Multiple Line Insurance Division of the NBCU, published an article concerning the "occurrence" policy in a publication of the Society of Chartered Property and Casualty Underwriters.[12] Mr. Nachman's article states that in some cases

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11. A copy of this address is appended as Exhibit 6 to the Compendium of Exhibits.

12. The Society of Chartered Property and Casualty Underwriters was comprised of underwriters who had earned the CPCU designation, a professional certification that is similar to the CPA designation awarded accountants.

> [i]njuries will take place over a long period of time before they become manifest. The slow ingestion of foreign matters and inhalation of noxious fumes are examples of injuries of this kind.
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> * * * *
>
> The definition [of "occurrence"] serves to identify the time of loss for application in these cases, viz., the injury must take place during the policy period. This means that in exposure-type cases, cases involving cumulative injuries, more than one policy contract may come into play in determining coverage and its extent under each policy.

Nachman, The New Policy Provisions for General Liability Insurance, The Annals, Vol. 18, No. 3 (Fall 1965), at 200.[13]

The Defense Research Institute ("DRI"), an insurance industry organization, also published a monograph by Willard J. Obrist, an assistant manager of the General Accident insurance companies, to explain the new "occurrence" policy. The DRI monograph states:

> Although most injuries occur simultaneously with the exposure, there are many instances in which injuries tack place over an extended period before they become evident as in slow ingestion of foreign substances or inhalation of noxious fumes.
>
> In some exposure cases involving cumulative injuries, it is possible that more than one policy will afford coverage, each to apply to bodily injury or property damage occurring during its policy period. The policy will not depend upon the causative event of occurrence but will be based upon injuries or damages which result from such event and which happened during the policy period.

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13. A copy of this article is appended as Exhibit 7 to the Compendium of Exhibits.

Obrist, New Comprehensive General Liability Insurance Policy, DRI (Nov. 1966) at 6.[14]

In sum, the contemporaneous explanations made by the insurance industry representatives who were involved in drafting the CGL "occurrence" policy are unequivocal: The insurance industry clearly understood and intended that all insurance policies in effect during the period of continuous property damage or bodily injury would be "triggered" and, therefore, must respond to the policyholder's claim for insurance coverage. Moreover, as shown below, the insurance industry rejected a "manifestation" trigger not only when the CGL policy was first drafted and introduced, but on repeated occasions throughout the 1960s, 1970s and 1980s.

B. A "Manifestation" Trigger Was Rejected by the Drafting Committees in the 1960s.

The insurance industry specifically rejected a "manifestation" trigger of coverage in the 1960s. On May 4, 1961, in connection with the initial drafting of the 1966 Form, the Joint Forms Committee sent to the Rating Committees of the NBCU and the MIRB a revised CGL policy draft that contained a "manifestation" trigger. The Joint Forms Committee found, however, that a "manifestation" trigger was not viable, in part, because the time of "manifestation" could not be determined with any precision:

> In order to establish the applicability of a particular policy to bodily injury or property damage

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14. A copy of this article is appended as Exhibit 8 to the Compendium of Exhibits.

which reveals itself after exposure to conditions over a long period of time, the Joint Scope of Coverage Subcommittee submitted to us the following language as expressing the intent:

> "All bodily injury or property damage which results from continuous or repeated exposure to the same cause is an accident. Such accident shall be deemed to have occurred on the date when the exposure culminates in injury or damage for which [the] claim is made, at any time."[15]

* * *

The Joint Forms Committee gave a great deal of study to the questions posed above and to various possible answers along the lines suggested by the Joint Scope of Coverage Subcommittee because theoretically they offer a most promising solution to both problems. Their success, however, rests in the final analysis upon two assumptions:

(1) that it is possible to telescope into one moment of time all of the injury resulting from continuous exposure to conditions over a long period of time without introducing undesirable side-effects, and

(2) that it is possible to determine precisely when exposure culminates in injury.

We feel that it is highly doubtful that either assumption would prove valid in actual practice.

Revised Comprehensive General Liability Policy, 5/4/61 Draft, Explanatory Memorandum of the Joint Forms Committee to the Rating Committees of the National and Mutual Bureaus (emphasis added).[16]

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15. The quoted language clearly shows that the insurance industry knew how to draft "manifestation" language. Tellingly, the 1966 and 1973 Forms do not contain any language that is even remotely similar to that found in the 1961 draft policy form.

16. A copy of this memorandum is appended as Exhibit 9 to the Compendium of Exhibits.

Because, in part, the drafters believed that the courts would not enforce a "manifestation" test as a "cut off," they specifically rejected the manifestation trigger:

> 1. There was no assurance that the courts would permit the "manifestation of injury" test to operate as a cut-off as well as a trigger for coverage.
>
> . . .
>
> 3. The lumping of all injury into the policy in force at the time of the first manifestation could have the effect of preventing the underwriter from ever terminating the company's exposure to future liability or securing the joinder of previous companies on the risk to share in the loss.

Report to the Joint Forms Committee from the Joint Drafting Committee (Apr. 17, 1961).[17]

At a September 21-24, 1964 Forms Committee Meeting, Drafting Committee Member Schoen stated that "as a fundamental principle we want to cover everything that flows ... from injurious exposure during the policy period." Indeed, Mr. Schoen noted that the underwriters at his insurance company, Hartford, were opposed to a manifestation trigger. Minutes of the Joint Forms Committee Meeting at 11. ("Mr. Schoen said his underwriters did not want to accept full liability because they are on a risk the last week of exposure.") Id.[18]

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17. A copy of this paper is appended as Exhibit 10 to the Compendium of Exhibits.

18. A copy of these minutes is appended as Exhibit 11 to the Compendium of Exhibits. Mr. Schoen's comments indicate that the "manifestation" trigger was rejected because, at the time, the insurance companies believed that it was in their interest to spread the costs of extended exposure claims among all insurance companies on the risk.

In 1964, Richard A. Schmalz, Liberty Mutual's representative on the NBCU and MIRB Joint Drafting and Joint Forms Committees responsible for developing the 1966 standard-form CGL policy language, prepared a memorandum to the Joint Forms Committee on the "occurrence" definition. See Memorandum from Subcommittee on Definition of Occurrence to Joint Forms Committee, dated Oct. 6, 1964, at 1-2.[19] An attachment to that document, a memorandum that Mr. Schmalz had prepared entitled "Various Approaches Considered to Date - Occurrence Coverage,"[20] explained that draft "manifestation" trigger provisions were rejected in favor of a draft incorporating a trigger, which "places emphasis on the time of the resulting injury." See "Various Approaches Considered to Date - Occurrence Coverage", at 1-2 (emphasis added). Id.[21]

Documents prepared after the insurance industry adopted the 1966 Form also confirm the drafters' rejection of the

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19. A copy of this memorandum is appended as Exhibit 12 to the Compendium of Exhibits. Mr. Schmalz was also one of three members of the Joint Scope of Coverage Subcommittee of the NBCU. That Subcommittee "held the authority of final approval in determining whether the [standard policy] language comported" with "[t]he ultimate underwriting intent of the form policy language." See Asbestos Insurance Coverage Cases, Cal. Super., Judicial Council Coordination Proceeding No. 1072, slip op., at 34 (Jan. 24, 1990).

20. A copy of this paper is appended as Exhibit 13 to the Compendium of Exhibits.

21. Mr. Schmalz testified by affidavit in another insurance coverage action, Liberty Mutual Insurance Co. v. Foremost-McKesson, Inc., that he had prepared the "Various Approaches" memorandum. See Affidavit of Richard A. Schmalz, sworn to Oct. 12, 1983, in Liberty Mut. Ins. Co. v. Foremost-McKesson, Inc., No. 82-1074-T (D. Mass.). A copy of this affidavit is appended as Exhibit 14 to the Compendium of Exhibits.

"manifestation"-only trigger. George Katz, an Aetna representative to the Joint Drafting Committee, and one of the principal drafters of the 1966 Form, explained:

> Certainly a traumatic injury ultimately resulting in cancer is a good example. Similarly, with respect to property damage, suppose blasting is done without proper controls and adjacent buildings sustain structural damage weakening the roof. Although the roof may not collapse for a month, the damage to the building is related back to the time of impact. What we have tried to do is to time coverage to coincide with the impact of the negligence or other wrongdoing upon the persons or property injured or destroyed, recognizing that this impact may not always be immediately manifest.

Letter from G. Katz of Aetna to J.R. Garr of Thomas McGee & Sons (an insurance company) (Jan. 18, 1966), at 1-2 (emphasis added).[22]

C. The Insurance Industry Again Rejected a "Manifestation" Trigger of Coverage in the 1970s.

When a large number of asbestos-related claims were submitted to insurance companies in the mid-to late-1970s, the insurance industry again confirmed that the appropriate trigger of coverage under the 1966 and 1973 Forms was the time that damage took place, regardless of when the damage became "manifest."

For example, the American Insurance Association ("AIA") held a meeting in April 1977 to discuss insurance companies' obligations regarding the growing number of asbestosis and DES claims. The minutes of that meeting state that the majority of

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22. A copy of this letter is appended as Exhibit 15 to the Compendium of Exhibits.

insurance companies believed that the continuous trigger of coverage is applicable to asbestosis claims:

> The majority view 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 the risk during any part of that period could be fully responsible for the cost of defense and loss.

Memorandum of the Meeting of Apr. 21, 1977 of the AIA, at 1 (emphasis added).[23]

To limit its obligations for such future long-term exposure claims, the insurance industry set out in the late 1970s to draft a policy form which would provide coverage for continuous injury claims only when the damage became "manifest." See Minutes of the Dec. 13-15, 1977 Meeting of the Ad Hoc Committee on Special Comprehensive Forms and Rules;[24] Minutes of the Mar. 28, 1978 Meeting of the General Liability Rules and Forms Committee;[25] ISO "Commercial General Liability Policies Executive Summary/Detailed Analysis."[26] These drafting efforts within ISO[27], and statements by the insurance industry in

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23. A copy of these minutes is appended as Exhibit 16 to the Compendium of Exhibits.

24. A copy of these minutes is appended as Exhibit 17 to the Compendium of Exhibits.

25. A copy of these minutes is appended as Exhibit 18 to the Compendium of Exhibits.

26. A copy of this paper is appended as Exhibit 19 to the Compendium of Exhibits.

27. The hierarchy of the ISO committees is as follows: The Ad Hoc Committee on Special Comprehensive Rules and Forms was the initial committee that addressed drafting questions. It was (continued...)

connection with that effort, further confirm the insurance industry's understanding that multiple, successive policies would be available to respond to a given claim for long-term and continuous damage or injury under the 1966 and 1973 standard form policy language.

For example, in November 1977, Mr. Schmalz recognized that the 1973 Form provided continuous coverage for asbestos-related diseases, disagreeing with the insurance industry's effort to adopt a "manifestation" trigger:

> At present, standard policies attached [sic] to bodily injury or property damage which occurs during the policy period, regardless of when the exposure to harmful conditions takes place or when injury becomes known or "manifest." Although there is some ambiguity in the concept of when injury "occurs", in general, courts probably place more emphasis on when actual physical changes occur which, cumulatively over a period of time, result in a visible injury or disability rather than on the manifestation itself.
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> The proposed change would try to eliminate the ambiguity by providing that the policy would apply to injury which first becomes manifest during the policy period. . . .
>
> We believe that these changes should not be made without very careful study for two reasons:
>
> 1. Manifestation of injury is itself an ambiguous concept, as we shall attempt to demonstrate.
>
> 2. The idea of artificially assigning all losses to the policy during which first

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27.(...continued)
appointed by the General Liability Rules and Forms Committee. As an appointed committee, it did not have a revolving, elected membership. The Ad Hoc Committee reported to the General Liability Rules and Forms Committee, an elected committee with a three-year membership turnover, one-third replaced each year. The General Liability Rules and Forms Committee reported to the Commercial Lines Committee, which is the policy-making group in ISO for CGL/property and casualty insurance policies.

> manifestation of injury takes place is so arbitrary that it may have serious adverse effects on the willingness of underwriters to provide markets, especially for product liability insurance.
>
> . . .
>
> We might add that this approach was carefully studied by the industry in 1961 and rejected, largely for these reasons.

R. Schmalz, The New Commercial General Liability Policy (Manifestation Injury Approach) (Nov. 14, 1977) (emphasis added).[28]

Despite such concerns, the General Rules and Forms Committee met in March 1978 to discuss, among other things, the "occurrence concept vs. the manifestation concept." See Digest of Agenda of General Liability Rules and Forms Committee Meeting, dated Mar. 17, 1978.[29] The General Rules and Forms Committee confirmed that the 1973 "occurrence" policy incorporates a continuous trigger:

> Presently, the standard general liability policies provide coverage for injury which occurs during the policy period, regardless of when the exposure to harmful conditions takes place, or when injury becomes known or manifest.

Id. at 1 (emphasis added). To prevent this result, the committee recommended that a "manifestation" trigger of coverage be adopted instead. The committee noted, however, that manifestation "is itself an ambiguous concept" and that "[t]his situation is

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28. A copy of this paper is appended as Exhibit 20 to the Compendium of Exhibits.

29. A copy of this paper is appended as Exhibit 21 to the Compendium of Exhibits.

compounded when this concept is applied to property damage coverage." Id. (emphasis added).

Thereafter, the Commercial Lines Committee tentatively approved a "manifestation" trigger in 1979, and directed the inferior committees to develop the concept further. See, e.g., Minutes of Feb. 27-28, 1979 Meeting of General Liability Rules and Forms Committee;[30] Minutes of Jan. 17, 1979 Meeting of Commercial Lines Committee; Committee.[31]

The Commercial Lines Committee, however, was deeply divided on this issue and ultimately rejected a "manifestation" trigger. See, e.g., Minutes of Aug. 22-23, 1979 Meeting of General Liability Rules and Forms Committee.[32]

D. In the 1980s, the Insurance Industry Again Rejected a "Manifestation," or "First Discovery," Trigger of Coverage.

In 1980, a CGL policy draft was prepared by ISO's Ad Hoc Committee on Special Comprehensive Forms and Rules. This form, which was to replace the 1973 "occurrence" Form, proposed a "first discovery" trigger, under which "coverage would attach as of each person's first discovery date, irrespective of cause."

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30. A copy of these minutes is appended as Exhibit 23 to the Compendium of Exhibits.

31. A copy of these minutes is appended as Exhibit 22 to the Compendium of Exhibits.

32. A copy of these minutes is appended as Exhibit 24 to the Compendium of Exhibits.

See Minutes of Meeting of General Liability Committee, dated Sept. 15-16, 1981.[33]

The proposed "first discovery" form was reviewed by the General Liability Committee and the Commercial Lines Committee and forwarded to a senior-level Ad Hoc Legal Review Committee. Id. An "exposure draft" was prepared by that Legal Review Committee, which was circulated among the insurance industry for review. There was substantial discussion within the insurance industry of the relative merits of the proposed "first discovery" trigger form and the "claims-made" form, which also was being proposed at that time. See Minutes of Oct. 7-8, 1981 Meeting of the General Liability Committee.[34]

The General Liability Committee met on October 7-8, 1981 to discuss the "timing provisions, with particular emphasis on the relative merits of a 'manifestation' and claims-made approach." See id. at 2. The General Liability Committee considered the pros and cons of a "first discovery" trigger, and determined that one disadvantage of the "first discovery" trigger was the "potential for controversy and litigation among claimants and companies unless 'first discovery' can be unambiguously defined." Id. at 3.

The General Liability Committee considered the issue again in March 1982 and concluded that "the possibility remains that controversy will arise over what constitutes 'first

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33. A copy of these minutes is appended as Exhibit 25 to the Compendium of Exhibits.

34. A copy of these minutes is appended to the Compendium of Exhibits as Exhibit 26.

discovery' under certain circumstances." See Minutes of Mar. 31, 1982 Meeting of General Liability Committee, dated Apr. 8, 1982.[35] The General Liability Committee submitted the proposed forms to ISO's Commercial Lines Committee. Id.

On December 14-15, 1982, the General Liability Committee noted that the Commercial Lines Committee had voted to adopt a claims-made trigger, rejecting the "first discovery" form, and ISO's Executive Committee and Board of Directors unanimously ratified the decision of the Commercial Lines Committee. See Minutes of the Dec. 14-15, 1982 Meeting of the General Liability Committee, dated Dec. 22, 1982.[36] Thus, the insurance industry has never adopted a "manifestation" or "discovery" trigger. As a result, the words "manifestation" and "manifest," and the trigger concept they represent, appear nowhere in the standard-form CGL policy.

III. COURTS HAVE RECOGNIZED THAT THE CGL DRAFTING HISTORY COMPELS THE REJECTION OF A "MANIFESTATION" TRIGGER

Every court that has considered evidence of the CGL drafting history has rejected the insurance companies' "manifestation" theory and, instead, held that policyholders are entitled to coverage under multiple, successive insurance policies for claims involving continuous or progressive injury or damage. For example, a federal district court refused to apply a "manifestation" trigger because, among other reasons, such an

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35. A copy of these minutes is appended as Exhibit 27 to the Compendium of Exhibits.

36. A copy of these minutes is appended as Exhibit 28 to the Compendium of Exhibits.

approach could not be reconciled with the evidence of the underwriting intent:

> Substantial evidence supports the view that the CGL draftsmen rejected the manifestation theory as a limitation on coverage. One of the first drafts, prepared by the Joint Drafting Committee in 1960, "would deem all of the injury to have occurred" at the first manifestation of injury or damage. That draft was sent back to the Drafting Committee by the higher level Joint Rating Committee, and Mr. Schmalz has testified without contradiction that this remand was a rejection by the task force leadership of the manifestation approach. The various committees rejected all other drafts that included a manifestation concept . . . because, among other reasons, "it would permit a carrier to cancel following the first notice of injury and leave the insured without coverage for other injuries emerging from the same exposure," and because in many cases injuries sufficiently serious to trigger coverage could occur prior to any form of manifestation.

American Home Prods. Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1501 (S.D.N.Y. 1983), aff'd as modified, 748 F.2d 760 (2d Cir. 1984) (emphasis added) (citations omitted).

The American Home Products court concluded that "[r]ejection of the manifestation concept in the CGL was thus implicit in its drafters' widespread recognition that the CGL would permit the insured to pyramid the limits of multiple policies when injuries occurred in more than one policy period." 565 F. Supp. at 1502 (citations omitted). On appeal, the Second Circuit affirmed, noting that the standard policy language does not support the insurance companies' restrictive interpretation:

> There is no language in the policies that purports to limit coverage only to injuries that become apparent during the policy period, regardless of when the injury actually occurred. Therefore, we agree with the district court that Liberty's manifestation interpretation is not reasonable.

748 F.2d at 764 (emphasis added).

Other courts that have examined the drafting history similarly have concluded that the drafters did not intend a "manifestation" trigger. More recently, the Supreme Court of California also relied upon evidence of the underwriting intent in rejecting a "manifestation" trigger. Montrose Chemical Corp. v. Admiral Ins. Co., 913 P.2d 878, 890-93 (1995) (citing statements of Elliot, Obrist, and Nachman, as set forth in Point II supra) The California Supreme Court concluded that the contemporaneous public statements of the CGL policy drafters "leaves little doubt that the definition of 'occurrence' in the newly drafted standard form CGL policy was intended to provide coverage when damage or injury resulting from an accident or 'injurious exposure to conditions' occurs during the policy period.'" 913 P.2d at 892. It also found that the insurance industry had expressly rejected "manifestation" as a trigger under CGL policies.

> [T]he drafting history of the standard occurrence-based CGL policy reflects that not only did the drafters understand the occurrence to mean an accident or exposure to injurious conditions resulting in the occurrence of damage or injury during the policy period, they specifically considered and rejected the suggestion that language establishing a manifestation or discovery trigger of coverage be incorporated into the standard form CGL policy.
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> * * *
>
> [T]he insurance industry is on record as itself having identifying several sound policy considerations favoring adoption of a continuous injury trigger of coverage in the third party liability insurance context.

913 P.2d at 891-92.[37]

All evidence shows that "manifestation" is an argument of convenience created by insurance companies as a means of avoiding their contractual obligations. There is no reason for this Court to adopt what the insurance industry itself has specifically considered and rejected. The judgments below should be reversed for this reason alone.

IV. NUMEROUS INSURANCE COMPANIES, INCLUDING SOME OF THE DEFENDANTS INVOLVED IN THE PRESENT APPEAL, HAVE URGED OTHER COURTS TO REJECT A "MANIFESTATION" TRIGGER AS CONTRARY TO THE CONTROLLING POLICY LANGUAGE AND THE UNDERWRITING INTENT

In this case, as well as hundreds of other similar cases across the country, insurance companies are espousing inconsistent positions in a feverish attempt to avoid their contractual obligations to their policyholders. As one court observed:

> With the growth of claims that have taken years to manifest themselves and the size of the class of potential claimants, many insurance companies faced with such claims have run for cover rather than coverage. The small print suddenly has been magnified, and insurance companies can be seen scurrying

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37. Many courts have relied upon drafting history and other policy interpretive materials in adopting coverage positions supported by policyholders. E.g., Elier, 972 F.2d 805, 810 (7th Cir. 1992); American Star Ins. Co. v. Grice, 854 P.2d 622 (Wash. 1993); Claussen v. Aetna Casualty & Sur. Co., 380 S.E.2d 686 (Ga. 1989); Morton Int'l, Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993), petition for reconsideration denied (Jan. 11, 1994); New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991), rev'd on other grounds, 970 F.2d 1267 (3d Cir. 1992), cert. denied, 113 S. Ct. 1846 (1993); United States Fidelity & Guar. Co. v. Specialty Coatings Co., 535 N.E.2d 1071 (Ill. App. Ct.), appeal denied, 545 N.E.2d 133 (Ill. 1989).

about the courts of this country in search of ways to avoid honoring their policies.

Sandoz, Inc. v. Employers Liability Assur. Corp., 554 F. Supp. 257, 258 (D.N.J. 1983) ("Sandoz").[38]

If, in the words of Ralph Waldo Emerson, "foolish consistency is the hobgoblin of little minds,"[39] then intentional inconsistency is the "hobgoblin" of insurance companies. In seeking to enforce their own rights under CGL "occurrence" policies, insurance companies -- including some of the insurance company appellees here -- have urged courts to reject the "discovery-only" or "manifestation" trigger, and have advocated the application of a comprehensive, "continuous" trigger to situations involving progressive or continuous loss or damage. Standard-form insurance policy provisions cannot, however, mean one thing at one time and something else entirely at another.[40] The insurance companies should therefore be held

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38. See also Universal Underwriters Ins. Co. v. Travelers Ins. Co., 451 S.W.2d 616, 622-23 (Ky. 1970) ("It seems that insurers generally are attempting to convince the customers when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered").

39. Ralph W. Emerson, "Self Reliance," in Essays, First and Second Series, 32 (1983).

40. The Association of California Insurance Companies, National Association of Independent Insurers, and Alliance of American Insurers have represented that "[n]ationwide uniformity in interpreting standard form policies is essential if insurers are to accurately predict loss experience and set fair premiums" and that judicial decisions "reflect an implicit recognition of the need for uniformity in interpretation of standard policy language." Brief of Amici Curiae Association of California Insurance Companies, National Association of Independent Insurers, and Alliance of American Insurers in Support of Real Party in Interest Industrial Indemnity Company, filed Sept. 13, 1991, at 2, 6-7, Bank of the West v. Superior Ct., No. S019556 (continued...)

to their prior studied, official, and affirmative representations to courts located throughout the United States that "manifestation" is an inappropriate trigger of coverage under the standard-form CGL insurance policy.

A. The Inconsistent Positions Taken by the Insurance Company Appellees

1. Although appellee American Motorists Insurance Company ("AMICO") is now urging this Court to impose a restrictive "manifestation" trigger on Michigan policyholders, it took exactly the opposite position on the same issue before the United States Court of Appeals for the Sixth Circuit. In an amicus brief filed with the Sixth Circuit, AMICO represented that the concept of "manifestation" is completely "foreign" to "occurrence"-based policies:

> Until the years when claims for asbestos related injuries were made in large numbers, there was no contention that bodily injury must manifest itself during the policy period to invoke coverage. The coverage parts of the policy and the definitions of occurrence' embrace within their terms the exposure basis of coverage. However, under no reasonable interpretation of that language can it be said that it embraces manifestation as a determinant of coverage. These policies were drafted by the insurance industry after considerable discussion, analysis and rejection of other possibilities. The concept of manifestation is so foreign to the language of the policies as presently written as to indicate that the omission of the words 'manifest' and 'manifestation' could only have been intentional.

Brief of Amicus Curiae American Motorists Insurance Company, filed May 24, 1979, at 8 (emphasis added), Insurance Co. Of N.

40.(...continued)
(Cal.). A copy of the relevant excerpts from this brief is annexed as Exhibit 29 to the Compendium of Exhibits.

Am. v. Forty-Eight Insulations, Inc., 451 F. Supp. 1230 (E.D. Mich. 1978), aff'd, 633 F.2d 1212 (6th Cir. 1980), modified, 657 F.2d 814, cert. denied, 102 S.Ct. 686 (1981) ("Forty-Eight Insulations").[41]

AMICO was successful. The Sixth Circuit adopted this view of the drafting history:

> The policies themselves show that the insurance industry contemplated the problem presented by cumulative trauma cases. [Citations to published materials omitted]. Since 1962, each of the policies in question has included in its definition of 'occurrence' a provision referring to continuous or repeated exposure to conditions which result in injury. There is strong evidence that coverage for diseases such as asbestosis was contemplated. Indeed, appellants openly admit that this is true. There is no similar provision in the policies restricting coverage to when asbestosis manifests itself.

633 F.2d at 1223 (emphasis added). The Forty Eight Insulations court held that the policyholder could recover under all policies in effect during the period of "exposure" to asbestos. 633 F.2d at 1218-1220 (6th Cir. 1980).

2. Appellee, Continental Insurance Company, and its affiliate, appellee Fidelity and Casualty Company of New York, are defendants in the Gelman Sciences case. In a brief filed with a federal district court in Louisiana, **Continental criticized the very "manifestation" theory that it now urges this Court to adopt. Continental told the federal court that the standard-form "occurrence" definition precludes the application of a "manifestation" trigger:**

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41. A copy of the relevant excerpts from this brief is annexed as Exhibit 30 to the Compendium of Exhibits.

> Again, we hearken to the definition of "occurrence" in Continental's policy: 'An accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury ..." Obviously, during Continental's policy period there was no exposure to injurious conditions; there was no contracting of the disease; there was no inception of disability; there was no use of the "named insured's products." There can therefore be no coverage under the policy.
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> * * *
>
> The language of the policy is on an occurrence and not "discovery" basis ....

Post-Trial Memorandum on Behalf of Continental Insurance Company, dated Oct. 11, 1977 at 5, Porter v. American Optical Corp., No. 75-2202 (E.D. La. 1978), aff'd, 641 F.2d 1128 (5th Cir. 1981), cert. denied sub. nom., Aetna Cas. & Sur. Co. v. Porter, 102 S.Ct. 686 (1982). ("Porter")[42] In Porter, both the federal district court and the United States Court of Appeals for the Fifth Circuit accepted Continental's argument and rejected the application of a "manifestation" trigger. See Porter, 641 F.2d at 1145.

3. Like appellee INA, the Pacific Employers Insurance Company ("PEIC") is a member of the CIGNA Group of insurance companies. PEIC recently represented to a New Hampshire Superior Court that the standard-form CGL insurance policy does not contain a "manifestation" trigger:

> The policies issued to [the policyholder] by the defendants in this action are "occurrence" policies. Occurrence policies promise to indemnify an insured for liability resulting from property damage that

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42. A copy of the relevant excerpts from this brief is annexed as Exhibit 31 to the Compendium of Exhibits.

> takes place during the policy period. [Citations omitted]. The PEIC policies at issue in this litigation require PEIC to indemnify [the policyholder] for liability . . . "because of . . . property damage . . . to which this insurance applies, caused by an occurrence." [Citation to record omitted] ... The insurance contract does not make coverage contingent on the policyholder's knowledge of the injury, but rather on the injury itself. Any argument that coverage is triggered upon manifestation ignores the plain language of the parties' agreement.

Pacific Employers Insurance Company's Memorandum of Law in Opposition to American Employers' and Commercial Union's Motion for Summary Judgment and in Support of PEIC's Cross-Motion for Summary Judgment, Conductron Corp. v. American Employers' Ins. Co., Nos. 93-C-599 and 93-E-149 (N.H. Super. Ct.) ("Conductron"), (dated Oct. 6, 1995) at 13-14 (emphasis added).[43] PEIC was successful. The Conductron court concluded that the "continuous trigger" is "the most realistic and practical approach ... because it recognizes that 'injury occurs during each phase of environmental contamination ....." Slip op. at 9 (N.H. Superior Ct. July 29, 1996) (quoting Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 981 (N.J. 1994)).[44]

4. Like appellee INA, the California Union Insurance Company is also a CIGNA insurance company. California Union urged a California Court of Appeals to reject the "manifestation" trigger, stating:

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43. A copy of the relevant excerpts from this brief is annexed as Exhibit 32 to the Compendium of Exhibits.

44. A copy of the Conductron opinion is annexed as Exhibit 33 to the Compendium of Exhibits.

> Cal Union submits that an occurrence is covered under a comprehensive general liability policy when damage begins, not when it is manifested. Damage can be inflicted and yet go unseen for many years. Nonetheless, there is an occurrence. Keene, supra, 667 F.2d at 1045-1047.

Appellant's Reply Brief, filed by California Union Insurance Company on July 5, 1983, at 6, California Union Ins. Co. v. Landmark Ins. Co., 193 Cal. Rptr. 461 (Ct. App. 1983) ("Landmark").[45] The Landmark court agreed, rejecting the application of a "manifestation" trigger in that case. Id. at 471.

B. Numerous Other Insurance Companies Also Have Advocated the Rejection of a "Manifestation" or "First Discovery" Trigger

Many other insurance companies similarly have urged courts to reject a "manifestation" or "first discovery" trigger as contrary to the policy language and the underwriting intent. Here are some notable examples.

1. In the long-running litigation known as the California Asbestos Cases, the following insurance companies urged the court to reject the "manifestation" trigger advocated by appellees here in favor of an "exposure" theory, according to which all policies in effect during the time of exposure to injurious substances would be triggered and are, therefore, available to respond to the policyholder's claim.

(a) The American Insurance Group ("AIG"). The AIG companies include the AIU, American Home, Granite State,

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45. A copy of the relevant excerpts from this brief is annexed as Exhibit 34 to the Compendium of Exhibits.

Lexington, Insurance Company of Pennsylvania, National Union Fire Insurance Company of Pittsburgh, and New Hampshire Insurance Companies.

(b) Admiral Insurance Company

(c) American Reinsurance Company

(d) Employers Reinsurance Company

(e) First State Insurance Company

(f) Hartford Accident and Indemnity Company

(g) The Home Insurance Company

(h) Mission Insurance Company

(i) Puritan Insurance Company

(j) Prudential Reinsurance Company

(k) Northbrook Insurance Company

(l) Travelers Indemnity Company

(m) A large number of Lloyd's of London and London Market insurance syndicates.

The following insurance companies were also involved in the California Asbestos Cases but declined to take any position with respect to the appropriate trigger of coverage under the standard-form CGL policies they had drafted and sold.

(a) American Reinsurance Company

(b) Central National Insurance Company

(c) Continental Casualty Company ("CNA")

(d) Employers Insurance of Wausau

(e) Great American Insurance Company

(f) Highlands Insurance Company

(g) Integrity Insurance Company

(h) Interstate Insurance Company

(i) Midland Insurance Company

(j) North River Insurance Company

(k) Puritan Insurance Company

(l) Rocky Mountain Insurance Company

(m) U.S. Fire Insurance Company

See Opening Phase III Trial Brief of Policyholders, In Re Asbestos Insurance Cases, Judicial Council Coordination Proceeding No. 1072 (Cal. Super. Ct., San Francisco Cty.), filed Sept. 18, 1985, at 4-9).[46]

2. First State Insurance Company and a large number of Lloyd's of London syndicates and London Market insurance companies submitted a brief to a Michigan Court of Appeals seeking the affirmance of the lower court's holding that the continuous trigger applied to property damage caused by the migration of contaminants over a period of years. These insurance companies, the plaintiffs in the action, stated:

> Plaintiffs contend that the continuous or multiple trigger approach is the most appropriate theory to be applied in the instant case. Although the leak was limited to a 22-day period, the contaminants continued to migrate for years. Even now, there is no guarantee that all toxins have been effectively removed from the groundwater. As the contaminants continue to migrate, additional parcels of property may be affected, exposing more people to injury. At each new exposure, [the policyholder] will be at risk of having to defend another lawsuit or engage in further cleanup efforts. Only by applying the continuous and multiple trigger theories are Plaintiffs in this case and future potential plaintiffs assured of complete redress for their damages and injuries.

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46. A copy of the relevant excerpts from this brief is annexed as Exhibit 35 to the Compendium of Exhibits.

Plaintiffs-Appellees' Brief on Appeal, filed by First State Insurance Company and a large number of Lloyd's of London syndicates and London Market companies, on Nov. 6, 1987, at 46-47 (emphasis added), Upjohn Co. v. New Hampshire Ins. Co., 178 Mich. App. 706, 444 N.W.2d 813 (Ct. App. 1989), rev'd, 438 Mich. 197, 476 N.W.2d 392 (1991)("Upjohn").[47]

3. The United States Fidelity & Guaranty Company has also sought the application of the continuous trigger, urging a federal court in the District of Columbia to

> 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 . . .

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, filed by United States Fidelity & Guaranty Company on March 15, 1988, at 5, Hobart Bros. Co. v. United States Fidelity & Guar. Co., No. 86-518 (D.D.C. 1988).[48]

4. In a case involving property damage resulting from the dumping of industrial wastes, the Centennial Insurance

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47. A copy of the relevant excerpts from this brief is annexed as Exhibit 36 to the Compendium of Exhibits.

In August 1989, First State petitioned this Court for permission to realign itself as a defendant-appellant and sought to "retract" the representations it had made to the trial and appellate courts below. Although First State subsequently attempted to withdraw this request as well, this Court nevertheless ruled on First State's motion in a July 13, 1990 order, stating that First State "is not entitled to the relief requested."

48. A copy of the relevant excerpts from this brief is annexed as Exhibit 37 to the Compendium of Exhibits.

Company successfully argued to a United States District Court in Pennsylvania as follows:

> [A]n occurrence took place on each occasion when the insured's allegedly hazardous wastes were delivered to the (disposal) site and then, or in close proximity in time thereto, were discharged or otherwise released upon the (disposal) site soil.

Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, filed by Centennial Insurance Company on Mar. 9, 1987, at 6, Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987) rev'd and Remanded, sub nom, New Castle County v. Hartford Acc. & Indem. Co., 970 F.2d 1267 (3d Cir. 1992), cert. denied, 113 S.Ct. 1846 (1993).[49]

5. American Star Insurance Company, citing Keene, advised a California Court of Appeals that the continuous trigger of coverage applies to property damage claims as well as claims for alleged bodily injury:

> [T]he reasoning of the asbestos-related cases should be applied to the instant case due to the latent and cumulative nature of the process which was active from installation of the defective pipe until the inevitable and eventual damage in the form of leaks.

Brief of Respondent and Cross-Appellant, American Star Insurance company, filed October 1983, at 14, American Star Ins. Co. v. American Employers Inc. Co., No. G000189 (Cal. Ct. App. 1983).[50]

6. In an action involving property damage caused by the spillage of hazardous wastes, the North Star Reinsurance

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49. A copy of the relevant excerpts from this brief is annexed as Exhibit 38 to the Compendium of Exhibits.

50. A copy of the relevant excerpts from this brief is annexed as Exhibit 39 to the Compendium of Exhibits.

Corporation (part of the General Reinsurance Group of insurance companies), submitted a brief where it stated:

> The Keene rationale, in emphasizing the language of the policies and the expectations that the insured, as an objective matter, could reasonably have formed, clearly seeks to ascertain and effectuate the intent of the parties in light of the policies' purpose of indemnity.

Brief on Behalf of Defendant North Star Reinsurance Corporation in Opposition to Defendant-Appellants' Motion for Leave to Appeal, filed March 23, 1987, at 17, Solvents Recovery Serv. v. Midland Ins. Co., No. A-2570-86TS (N.J. Super. Ct. App. Div. Mar. 23, 1987).[51]

7. In a case before a New Jersey Superior Court, the North River Insurance Company (a Crum & Forster Company) urged the application of the Keene continuous trigger to claims arising from alleged asbestos-related bodily injuries:

> The persuasive logic of its rationale, and the valid public policy objective of maximizing available insurance coverage to compensate injured victims of asbestos exposure, mitigate in favor of the adoption of the Keene interpretation of coverage . . . .

Brief on Behalf of the North River Insurance Company In Support of Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment, filed April 2, 1986, at 11, Madsen & Howell, Inc. v. Sentry Ins. Co., No. L-021632-85 (N.J. Super. Ct. Law Div. 1986).[52]

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51. A copy of the relevant excerpts from this brief is annexed as Exhibit 40 to the Compendium of Exhibits.

52. A copy of the relevant excerpts from this brief is annexed as Exhibit 41 to the Compendium of Exhibits.

8. In a brief filed with the United States Court of Appeals for the Second Circuit, the Home Insurance Company advocated the rejection of manifestation trigger as follows:

> In further support of its position, Home submitted an affidavit to the district court explaining that the insurance industry is only now considering a proposed revision of the 'occurrence' language in the CGL policy to incorporate an express manifestation' trigger of coverage.
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> * * *
>
> Surely the most reasonable inference to be drawn from the fact that an express 'manifestation' trigger is only now being considered by Home and the insurance industry for inclusion in the CGL policy is that discovery of injury -- which Schering originally favored and the district court adopted in part as the proper interpretation of the 'occurrence' clause -- was never intended to be a requirement of trigger of coverage under the policies issued to Schering.

Brief of Defendant-Appellant-Cross-Appellee The Home Insurance Company, filed April 8, 1983, at 15-16 (emphasis added), Schering Corp. v. Home Ins. Co., 712 F.2d 4 (2d Cir. 1983), cert. denied sub nom Falcon Ins. Co. v. Eli Lilly & Co., 107 S.Ct. 940 (1987).[53]

9. The RLI Insurance Company advocated the rejection of a "manifestation" trigger in a brief filed with the United States District Court of New Jersey. This insurance company stated:

> [The policyholder] may also be urging the Court to apply the manifestation trigger theory [of] coverage in this case. [Citation to record omitted] No New Jersey court has accepted the manifestation of injury as the appropriate trigger of coverage under a liability policy.

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53. A copy of the relevant excerpts from this brief is annexed as Exhibit 42 to the Compendium of Exhibits.

Revised Brief In Support of RLI Insurance Company's Cross-Motion for Summary Judgment and In Opposition to Motion for Summary Judgment, filed by RLI Insurance Company on May 7, 1990, at 42, Marotta Scientific Controls, Inc. v. RLI Ins. Co., No. 87-4438 (D.N.J. June 4, 1990).[54]

10. In a case involving property damage resulting from the chipping and spilling of patching material on the exterior facade of a hotel, Fireman's Fund Insurance Company -- relying on California Union Ins. Co. v. Landmark Ins. Co., 145 Cal. App. 462, 476, 193 Cal. Rptr. 461 (1983); Gruol Constr. Co. v. Insurance Co. of N. Am., 11 Wash. App. 632, 524 P.2d 427 (Ct. App.), review denied, 84 Wash. 2d 1014 (1974); Insurance Co. of N. Am. v. Forty-Eight Insulations Co., 633 F.2d 1212 (6th Cir. 1980), reh'g granted in part, clarified, 657 F.2d 814 (6th Cir.), cert. denied, 454 U.S. 1109 (1981); and Lac D'Amiante du Quebec, Ltee. v. American Home Assurance Co., 613 F. Supp. 1549, 1561 (D.N.J. 1985) -- argued to a California Court of Appeals that "ALL CARRIERS ON THE RISK DURING THE PERIOD OF CONTINUING DAMAGE BEAR RESPONSIBILITY FOR THE LOSS." Opening Brief of Appellant, filed by Fireman's Fund Insurance Company on Feb. 13, 1990 at 13 (emphasis in original), Fireman's Fund Ins. Co. v. Aetna Casualty & Sur. Co., 273 Cal. Rptr. 431 (Ct. App. 1990).[55]

11. Travelers Indemnity of Rhode Island, an affiliate of the Travelers Indemnity Company, advocated a continuous

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54. A copy of the relevant excerpts from this brief is annexed as Exhibit 43 to the Compendium of Exhibits.

55. A copy of the relevant excerpts from this brief is annexed as Exhibit 44 to the Compendium of Exhibits.

trigger in Insurance Co. of N. Am. v. Forty-Eight Insulations Co., 633 F.2d 1212 (6th Cir. 1980), reh'g granted in part, clarified, 657 F.2d 814 (6th Cir.), cert. denied, 454 U.S. 1109 (1981), a coverage case involving liabilities arising from alleged asbestos-related bodily injuries. In that case, Travelers argued that the CGL policy language provides absolutely no support for a "manifestation" approach:

> If the insurance carriers providing coverage to [the policyholder] in our case meant manifestation to be controlling, they could easily have provided for it in their policies in the definition of 'bodily injury.' They could have stated that 'bodily injury' means bodily injury, sickness or disease sustained by any person which becomes manifest during the policy period. The insurance carriers did not do so and . . . are asking this Court to rewrite the insurance policies to include the language.

Brief of Appellee Travelers Indemnity of Rhode Island, filed Dec. 7, 1978, at 11, Insurance Co. of No Am. v. Forty-Eight Insulations, Inc., Nos. 78-1322/23/24/25/26 (6th Cir. 1980)."[56] Travelers added that, because injury triggers coverage, a continuous trigger is required to provide coverage for continuous damage: "It is the injury, not exposure, that triggers coverage and as long as the injury continues to happen the policies in effect during those times are activated." Id. at 30 (emphasis added).

C. The Insurance Companies' Judicial Representations Mandate the Rejection of a "Manifestation" or "First Discovery" Trigger.

The inconsistent litigation position of the insurance industry compels a finding in favor of the policyholders here.

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56. A copy of the relevant excerpts from this brief is annexed as Exhibit 45 to the Compendium of Exhibits.

This Court has long recognized that a policyholder is entitled to the benefit of any "reasonable" interpretation of the policy language. See e.g., Bronson Plating, 445 Mich.558, 567-71 (1994); Leski v. State Farm Mut. Automobile Ins. Co., 367 Mich. 560, 566 (1962). The judicial representations by insurance companies that the standard form policies they drafted and marketed do not contain a "manifestation" or "first discovery" limitation clearly provide a "reasonable" basis for rejecting the same approach in this case.

United Policyholders respectfully submits that this Court should adopt the long-standing position of the insurance industry that the standard-form CGL insurance policy does not contain a "manifestation" or "first discovery" trigger.

V. THE DOCTRINE OF QUASI-ESTOPPEL AND MAINTENANCE OF THE INTEGRITY OF THE JUDICIAL PROCESS REQUIRES THIS COURT TO PREVENT THE INSURANCE COMPANIES FROM PROFITING FROM THEIR INCONSISTENT POSITIONS

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. . . ." Davis v. Wakelee, 156 U.S. 680, 689-90 (1895). This Court should join the other courts around the country that have refused to reward insurance companies for taking inconsistent positions based upon their shifting pecuniary interests.

For instance, in Morton International, Inc. v. General Accident Insurance Co., 629 A.2d 831, 852-53 (N.J. 1993), cert. denied, 114 S.Ct. 2764 (1994) ("Morton"), the Supreme Court of

New Jersey held that -- because of its representations to state regulators that the "polluters exclusion" was a mere "clarification" which continued preexisting insurance coverage for "accidental" pollution -- the insurance industry is barred from relying upon a construction of that exclusion that would preclude coverage for gradual pollution. The Morton court recognized that allowing an insurance company to renounce its prior representations would: (i) violate the strong public policy requiring regulation of the insurance business in the public interest; and (ii) reward the industry for its misrepresentation and nondisclosure to state regulatory authorities.[57]

In general, the doctrine applied in Morton and similar cases is labelled "quasi estoppel," and "applies where it would be unconscionable to allow a person to maintain a position

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57. 629 A.2d at 855; see also General Ceramics Inc. v. Fireman's Fund Ins. Cos., 66 F.3d 647 (3d Cir. 1995); Sandoz, Inc. v. Employers Liab. Assurance Corp., 554 F. Supp. 257, 258 (D.N.J. 1983) ("With the growth of claims that have taken years to manifest themselves and the size of the class of potential claimants, many insurance companies faced with such claims have run for cover rather than coverage. The small print suddenly has been magnified, and insurance companies can be seen scurrying about the Courts of this country in search of ways to avoid honoring their policies."); Claussen v. Aetna Cas. & Sur. Co., 380 S.E.2d 686, 687-88 (Ga. 1989); Joy Technologies v. Liberty Mut. Ins. Co., 421 S.E.2d 493, 497 (W. Va. 1992) (barring an insurance company from taking a position inconsistent with its "studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies"); Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 571 (Wis. 1990); Universal Underwriters Ins. Co. v. Travelers Ins. Co., 451 S.W.2d 616, 622-23 (Ky. 1970) ("It seems that insurers generally are attempting to convince the customers when selling the policy that everything is covered and convince the Court when a claim is made that nothing is covered"); George Pendygraft, et al., Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation, 21 Ind. L. Rev. 117, 152 (1988).

inconsistent with one in which he acquiesced, or of which he accepted a benefit":

> The doctrine classified as quasi estoppel has its basis in election, ratification, affirmance, acquiescence, or acceptance of benefits; and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit.

31 Corpus Juris Secundum Estoppel and Waiver § 120 (1996); see also Weiss v. Stein, 209 Mich. 482, 485 (1920). Quasi estoppel applies here. It would be unconscionable to allow the appellee insurance companies to obtain a "manifestation" or "first discovery" trigger to their policyholders' disadvantage, when these same companies have profited -- in the form of regulatory approval of the policy based on the representation that it contained an "occurrence" trigger, additional premiums and judgments in other cases -- from their previous assertion of "trigger" theories that are inconsistent with a "manifestation" approach.

Indeed, prohibiting inconsistent conduct before this and other courts serves public policy by preventing four types of abuse:

> First, inconsistent results, which weaken public confidence in the judiciary;
>
> Second, intentional inconsistency by parties seeking to manipulate the judicial process;
>
> Third, the appearance of control of the judiciary by powerful and frequent users of the courts; and

Fourth, unnecessary litigation, which diminishes the efficiency of the judicial system.[58]

In the service of these goals, this Court should reject the appellee insurance companies' attempt to profit by renouncing their prior judicial representations. Consistent with the insurance companies' own judicial admissions, the CGL policy language, and the underwriting intent, this Court should hold that the standard form CGL insurance policy does not contain a "manifestation" or "first discovery" trigger of coverage.

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58. See Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-99 (6th Cir. 1982); USLIFE Corp. v. United States Life Ins. Co., 560 F. Supp. 1302, 1304-05 (N.D. Tex. 1983).

RELIEF REQUESTED

For the reasons set forth herein, amicus curiae United Policyholders respectfully requests that the Court reverse the decisions of the Court of Appeals in Cello-Foil, Gelman Sciences, and Arco, and rule that the standard-form CGL "occurrence" policies at issue are not subject to any "manifestation" or "discovery" limitation.

Respectfully submitted,

By: Steven D. Weiss /SPW

Dated: May 6, 1997

STATE OF MICHIGAN
IN THE SUPREME COURT

CELLO-FOIL PRODUCTS, INC., Plaintiff-Appellant/ Cross-Appellee, v. MICHIGAN MUTUAL LIABILITY COMPANY, et al., Defendants-Appellees	Supreme Court No. 104107 Court of Appeals No. 151615 Lower Court 90-1901-C2
GELMAN SCIENCES, INC., et al., Plaintiffs-Appellants, v. FIDELITY AND CASUALTY COMPANY OF NEW YORK, et al., Defendants-Appellees	Supreme Court No. 105981 Court of Appeals No. 164382 Lower Court No. 91-42288-CK
ARCO INDUSTRIES CORPORATION and FREDERICK C. MATTHAEI, JR. Plaintiffs-Appellants, v. AMERICAN MOTORISTS INSURANCE COMPANY, Defendant-Appellee	Supreme Court No. 106678 Court of Appeals No. 187104 Lower Court No. A87-0218-CK

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)SS
COUNTY OF NEW YORK)

I, Nancy B. Lipin, being duly sworn, deposes and says that on the 6th day of May, 1997, she did serve copies of the within Memorandum of Law of Amicus Curiae United Policyholders in Support of Plaintiffs-Appellants Arco Industries Corporation, Cello-Foil Products, Inc., Gelman Sciences, Inc., and Frederick C. Matthaei, Jr. and the accompanying Compendium of Exhibits by

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me this 6th day of May, 1997

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My Commission expires:

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