CTQ-2015-0003

Court of Appeals

STATE OF NEW YORK

In the Matter of Viking Pump, Inc. and Warren Pumps LLC, Insurance Appeals.

VIKING PUMP, INC. and WARREN PUMPS LLC,

Appellants,

—against—

TIG INSURANCE COMPANY, *et al.*,

Respondents.

ON APPEAL FROM THE QUESTIONS CERTIFIED BY
THE SUPREME COURT OF THE STATE OF DELAWARE
(DOCKET NOS. 518, 2014; 523, 2014; 525, 2014; 528, 2014)

**BRIEF OF PROPOSED *AMICI CURIAE*
UNITED POLICYHOLDERS, WRG ASBESTOS PI TRUST,
ASARCO ASBESTOS PERSONAL INJURY TRUST, DURO DYNE
CORPORATION, JOHN CRANE INC. AND ALFA LAVAL INC.
IN SUPPORT OF APPELLANTS VIKING PUMP, INC.
AND WARREN PUMPS LLC**

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John Crane Inc. and Alfa Laval Inc.*

Dated: January 8, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, proposed *amici curiae* make the following disclosure:

United Policyholders is a non-profit 501(c)(3) organization. It has no parents, subsidiaries, or affiliates.

WRG Asbestos PI Trust is a Delaware statutory trust. It has no parents, subsidiaries or affiliates.

ASARCO Asbestos Personal Injury Trust is a Delaware statutory trust. It has no parents, subsidiaries or affiliates.

Duro Dyne Corporation is a New York corporation with its principal place of business located in Bay Shore, New York. Duro Dyne Corporation hereby states that as of the date of this filing: its parent corporation is Duro Dyne National Corp. and no publicly held company owns any of its stock.

John Crane Inc. is a wholly owned subsidiary of John Crane Group, Ltd. (UK), which itself is a wholly owned subsidiary of Smith Groups Inter. Holdings, Ltd., which is wholly owned by Smiths Group PLC and traded on the London Stock Exchange.

Alfa Laval Inc. is a New Jersey corporation with its principal place of business located at 5400 International Trade Drive, Richmond, Virginia. Alfa

Laval Inc. hereby states that as of the date of this filing, it is 100% owned by Alfa Laval U.S. Holding Inc., a Delaware corporation having its principal office at 5400 International Trade Drive, Richmond, Virginia. Alfa Laval U.S. Holding Inc. is 100% owned by Alfa Laval USA Inc., a Delaware corporation having its principal office at 5400 International Trade Drive, Richmond, Virginia. Alfa Laval USA Inc. is 100% owned by Alfa Laval Holding BV, a Dutch corporation having its principal office at Baarschot 2, 4817 ZZ Breda, The Netherlands. Alfa Laval Holding BV is 100% owned by Alfa Laval Holding AB, a Swedish corporation having its principal office at Rudeboksvagen 1, S-221 00 Lund, Sweden. Alfa Laval Holding AB is 100% owned by Alfa Laval AB, a Swedish corporation having its principal office at Rudeboksvagen 1, S-221 00 Lund, Sweden. Alfa Laval AB is publicly held and no single person has a greater than 10% interest.

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PRELIMINARY STATEMENT

Proposed *amici curiae* United Policyholders, WRG Asbestos PI Trust (the "WRG Trust"), ASARCO Asbestos Personal Injury Trust (the "ASARCO Trust"), Duro Dyne Corporation ("Duro Dyne"), John Crane Inc. ("JCI") and Alfa Laval Inc. ("Alfa Laval") respectfully submit this brief in support of the arguments made by Appellants Viking Pump, Inc. ("Viking") and Warren Pumps LLC ("Warren"). United Policyholders, the WRG Trust, the ASARCO Trust, Duro Dyne, JCI and Alfa Laval seek to fulfill the role of *amici curiae* by supplementing the information the parties are providing the Court in this case on important insurance principles that will impact New York residents.

The questions certified to the Court in this matter are:

> (1) under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions, and
>
> (2) given the Court's answer to question #1, under New York law and based on the policy language at issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance?

The Court's decision on these questions will have a significant effect on liability insurance policyholders in New York and on injured parties in New York seeking damages from such policyholders on "long-tail" claims like the asbestos claims at

issue here and similar claims involving delayed manifestation disease or environmental property damage.

Accordingly, and as argued more fully below, the proposed *amici curiae* urge the Court to hold that under New York law, (1) as to the allocation question, comprehensive general liability insurance policies containing non-cumulation and prior insurance provisions provide coverage in accordance with the "all sums" allocation method, and (2) as to exhaustion, whatever the Court may hold regarding allocation, excess liability insurance policies are triggered by "vertical" exhaustion of directly underlying insurance policies in the same policy period, and "horizontal" exhaustion of lower-level primary and umbrella policies in other periods should not be required.

STATEMENTS OF INTEREST OF *AMICI CURIAE*

United Policyholders

United Policyholders, a non-profit 501(c)(3) organization founded in 1991, serves as an independent information resource and a voice for insurance consumers in all 50 states. Donations, foundation grants and volunteer labor fuel the organization. United Policyholders' Board of Directors includes the former Chief Justice of the Arizona Supreme Court and the former Washington State Insurance Commissioner.

United Policyholders divides its work into three program areas: (1) the Roadmap to Recovery program provides tools and resources that help individuals and businesses solve insurance problems that can arise after an accident, illness, disaster, or other adverse event; (2) the Roadmap to Preparedness program promotes insurance and financial literacy as well as disaster preparedness; and (3) the Advocacy and Action program advances policyholders' interests in courts of law, legislative and public policy forums, and in the media.

United Policyholders participates in the proceedings of the National Association of Insurance Commissioners ("NAIC") as an official consumer representative. United Policyholders interfaces with the Insurance Division of the Department of Financial Services when providing disaster recovery and claim help to New York State residents through a "Roadmap to Recovery" program. United Policyholders maintains an extensive free library of publications, legal briefs, sample policies, forms, and articles on commercial and personal lines insurance products, coverage, and the claims process on its website, www.unitedpolicyholders.org.

In addition to serving as a resource for individuals and commercial policyholders, United Policyholders monitors legal and marketplace developments in the Empire State. United Policyholders has participated in legislative and other public forums related to home, auto and title insurance rates and claim practices,

and is currently working in partnership with the Touro Law Center on Long Island on Super Storm Sandy recovery.

United Policyholders has filed many briefs in the New York Court of Appeals,[1] as well as *amicus curiae* briefs in numerous cases before the United States Supreme Court.[2] The U.S. Supreme Court referenced United Policyholders' *amicus curiae* brief in its opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999).

United Policyholders has a vital interest in ensuring that insurance companies fulfill the promises they make to their New York policyholders. While insurance companies earn profits through risk assumption, businesses and individuals rely on insurance to protect property and livelihoods. United Policyholders seeks to prevent insurance companies from shifting risk back to policyholders through schemes that are not authorized by insurance contracts or

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[1] *See, Millenium Holdings, LLC, et al. v. The Glidden Co., n/k/a Akzo Nobel Paints LLC et al.*, No. 2015-00048 (pending); *Monarch Consulting, Inc. et al. v. National Union Fire Ins. Co. of Pittsburgh, PA;* No. 2014-00271 (pending); *Universal Am. Corp. v. Natl. Union Fire Ins. Co.*, 25 N.Y.3d 675 (2015); *U.S. Fid.& Guar. Co. v. Am. Re-Insurance Co.*, 21 N.Y.3d 923 (2013); *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y.*, 10 N.Y.3d 187 (2008); *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592 (2004); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377 (2003); *Consol. Edison Co. v. Allstate Ins. Co.*, 98 N.Y.2d 208 (2002); *Travelers Cas. and Sur. Co. v. Certain Underwriters at Lloyd's of London*, 96 N.Y.2d 583 (2001); *A-One Oil, Inc. v. Mass. Bay Ins. Co.*, 92 N.Y.2d 814 (1998); *Am. Home Assurance Co. v. Int'l Ins. Co.*, 90 N.Y.2d 433 (1997); *Town of Harrison v. Nat'l Union Fire Ins. Co.*, 89 N.Y.2d 308 (1996).

[2] *See, e.g.*, *Fuller-Austin Insulation Co., v. Highlands Ins. Co.*, 549 U.S. 946 (2006); *Philip Morris USA v. Mayola Williams*, 547 U.S. 1162 (2006); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Rush Prudential HMO, Inc. v. Moran*, 533 U.S. 948 (2001), *aff'd*, 536 U.S. 355 (2002); *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

public policy. The organization works to counter-balance the able representation of insurance companies through its advocates and lobbyists by advocating for large and small policyholders throughout the country.

In this case, United Policyholders seeks to appear as *amicus curiae* to address certified questions before the Court concerning New York law regarding allocation and exhaustion of comprehensive general liability insurance policies in the context of "long-tail" asbestos claims. These questions will affect policyholders throughout the state of New York. Unpaid volunteer counsel performed all of the legal research and writing in this brief, and no party to this appeal funded this work.

WRG Asbestos PI Trust

The WRG Trust is a Delaware statutory trust formed on or around February 3, 2014, the effective date of the Plan of Reorganization confirmed by the Memorandum Opinion of January 30, 2012 (by the Honorable Ronald L. Buckwalter) of the United States District Court for the District of Delaware in the United States Bankruptcy Court for the District of Delaware in the matter of *In re W.R. Grace & Co., et al.*, Case No. 01-1139 (JKF). The WRG Trust is the sole entity responsible for the resolution of thousands of claims alleging asbestos personal injury liabilities against W. R. Grace Co. ("Grace"), a major chemical and materials company, pursuant to the judicially-approved plan of reorganization.

Grace faced thousands of claims for, among other things, liquidated damages imposed upon it because of bodily injuries allegedly incurred by thousands of individuals from exposures to asbestos. These claims arise nationwide, but a significant number arise in New York State, where W.R. Grace was headquartered from 1865 to 1999. The WRG Trust has identified 289 approved sites in New York where asbestos exposure occurred for purposes of submitting injury claims.

As a result of these asbestos claims, Grace sought protection under the Bankruptcy Code in order to consolidate its liability for present and future asbestos personal injury claims in a trust established pursuant to 11 U.S.C. § 524(g) of the Bankruptcy Code. The objective of 11 U.S.C. § 524(g) is to discharge the debtor from liability for present asbestos claims and channel liability for future asbestos claims to a trust which would assume those liabilities.

In accordance with the approved reorganization plan, the asbestos personal injury liabilities of the debtor Grace are channeled into the WRG Trust and funded by specified assets of Grace, including the right to recover under certain insurance policies purchased by Grace.[3] The WRG Trust operates exclusively for the benefit of asbestos personal injury claimants, and all insurance

[3] Each of the WRG Trust's insurance policies is subject to its own wording, which differs in certain respects from the Viking/Warren insurance policies in this particular case. The WRG Trust reserves all rights and makes no admissions regarding rights under its own insurance policies.

recoveries are for the benefit of those claimants. The WRG Trust now is the sole entity responsible for the resolution of Grace's asbestos personal injury liabilities.

ASARCO Asbestos Personal Injury Trust

The ASARCO Trust was created in 2009 as a result of the confirmation of the Chapter 11 Joint Plan of Reorganization of ASARCO, LLC. ("ASARCO"), a multinational company engaged primarily in the business of mining, smelting and refining. Prior to reorganization, plaintiffs had filed hundreds of thousands of asbestos claims against ASARCO and related entities. The ASARCO Trust now processes, liquidates, and pays valid asbestos personal injury claims in accordance with trust distribution procedures that aim to provide fair, equitable, and substantially similar treatment for all personal injury claims that may presently exist or may arise in the future.

The ASARCO Trust has an interest in New York law on allocation because the New York Liquidation Bureau is applying New York law to the insurance policies that ASARCO purchased from Midland Insurance Company for the 1974-1976 time period. ASARCO's national headquarters were located in New York at the time the policies were purchased and ASARCO's insurance brokers were located in New York as well.[4]

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[4] Each of the ASARCO Trust's insurance policies is subject to its own wording, which differs in certain respects from the Viking/Warren insurance policies in this particular case. The

Duro Dyne Corporation

Duro Dyne is a leading manufacturer of sheet metal accessories and equipment for the heating, ventilating, and air conditioning industry. Duro Dyne was established in 1952 and, over the span of the last sixty-four years, Duro Dyne has expanded its plant locations and now employs over 200 people. Plaintiffs have filed thousands of asbestos claims against Duro Dyne and related entities. These claims arise nationwide, but a significant number arise in New York.

Duro Dyne has an interest in New York law on allocation because New York law applies to the insurance policies that Duro Dyne purchased from various insurance companies between at least 1968 and 1991. The basis for this approach is that Duro Dyne is a New York corporation that was headquartered in New York at the time the policies were purchased, and Duro Dyne's insurance brokers were located in New York as well.[5]

John Crane Inc.

JCI is one of the world's leading providers of engineered technology. JCI supplies and services the products used by its customers in energy services and

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ASARCO Trust reserves all rights and makes no admissions regarding rights under its own insurance policies.

[5] Each of Duro Dyne's insurance policies is subject to its own wording, which differs in certain respects from the Viking/Warren insurance policies in this particular case. Duro Dyne reserves all rights and makes no admissions regarding rights under its own insurance policies.

other process industries for their mission-critical operations. JCI's outstanding reputation for designing and engineering high-quality, durable, customized solutions is globally recognized. And JCI's solutions – ranging from seals, filtration systems and bearings to couplings – are backed by the largest global service network in the industry.

JCI has been at the forefront of innovation throughout its 95-year history. Headquartered in Chicago, JCI helps its customers safely supply energy to communities around the world. Plaintiffs have filed thousands of asbestos claims against JCI. Although these claims arise nationwide, JCI has an interest in New York law on allocation because a significant number of the asbestos claims that have been brought against JCI arise in New York.[6]

Alfa Laval Inc.

Alfa Laval is today a world leader within the key technology areas of heat transfer, separation and fluid handling. Alfa Laval's worldwide organization helps customers in nearly 100 countries to optimize their processes. The company has over 18,000 employees, the majority of whom are located in Sweden, Denmark, India, China, the United States, and France.

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[6] Each of JCI's insurance policies is subject to its own wording, which differs in certain respects from the Viking/Warren insurance policies in this particular case. JCI reserves all rights and makes no admissions regarding rights under its own insurance policies.

Plaintiffs have filed thousands of asbestos claims against Alfa Laval. These claims arise nationwide, but a significant number arise in New York. Alfa Laval has an interest in New York law on allocation because New York law has been applied to the insurance policies that Alfa Laval purchased from various insurance companies covering asbestos liabilities.[7]

STATEMENT OF FACTS

The proposed *amici curiae* adopt the Factual Background Statement and Statements of the Case submitted by Appellants Viking and Warren. *See* Brief for Appellant Warren Pumps LLC dated August 21, 2015 ("Warren App. Br."), at pp. 7-23; Brief for Appellant Viking Pump, Inc., dated August 21, 2015 ("Viking App. Br."), at pp. 4-12.

ARGUMENT

I. THIS COURT SHOULD GRANT THE MOTION OF UNITED POLICYHOLDERS, THE WRG TRUST, THE ASARCO TRUST, DURO DYNE, JCI AND ALFA LAVAL TO APPEAR AS *AMICI CURIAE*.

Under Rule 500.23(a)(4) of the Rules of the New York Court of Appeals (22 NYCRR), "a motion for *amicus curiae* relief shall demonstrate that: (1) the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency; (ii) the amicus could identify law or arguments that

[7] Each of Alfa Laval's insurance policies is subject to its own wording, which differs in certain respects from the Viking/Warren insurance policies in this particular case. Alfa Laval reserves all rights and makes no admissions regarding rights under its own insurance policies.

might otherwise escape the Court's consideration; or (iii) the proposed *amicus curiae* brief otherwise would be of assistance to the Court." Generally, leave to appear as *amicus curiae* is liberally granted, especially "[i]n cases involving questions of important public interest," though the ultimate determination is left in the sound discretion of the court. *Colmes v. Fisher*, 151 Misc. 222, 223 (N.Y. Sup., Erie Cnty. 1934).

Such leave should be granted here because proposed *amici curiae* will "identify law or arguments that might otherwise escape the Court's consideration." 22 NYCCR at 500.23(a)(4), *supra*. Indeed, proposed *amici curiae* seek to fulfill the "classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). Legal scholars and commentators have noted that this is an appropriate role for *amicus curiae*. An *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." Robert L. Stem, et al., *Supreme Court Practice* § 570.71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

As a non-profit consumer advocacy organization with no financial stake in the outcome of this litigation, United Policyholders' perspective on the

issues in the case clearly differs from those of the parties. United Policyholders also shares a genuine and unique concern about the impact of an adverse decision on New York policyholders. As a voice and information resource for insurance consumers, United Policyholders plainly possesses the expertise required to provide a meaningful contribution to the briefing on the certified questions before the Court. (*See* Statement of Interest, *supra*.)

The WRG Trust is the sole entity responsible for the resolution of thousands of claims that have been brought against W.R. Grace for alleged asbestos-related personal injuries. These claims arise nationwide but a significant number arise in New York State, where W.R. Grace was headquartered for over a century and where the WRG Trust has identified 289 approved sites for asbestos claims. (*See id.*)

The ASARCO Trust has an interest in New York law on allocation because the New York Liquidation Bureau is applying New York law to the insurance policies that ASARCO purchased from Midland Insurance Company for the 1974-1976 time period. ASARCO's national headquarters were located in New York at the time the policies were purchased and ASARCO's insurance brokers were located in New York as well.

Duro Dyne has an interest in New York law on allocation because New York law applies to the insurance policies that Duro Dyne purchased from

various insurance companies between at least 1968 and 1991. The basis for this approach is that Duro Dyne is a New York corporation that was headquartered in New York at the time the policies were purchased, and Duro Dyne's insurance brokers were located in New York as well.

Both JCI and Alfa Laval have an interest in New York law on allocation because a significant number of asbestos claims against them arise in New York. Alfa Laval also has an interest in New York law on allocation because New York law has been applied to the insurance policies that Alfa Laval purchased from various insurance companies covering asbestos liabilities.

Accordingly, the proposed *amici curiae* respectfully request that this Court grant their motion to appear as *amici curiae* in this appeal and accept this memorandum of law.

II. "ALL SUMS" IS THE APPROPRIATE ALLOCATION RULE

A. *Viking Pump* Addresses One of the Important Open Issues in New York Allocation Law After *Consolidated Edison*

The policies at issue here (the "Policies"), like most standard form comprehensive general liability ("CGL") insurance policies, promise to "pay on behalf of the insured *all sums* … which the insured shall become legally obligated to pay … as damages, direct or consequential, because of: (a) personal injury … with respect to which this policy applies and caused by an occurrence." *Viking*

Pump, Inc. v. Century Indem. Co., 2 A.3d 76, 109 (Del. Ch. 2009) (emphasis in original) ("*Viking Pump*"). The proposed *amici curiae* believe that this promise requires an insurance company to pay "all sums" of the policyholder's damages, if a policy is triggered by an "occurrence." The insurance industry did not write their policies so as to pay "a portion of the sums" or "some sums." They promised "all sums." That should settle the allocation argument.

However, insurance companies continue to dispute that requirement for the transparent purpose of paying less for claims than they promised decades ago to cover. Their argument for pro rata allocation is based on the Policies' promise to pay "all sums" if there is an "occurrence." The "occurrence" definition refers to "personal injury," which is defined in turn as "personal injury or bodily injury *during the policy period*." *Id.* (emphasis in original).

The Policies at issue here also contain "Non Cumulation Provisions" and "Prior Insurance Provisions" that apply where injury or damage occurs over multiple insurance periods. This Court has never addressed the effect of these Provisions on allocation among insurers in this context.

The Delaware Court of Chancery in *Viking Pump* correctly concluded that provisions in the Policies other than the "all sums" promise, in particular the "Non-Cumulation" and the "Prior Insurance Provisions," mandate application of the all sums allocation rule, because those provisions cannot be reconciled with pro

rata allocation. *See generally id.* at 107-130. In general, and as explained more fully in Warren's briefs herein, the *Viking Pump* court found that the Policies' Non-Cumulation[8] and Prior Insurance Provisions[9] expressly contemplate that a policy could be triggered by an indivisible continuing injury and "operate to ensure that the insured does not get to stack multiple policies together," which could otherwise result because "an insurer must pay for injuries caused by that occurrence that continues into other periods." *Id.* at 121.

Examining these "anti-stacking" provisions, the *Viking Pump* court explained:

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[8] The Non-Cumulation Provision states:

> If the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within any annual period of this policy, the each occurrence limit and the applicable aggregate limit or limits of this policy shall be reduced by the amount of each payment made by [Liberty Mutual] with respect to such occurrence, either under a previous policy or policies of which this is a replacement, or under this policy with respect to previous annual periods thereof.

Viking Pump, 2 A.3d at 121.

[9] The Prior Insurance Provision states:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess Policy issued to the Insured prior to the inception date hereof, the limit of liability hereon stated in the Items 5 and 6 of the Declarations shall be reduced by any amounts due to the Insured on account of such loss under such prior insurance.
>
> Subject to the foregoing paragraph and to all the other terms and conditions of this Policy in the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy the Company will continue to protect the Insured for liability in respect of such personal injury or property damage without payment of additional premium.

Viking Pump, 2 A.3d at 121-122.

> In other words, the Non-Cumulation and Prior Insurance Provisions are designed for a situation in which different policies are responding to the same injury. By their very presence, they suggest that the words "during the policy period," do not have the drastic effect the Excess Insurers contend for. Rather, the words "during the policy period" simply require that the insured's liability for the claim in question be attributable to an occurrence during the policy period; that is, that the tort plaintiff have suffered an injury in fact during the policy period that has resulted in the insured's liability.
>
> Of paramount importance in deciding this case is the fact that the Non-Cumulation and Prior Insurance Provisions cannot be reconciled with the pro rata method of allocation. Applying those Provisions makes no sense once proration occurs.

Id. at 122-123.

While this Court's decision in *Consolidated Edison Co. of N.Y. v. Allstate Insurance Co.*, 98 N.Y.2d 208 (2002) ("*Consolidated Edison*"), applied pro rata allocation in another continuing injury case, the *Viking Pump* court nevertheless applied "all sums" allocation under the Policies at issue, distinguishing *Consolidated Edison* because the Non-Cumulation and Prior Insurance Provisions here are inconsistent with pro rata allocation. *Viking Pump* at 122. In other words, *Viking Pump* "first look[ed] to the language of the policy" in order to "afford[] a fair meaning to all of the language employed by the parties … and leave[] no provision without force and effect." *Consolidated Edison* at 220. Thus, the all sums holding in *Viking Pump* is consistent with this Court's

acknowledgment that *Consolidated Edison* "[c]learly … is not the last word on proration." *Consolidated Edison* at 225.

The pending certified questions provide an occasion for the Court to provide "another word" on proration, and there may well be other occasions in future cases. Respectfully, moreover, *Consolidated Edison* has resulted in uncertainty and increased litigation costs, and the Court may wish to restrict or revisit it for a number of reasons (even if such a restriction or revisitation is not needed to rule that the *Viking Pump* trial court correctly held that the application of "all sums" allocation is consistent with *Consolidated Edison* in this particular case).

The *Consolidated Edison* Court expressly recognized that pro rata allocation was "not explicitly mandated by the policies," *id.* at 224, and such a departure from express policy language is not consistent with ordinary rules of insurance policy interpretation. *Cf Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 626 (Wis. 2009) ("[W]e are again driven by the policy language. Liberty Mutual's policy contains no language that limits its obligation to a pro rata share.")

Notably, even in the wake of *Consolidated Edison*, many other courts have concluded that all sums allocation is particularly appropriate where the underlying bodily injuries or property damage are "indivisible" in nature. *See, e.g.,*

State of California v. Continental Ins. Co., 281 P.3d 1000, 1005 (Cal. 2012) (applying all sums allocation to third-party claim arising from a "series of indivisible injuries attributable to continuing events without a single unambiguous 'cause'").

Finally, while the *Consolidated Edison* decision dismissed the policyholders' reliance on the recent trend in other courts toward adopting all sums allocation, it discussed and distinguished only one case, the Delaware Supreme Court's decision in *Hercules, Inc. v. AIU Insurance Co.*, 784 A.2d 481 (Del. 2001), based on a difference in policy language. As more fully briefed by Warren, that policy language difference – the existence of a non-cumulation provision – requires application of the "all sums" rule in the present case. *See, e.g.*, Warren App. Br. at 24-25. As the California Supreme Court recognized more recently:

> [T]he "during the policy period" language that the insurers rely on to limit coverage does not appear in the "Insuring Agreement" section of the policy and therefore is neither "logically [n]or grammatically related to the 'all sums' language in the insuring agreement." The insurers' claim that their indemnity responsibility is limited to damage occurring "during the policy period" would unduly restrict their agreement to pay "all sums" the insured is obligated to pay for damages due to "injury to or destruction of property." The CGL policy language does not contemplate such a limited result once there is a property damage occurrence that triggers the insurers' indemnity responsibilities for the entirety of the loss, and *a growing number of states have similarly adopted this interpretation of the all sums language*

State of California, 281 P.3d at 1007-1008 (emphasis added). The "growing number" of decisions cited by California's highest court include not only decisions involving Non-Cumulation and Prior Insurance Provisions like the *Viking Pump* matter now before this Court, but also others which rejected pro rata allocation based on standard form CGL language. *See id.* at 1008 n.5 (citing *Hercules, supra*); *Allstate Ins. Co. v. Dana Corp.* 759 N.E.2d 1049, 1058 (Ind. 2001); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.,* 769 N.E.2d 835 (Ohio 2002); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993); *Am. Nat'l Fire Ins. Co. v. B & L Trucking*, 951 P.2d 250 (Wash. 1998); *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.* 759 N.W.2d 613 (Wisc. 2009)).

B. *Viking Pump* Is Consistent With The Logic Of "All Sums" Decisions Nationwide

Appellant Warren has briefed numerous authorities supporting all sums allocation in light of the anti-stacking provisions found in the Policy language at issue here. *See* Warren App. Br. at 29-31; Reply Brief for Appellant Warren Pumps LLC, dated October 22, 2015 ("Warren Reply Br.") at 17-21. The Delaware court in *Viking Pump* also grounded its decision on an analysis of decisions from other jurisdictions which have adopted the all sums rule, *see Viking Pump*, 2 A.3d at 107 n.99; 113 n.124, and which similarly concluded that Non-Cumulation and Prior Insurance Provisions are inconsistent with pro rata

allocation. *Id*. at 125-126. The proposed *amici curiae* adopt Warren's arguments and concur with the Delaware court's analysis in *Viking Pump*.

Along with those authorities, *State of California*, *supra,* confirms that anti-stacking provisions like the Non-Cumulation and Prior Insurance Provisions at issue here are wholly consistent only with "all sums" allocation. *State of California* involved common "occurrence"-based comprehensive general liability insurance provisions, in which the insurance companies promised to pay "all sums which the insured shall become obligated to pay . . . for damages . . . because of injury to or destruction of property. . . ," with "occurrence" defined to require "damage to property during the policy period." 281 P.3d at 1003. The California court held that: "the policies at issue obligate the insurers to pay all sums for property damage attributable to the [underlying environmental property damage], up to their policy limits, if applicable, as long as some of the continuous property damage occurred while each policy was 'on the loss.'" *Id.* at 1008. The court also observed that "a growing number of states have similarly adopted this interpretation of the "all sums" language," while acknowledging that others have taken the pro-rata position. *Id.*

State of California next turned to the so-called "stacking" issue. Because its liabilities exceeded the "occurrence" limits available during a single policy period, the policyholder in that case sought to collect from more than a

single period's insurance. The court disapproved a lower court decision, *FMC Corp. v. Plaisted & Companies*, 72 Cal. Rptr. 2d 467 (Ct. App. 1998), which resorted to "judicial intervention" to prohibit stacking and found that policies "which do not contain antistacking language, allow for its application." *State of California*, 281 P.3d at 1009. Notably, the *State of California* court observed *"[t]he most significant caveat to all-sums-with-stacking indemnity allocation is that it contemplates that an insurer may avoid stacking by specifically including an 'antistacking' provision in its policy."* *Id.* (emphasis added).

That is exactly what Respondents have done. Respondents clearly foresaw, and sought to limit, their exposure to paying multiple policy limits toward liabilities arising from property damage or personal injury that continues over successive policy periods. Had they had intended for a pro rata allocation method to apply, Respondents would have included language stating such an intention, and they would *not* have included anti-stacking provisions which the *California* court correctly concluded were only consistent with "all sums" allocation.

C. The History of the Standard CGL Policy Compels Application of the "All Sums" Rule

Among other things, the Chancery Court in *Viking Pump* noted that the extrinsic evidence, in the form of the parties' later course of conduct manifesting intent, further resolved any ambiguity resulting from the parties' competing interpretations of the policies' "all sums" insuring agreement, Non-

Cumulation and Prior Insurance Provisions. *Viking Pump* at 127-129. If there are competing reasonable interpretations of the Policies, it remains appropriate to consider this extrinsic evidence. *See State v. Home Indem. Co.*, 66 N.Y.2d 669, 671 (1985) (if "language in the insurance contract is ambiguous and susceptible of two reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction"). Thus, Appellants are correct to urge this Court to consider that Appellants' asbestos claims here were paid on an "all sums" basis for more than twenty years before Respondents contended the pro rata rule should apply. *See* Warren App. Br. at 11-12.

The Court also should consider that the conduct of the particular parties in this case arose in the context of an historical record which clearly shows that Liberty Mutual and the insurance industry always have understood that standard-form general liability insurance policies obligate insurance companies to pay in full — "all sums" — for a continuing injury. Statements and analyses by the insurance industry at the time the standard policy language was written — sometimes called "drafting history" — emphasize the intentional omission of any allocation provision, pro rata or otherwise, from standard CGL policies. Allowing the insurance industry to benefit now, as claims arise, from positions inconsistent with the industry's own understanding at the time of underwriting would undermine basic fairness and the consistency crucial to proper working of the

liability and insurance systems. It also would diminish the benefit of the insurance that policyholders — large and small — purchased with hard-earned premium dollars.

Indeed, the drafters of the standard general liability insurance forms[10] clearly understood that the promise to indemnify "all sums" required insurance companies to pay the whole of a policyholder's liability, even if some injury took place outside the policy period. Richard A. Schmalz, one of the primary drafters of the standard 1966 form CGL insurance policy and Assistant Counsel of Liberty Mutual Insurance Company (which sold the underlying primary and umbrella insurance policies to which the Policies at issue herein followed form), told an insurance industry conference in 1965 that more than one policy period could be

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[10] In the 1960s, domestic insurance companies, acting through industry trade associations, including the National Bureau of Casualty Underwriters, the Insurance Rating Board, and the Mutual Insurance Rating Board (all predecessors of the Insurance Services Office, Inc. ("ISO"), formed by merger in 1971), established several committees which engaged in the process of revising the standard-form general liability insurance policy. These committees, which consisted of the insurance industry's most respected experts and legal counsel, developed a revised standard-form general liability insurance policy, substituting the concept of "occurrence" for the "accident" trigger used in the prior, 1955 standard-form policy. *See Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 810-12 (7th Cir. 1992); *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1500-03 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 897 P.2d 1, 14 (Cal. 1995) ("Most courts and commentators have recognized that the presence of standardized industry provisions and the availability of interpretive literature are of considerable assistance in determining coverage issues."); *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, 623 A.2d 1128, 1129 n.1 (Del. Super. Ct. 1992) (noting "most if not all insurers use ISO standard-form language in their policies" and "most insurers do in fact use ISO language nearly or completely verbatim"). The result was the 1966 standard-form general liability policy, the insuring agreement of which remained unaltered in the subsequent 1973 standard-form general liability insurance policy.

held liable under the 1966 form to pay for a policyholder's liability "where the injury actually occurs over two or more policy periods." Richard A. Schmalz, New Comprehensive General Liability and Automobile Program, Mutual Insurance Technical Conference (Nov. 15-18, 1965) (quoted in Lorelie S. Masters, Jordan S. Stanzler & Eugene R. Anderson, *Insurance Coverage Litigation* at § 4.07, at 4-128–4.129 (Wolters Kluwer Law & Business, 2000 & Supp. 2015) (hereafter "Masters, Stanzler & Anderson")). He also acknowledged that "*[t]here is no pro-ration formula in the policy, as it seemed impossible to develope [sic] a formula which would handle every possible situation with complete equity*." *Id.* (emphasis added).

Liberty Mutual's Assistant Secretary, Gilbert Bean, agreed:

> [I]f the injury or damage from waste disposal should continue after the waste disposal ceased, as it usually does, it could produce losses on each side of a renewal date, and in fact over a period of years, with a separate policy applying each year.
>
> The policy limits are renewed every year, so the underwriter of a manufacturing risk may have his limits pyramid [i.e., "stack"] under this new contract.[11]

Other courts have noted and relied upon Liberty Mutual's historical understanding that each CGL insurance policy in effect during a continuing loss provides coverage. In *Joy Technologies v. Liberty Mutual Insurance Co.*, 421 S.E.2d 493 (W. Va. 1992), the court observed:

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[11] Masters, Stanzler & Anderson at § 4.07[A], at 4-127.

> The record shows at the time Liberty Mutual adopted this standard form for the commercial general liability policy, a memorandum entitled "Summary of Broadened Coverage Under New GL Policies With Necessary Limitations to Make This Broadening Possible," was circulated internally within the company. That memorandum indicated that the policies covered liabilities including: "Coverage for gradual BI [bodily injury] or gradual PD [property damage] resulting over a period of time from exposure to the insured's waste disposal. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the water intake of down stream industrial sites, the Donora Pa. atmospheric contamination, and the like."

Id. at 498. The *Joy Technologies* court therefore concluded that "[t]he 1966 commercial general liability insurance policies, as originally issued, covered gradual bodily injury and property damage resulting over a period of time from exposure to the insured's waste disposal," as Mr. Bean had suggested when the insurance policies were drafted. *Id.* at 499.

Confirming the statements of Messrs. Schmalz and Bean, at an April 21, 1977 insurance industry meeting devoted to discussing the industry's response to claims for coverage for asbestos-related claims, a classic type of multiple policy period liability claim, the "majority" of the insurance company representatives present contended that, for continuing injuries, "each carrier on risk during any part of that period" could be "fully responsible" for the *entire* loss:

> The majority view [held by the insurance industry representatives] was that coverage existed for each carrier throughout the period of time the asbestosis condition developed, *i.e.*, from the first exposure through the discovery and diagnosis. *The majority also contended that each carrier on risk during any part of that period could be fully responsible for the cost of defense and loss.*

Memorandum of Meeting of Discussion Group, Asbestosis, held under the auspices of the American Mutual Insurance Alliance and American Insurance Association (April 21, 1977), quoted in Masters, Stanzler & Anderson at § 4.07[A], at pp. 4-129 to 4-130) (emphasis added); *see also Hearings on the Occupational Disease Comp. Act of 1983 Before the Subcomm. on Labor Standards of the Comm. on Educ. and Labor*, 98th Cong. at 236 – 240, 1988 (Memorandum of Meeting of Discussion Group).

Thus, the drafting history is consistent with "all sums" allocation, not the pro rata allocation that the industry now advocates simply to cut losses after collecting premiums for policies that it knew for decades provided much broader coverage. Moreover, there can be no doubt that Liberty introduced the Non-Cumulation Provision precisely because Liberty understood that its policies provided coverage on an all sums basis and that the potential therefore existed for policyholders to "stack" the full limits of successive Liberty policies to maximize coverage for their long-tail liabilities. Notably, Liberty began including those provisions in its policies at or around the time that Messrs. Schmalz and Bean were

expressing their concerns over the 1966 "occurrence"-based general liability policy form discussed above. *See, e.g., Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 928 F. Supp. 176, 178-80 (N.D.N.Y. 1996) (noting that policyholder was insured under consecutive Liberty policies covering the years from 1944 to 1981 but that Non-Cumulation Provisions appeared only in the policies that covered years after 1966).

D. Pro-Rata Allocation Schemes Are Unfair, Unworkable And Cause Unnecessary Complication And Allocation Litigation That Could Be Avoided Through Enforcing The "All Sums" Promise.

Respondents' contention that pro rata allocation is "fair and efficient," *see* Brief for Respondents dated October 8, 2015 ("Respondents Br.") at pp. 36 – 38, is belied by experience and common sense, and considers "fairness" solely from the insurance industry's perspective, ignoring not only policyholders' interests but also the insurance policy language which the insurance industry drafted and to which all parties agreed. Even courts which have adopted "pro-rata" allocation have recognized that this methodology may prove burdensome, if not impossible, to implement. *See Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994) (adopting "pro-rata allocation" under New Jersey law, but stating that "[w]e realize that many complexities encumber the solution that we suggest," and that, "[i]f, after experience, we are convinced that our solution is

inefficient or unrealistic, we will not hesitate to revisit the issue"). Experience has shown that these concerns are well-founded. In an effort to minimize or eliminate their liability for losses stemming from claims of gradual injury, insurance companies commonly exploit the complexities inherent in pro-rata allocation, leading to years of litigation over which losses are "allocable" to particular policies or time periods.

For example, in the long-running *Olin* coverage litigation, the Second Circuit has been called upon to address the allocation of liabilities on not just one but three separate occasions. *See Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307 (2d Cir. 2000); *Olin Corp. v. Certain Underwriters at Lloyd's,* 468 F.3d 120 (2d Cir. 2006); *Olin Corp. v. A,. Home Assur. Co.*, 704 F.3d 89 (2d Cir. 2012).

1. <u>The Complexities of Pro Rata Allocation</u>

As an initial matter, any attempt to prorate defense costs, such as the costs of defending the asbestos claims that have been brought against Warren and Viking (*see* Warren App. Br. at 44-48, and Warren Reply Br. at 39-44), fails to consider the obvious. It makes no conceptual sense to allocate defense costs to triggered time periods, because no relationship exists between the amount and nature of a policyholder's defense expenditures, on the one hand, and the duration or timing of the third-party claimant's injuries, on the other. For that reason among many others, it is settled New York law that a liability insurance company

must provide a complete defense to a lawsuit that involves a potentially covered claim, notwithstanding that the third-party claimant's injuries may have occurred during other policy periods. *Cont'l Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640 (1993); *Travelers Cas. and Sur. Co. v. Alfa Laval Inc.*, 100 A.D.3d 451 (1st Dep't 2012).

There are many other complications with applying a "pro-rata" allocation scheme. Potential problems to consider – not all present here but likely to arise in future cases – include:

- Insolvency. Insurance companies argue that policyholders are responsible for time periods for which the policyholders purchased insurance from insurance companies that later became insolvent. *See, e.g., Olin*, 221 F.3d at 323. Thus, the policyholder is penalized in having to pay both the original premium and the pro rata share assigned to the period covered by the insolvent insurance company, despite the remaining solvent insurance companies' promises to pay "all sums" toward third-party claims that implicate their policies. The solvency of insurance companies is supposed to be within the purview of state insurance regulators. It would be unfair to punish policyholders because a regulated company became insolvent. It would be even more anomalous to reduce the obligations of a solvent insurance company that promised to pay "all sums" because some other regulated insurance company that collected premiums from the same policyholder became insolvent.

- Availability: Insurance companies argue that pro rata allocation to "uninsured" or "underinsured" policy periods, forcing the policyholder to bear the costs of those allocated amounts, "fairly" represents the policyholder's "choice" to go "bare" during those policy periods. That rationale does not, however, account for the fact that, at certain times, the

insurance industry as a whole has excluded entire categories of claims from coverage, such as through the "total" pollution or asbestos exclusions that have appeared in virtually all general liability insurance policies since the mid-1980s. Application of a pro rata allocation to such periods thus not only divorces the rationale for doing so from reality, but complicates the insurance dispute, by requiring consideration and determination of the often complex factual issue of what coverage the policyholder realistically could have purchased. *See, e.g., Olin Corp. v. Ins. Co. of N. Am.* 986 F. Supp. 841, 844 (S.D.N.Y. 1997) (discussing the "enormous amount of evidence" submitted by the parties as to what the policyholder "did or did not do to try to obtain" insurance after 1985 for its environmental liabilities, what insurance the policyholder conceivably could have obtained, and whether any insurer would have sold that coverage to the policyholder in light of its "loss record"), *aff'd*, 221 F.3d 307, 325-27 (2d Cir. 2000).

- Pre-Acquisition Coverage: Insurance companies also argue that, even where the relevant damage or injury was caused by the prior conduct of an acquired company, the resulting losses should be allocated to the earlier years in which some damage or injury took place, even though the policyholder may not have existed during that time period (and, thus, could not have purchased insurance for that time period). But even if the policyholder did exist and did purchase insurance for the relevant time period, the insurance companies argue that the policyholder cannot use that insurance to cover entities that it did not own during that time period.

- Method for Pro-Rating Liabilities: In *Consolidated Edison*, this Court recognized that numerous alternative means exist for prorating losses across triggered time periods and stated that "this is not the last word on proration." 98 N.Y.2d at 225. Some courts – like the trial court in *Consolidated Edison* – have applied a "time on the risk" methodology – which this Court merely noted was "not error" in the circumstances of that case. *See id.* at 224-25. Other courts,

> however, require consideration of factors such as the liability limits that a particular insurer sold to cover losses that are deemed to be "allocable" to a triggered time period. *See, e.g., Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994).

These complexities – and others that insurance industry lawyers have devised – ensure that the application of pro rata allocation methods is anything but "simple" and "efficient," as Respondents contend. Indeed, these complications arise in the first place because general liability insurance policies do not contain any provision detailing how a court is to construct its primary-first allocation scheme. The drafting history cited above demonstrates that is not the means of allocation the drafters intended. Rather, and as the insurance industry has admitted, it proved "impossible to develop[] a formula which would handle every possible situation with complete equity." *See* Section II.C, *supra*. Instead, the policies promise broadly that they will pay "all sums" that the policyholder becomes obligated to pay. Further, the end result of these complications would be to deprive New York policyholders of coverage they would have under the majority rule of other states, enforcing the promise to pay all sums, and burden the courts with additional, time-consuming litigation between policyholders and their insurance companies.

2. The Benefits of "All Sums" Allocation

Respondents' assertion that all sums allocation "promotes inefficiency and unnecessarily multiplies litigation costs" (Respondents Br. at 37) is as wrong as their assertion that proration promotes "simplicity" and 'fairness." Tellingly – and even though numerous states follow the "all sums" approach – Respondents point to no case from any jurisdiction where application of the "all sums" method actually proved "inefficient" or led to litigation that could have been avoided under a pro rata approach.

That omission should surprise no one because Respondents' judicial efficiency argument rests on a wholly erroneous premise. Respondents simply assume that, under an "all sums" rule, a policyholder will bring suit against only one insurance company, which will then pursue contribution from other insurance companies in a later, separate action. Nothing in the all sums rule, however, limits a policyholder's suit to a single insurance company. Rather, and as a practical matter, policyholders almost invariably bring suit under every potentially applicable insurance policy to recover losses arising from claims for continuous injury or damage. That only is logical. Where multiple insurance companies are involved, policyholders have every reason to obtain a comprehensive adjudication of all implicated insurance companies' obligations for the underlying claims – and that is so irrespective of which allocation method is applied.

Further, even if an insured sued only a single insurance company, nothing would prevent that insurance company from bringing other insurance companies into the same action via a cross-complaint for equitable contribution, which could just as efficiently resolve all related issues in a single action. Finally, when a smaller loss would be fully covered by any single policy, it is inefficient to require the insured to sue all of its insurance companies merely to recover what could be paid under a single policy.

It is equally clear that an insurance company has no legally recognized interest in forcing the policyholder itself to seek contribution from other triggered policies issued by other insurance companies. Granted, if the policyholder purchases insurance covering other time periods, then the insurance company might collect contribution from other insurance companies and thus benefit from the premiums that the policyholder paid to those insurance companies. But that is purely a windfall. Respondents have introduced no evidence that the premiums they charged were based on the availability of insurance coverage in other policy periods. Moreover, because any given "occurrence" could have taken place years or decades before policy issuance, there would be no accurate way to do so prior to policy issuance. To the contrary, Respondents' policies show that they only mandated that the policyholder maintain a set amount of directly underlying policy limits. *See* Brief for Appellant Viking

Pump, Inc. at 9 (describing and categorizing Excess Policy "underlying limits" provisions). Thus, an insurance company's obligations under a particular policy *to its policyholder* do not turn on whether its policyholder did, or did not, (i) purchase insurance covering other periods, (ii) retain copies of all policies that it purchased, (iii) purchase coverage from one or more insurance companies that later became insolvent despite state regulatory supervision, or (iv) provide timely notice to other insurance companies of third-party claims against it. CGL policies contain no requirement that the policyholder take, or refrain from taking, any action to relieve the relevant insurance company of part or all of its contractual promise to pay "all sums."

In short, there is nothing unfair or unworkable about enforcing the "all sums" promise as written. As the *State of California* court observed:

> An all-sums-with-stacking rule has numerous advantages. It resolves the question of insurance coverage as equitably as possible, given the immeasurable aspects of a long-tail injury. It also comports with the parties' reasonable expectations, in that the insurer reasonably expects to pay for property damage occurring during a long-tail loss it covered, but only up to its policy limits, while the insured reasonably expects indemnification for the time periods in which it purchased insurance coverage. All-sums-with-stacking coverage allocation ascertains each insurer's liability with a comparatively uncomplicated calculation that looks at the long-tail injury as a whole rather than artificially breaking it into distinct periods of injury. If an occurrence is continuous across two or more policy periods, the insured has paid two or more premiums and

> can recover up to the combined total of the policy limits. There is nothing unfair or unexpected in allowing stacking in a continuous long-tail loss.

State of California, 55 281 P.3d at 1009.

As *State of California* recognizes, it works no unfairness on insurance companies to enforce contractual language as written. Insurance companies that contracted to pay "all sums" should be held to that promise, just as insurance companies hold policyholders to anti-stacking provisions set forth in their policies.

III. EXCESS LIABILITY INSURANCE POLICIES ATTACH UPON "VERTICAL" EXHAUSTION OF LOWER LEVEL INSURANCE IN THE SAME POLICY PERIODS, WITHOUT "HORIZONTAL" EXHAUSTION OF POLICIES COVERING OTHER TIME PERIODS

Like most excess liability insurance policies, the Policies at issue here state that specific underlying policies in the same periods in which they were issued must be exhausted before the excess coverage obligations attach. As shown in Viking's Brief and its Reply Brief, the Policies' plain language allows for vertical exhaustion, there is no New York law to the contrary, and the "other insurance" provision in excess policies do not require horizontal exhaustion.

The proposed *amici curiae* respectfully request that the Court consider two additional points in support of Viking and Warren's position.

A. **Absent Express Policy Provisions Requiring Horizontal Exhaustion, It Is At Best An Equitable Doctrine Between Insurance Companies, Not A Rule That Applies To Policyholders.**

Respondents' horizontal exhaustion argument relies in part on California law, citing *Kaiser Cement & Gypsum Corp. v. Ins. Co. of the State of Pa.*, 126 Cal. Rptr. 3d 602 (Ct. App. 2011), *superseded,* 155 Cal. Rptr. 3d 283 (Ct. App. 2013). *See* Respondents' Br. at 4, 49. That superseded decision has been depublished, *see Kaiser Cement & Gypsum Corp. v. Insurance Co. of the State of Pa.*, S210870, 2013 Cal. LEXIS 6033 (Cal. July 17, 2013), but what remains of interest are the cases and concepts it discusses, including in particular *Community Redevelopment Agency v. Aetna Casualty & Surety Co.,* 57 Cal. Rptr. 2d 755 (Ct. App. 1996) ("*CRA*"). That decision shows that, absent express policy language requiring horizontal exhaustion between a policyholder and an excess insurance company, the doctrine applies, if at all, only as an equitable claim or defense between or among the implicated insurance companies.

In *CRA*, a primary insurance company sought equitable contribution from an excess insurance company for the costs of defending an action involving long-term damage occurring over multiple policy periods. The court concluded that "a horizontal exhaustion rule should be applied in continuous loss cases"

under which "all of the primary policies in force during the period of continuous loss will be deemed primary policies to each of the excess policies covering the same period. Under the principle of horizontal exhaustion, *all* of the primary policies must exhaust before *any* excess will have coverage exposure." *Id.* at 761 (italics in original). Although the coverage litigation initially involved multiple policyholders and insurance companies, the only claim remaining on appeal was a declaratory relief and equitable contribution dispute between two insurance companies. *Id.* at 756 n.1. Thus *CRA* is consistent with cases recognizing that horizontal exhaustion is an *equitable contribution* doctrine, designed to equitably apportion losses among multiple insurance companies, not to eliminate coverage available to a policyholder. *Transcontinental Ins. Co. v. Ins. Co. of the State of Pa.*, 56 Cal. Rptr. 3d 491, 497 n.4, (Ct. App. 2007) ("we need not address ISOP's extensive discussion of the horizontal exhaustion rule as those cases invoke the doctrine of equitable contribution, which is not controlling in this case").

However, horizontal exhaustion should not determine a policyholder's *direct* contractual rights against an insurance company from whom it purchased an insurance policy. *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909, 930 (Cal. 1997) ("Although insurers may be required to make an equitable contribution . . . *among themselves*, that is all: An insured is not required to make such a contribution *together with insurers*. Equitable contribution applies *only*

between insurers . . . It therefore has no place between insurer and insured, which have contracted the one with the other") (italics in original; citations omitted). As a later case observed, "the horizontal exhaustion rule only governs the relationship between the primary and excess insurers." *State of Calif. v. Continental Ins. Co.* 88 Cal. Rptr. 3d 288, 306 (Ct. App. 2009), *aff'd*, *State of California, supra.*

Respondents' "other insurance" argument also fails, because it is well established that "other insurance" provisions only apply to allocation disputes between or among insurers. *See, e.g., New Castle County v. Continental Cas Co.,* 725 F. Supp. 800, 817 (D. Del. 1989) ("[O]nly rights among carriers are implicated by the 'other insurance' clause."), *aff'd in part, rev'd on other grounds*, 933 F. 2d 1162 (3d Cir. 1991); *Baker v. Aetna Cas. and Sur. Co., Civ. Action No. 86-4974, 1996 U.S. Dist. LEXIS 11600, at *31* (D. N.J. Aug. 5, 1996). They are not intended to be used to limit coverage available to policyholders. *See id.*

In any event, *CRA* and the *Kaiser* decision which followed it are not absolute, but like any insurance coverage case merely turned on their particular policy language. Any "horizontal exhaustion" rule is subject to standard rules of insurance policy interpretation and must be based on the policy language:

> The significant point is that these cases, like all other insurance cases, look first to the terms of the policy . . . . *CRA* does not stand for the proposition all primary coverage must be exhausted before excess policies may be reached without regard to the express terms of the excess policies. Indeed, the *CRA* court said "if an excess

> policy states that it is excess over a specifically described policy and will cover a claim when that specific primary policy is exhausted, such language is sufficiently clear to overcome the usual presumption that all primary coverage must be exhausted." [Citation omitted.] *Here, the Insurers' policies state they are excess over a specifically described SIR and will cover a claim when that SIR is exhausted. Accordingly, CRA provides no comfort to Insurers on this point.*

Montgomery Ward & Co. v. Imperial Cas. & Indem. Co., 97 Cal. Rptr. 2d 44, 52 (Ct. App. 2000) (emphasis added). Similarly, here, Respondents' Policies state they are excess over specifically described underlying insurance and will cover a claim once *that* underlying insurance is exhausted.

In short, the horizontal exhaustion rule is an *equitable contribution* doctrine affecting the allocation of coverage among multiple insurance companies, none of whom owes any contractual duty to the other. It should not affect Respondents' direct contractual duties to *policyholders* – all the more so, where, as here, the relevant insurance contracts condition the excess insurance company's coverage obligations solely upon the exhaustion of specified underlying insurance policies.

B. **There Is No "Sophisticated Insured" Exception To The Doctrine Of *Contra Proferentum*, Which Requires Any Ambiguous Policy Language To Be Resolved In Favor Of The Policyholders' Vertical Exhaustion Rule.**

There is no merit whatsoever to Respondents' suggestion in support of their horizontal exhaustion argument that there is an "unresolved question" whether the rule of *contra proferentum* applies in cases involving a "large, sophisticated business." *See* Respondents Br. at 55. Viking's Reply Brief discusses New York authorities rejecting such arguments unless an insurance company can show that the supposedly "sophisticated" policyholder actually negotiated the ambiguous provision in dispute. *See id.* (citing *Morgan Stanley Grp., Inc. v. New Eng. Ins. Co.*, 225 F.3d 270 (2d Cir. 2000), and *Ogden Corp. v. Travelers Indem. Co.*, 681 F. Supp. 169, 174 (S.D.N.Y. 1988)); *see also U.S. v. Brennan*, 938 F. Supp. 1111, 1121 (E.D.N.Y. 1996) ("Even were it appropriate to apply the 'sophisticated commercial entity' analysis to the insurer/insured relationship, … [t]he particular sophisticated commercial entities involved in this case were in different businesses. USAir and Ogden-Allied may have been knowledgeable about their own businesses, aviation, and security, respectively, but not necessarily insurance.").

Many other courts have rejected Respondents' argument that commercial policyholders are not entitled to standard rules of construction and

interpretation because standard-form policy provisions — like the exhaustion provisions at issue here — are drafted by the insurance company. For example, in *Boeing Co. v. Aetna Casualty & Surety Co.*, 784 P.2d 507 (Wash. 1990), the Washington Supreme Court recognized that the policyholder was a corporate giant but rejected the insurance company's argument that the usual rules of policy interpretation would not apply. The *Boeing* court emphasized that the same standard-form language was sold to large and small policyholders alike, and that the same insurance policy language cannot mean one thing for one policyholder and a different thing for another. The *Boeing* court also recognized that its construction of a standard-form insurance policy provision thereafter would apply to policyholders of all sizes, large and small:

> The specific language in question was not negotiated, therefore, it is irrelevant that some corporations have company counsel. Additionally, this standard form policy has been issued to big and small businesses throughout the state. *Therefore it would be incongruous for the court to apply different rules of construction based on the policyholder because once the court construes the standard form coverage clause as a matter of law, the court's construction will bind policyholders throughout the state, regardless of the size of their business.*

Boeing, 784 P.2d at 514 (emphasis added).

Similarly, in *AIU Insurance Co. v. Superior Court of Santa Clara County*, 799 P.2d 1253 (Cal. 1990). the California Supreme Court recognized that a large corporate policyholder possessed "both legal sophistication and substantial

bargaining power" in purchasing its insurance policies. However, because standard-form insurance policy language was at issue, the court declined to depart from the ambiguity rule. In *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162 (3d Cir. 1991), the U.S. Court of Appeals for the Third Circuit could "conceive of no compelling reason why even a sophisticated insured should not be entitled to a pro-coverage interpretation of a standardized...policy drafted by the insurance industry." *Id.* at 1189. *See also Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F. Supp. 1136, 1156 (D.N.J. 1993), *rev'd on other grounds*, 68 F.3d 658 (3d Cir. 1995) ("This Court...is convinced that the size or sophistication of the insured is irrelevant under New Jersey law to the application of the rule of contra proferentum when the policy in dispute has been drafted solely by the carrier."); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1334, 1349 (D.N.J. 1992); *Clemco Indus., Inc. v. Commercial Union Ins. Co.*, 665 F. Supp. 816, 819 (N.D. Cal. 1987), *aff'd,* 848 F.2d 1242 (9th Cir. 1988); *CPS Chem. Co. v. Continental Ins. Co.*, 536 A.2d 311, 318 (N.J. Super. App. Div. 1988) (holding that "principles [of interpretation] are no less applicable merely because the insured is itself a corporate giant. The critical fact remains that the ambiguity was caused by language selected by the insurer.").

Thus, when standardized insurance policy terms are at issue, such as Respondents' exhaustion and "other insurance" clauses, courts across the country

rightly recognize that a "sophisticated policyholder" exception should not apply. Faced with an insurance company's sophisticated policyholder argument, one New Jersey court observed that "the benefits of standardization would be lost if standard form [insurance policy] language were given different meanings for different insureds based upon individual degrees of sophistication and bargaining power." *Diamond Shamrock Chem. Co. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440, 461 (N.J. Super. App. Div. 1992). The *Diamond Shamrock* court explained that a "sophisticated policyholder exception" to the *contra proferentum* doctrine would result in irregularities such as a "highly sophisticated" policyholder being found to have less insurance protection than its less sophisticated counterpart despite identical language in each policyholder's insurance policy. *Id.*

Of course, what the *Diamond Shamrock* court left unstated is the reality that "less sophisticated" policyholders might have no protection in the end, because they lack the resources to pursue coverage litigation. Lengthy and complex coverage litigation, particularly when allocation is involved, requires the resources of a "sophisticated" policyholder, but as the *Boeing* court observed, the resulting precedents benefit individuals and smaller enterprises alike.

CONCLUSION

Proposed *amici curiae* respectfully request that this Court grant them permission to appear as *amici curiae* in this proceeding and, on the merits hold that the all sums allocation rule and vertical exhaustion apply under New York law.

Dated: January 6th, 2016
New York, New York

Respectfully submitted,
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