No. 15-3409

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GENERAL REFRACTORIES COMPANY, Plaintiff-Appellee
v.
FIRST STATE INSURANCE CO; WESTPORT INSURANCE CORPORATION, Successor to, or, f/k/a Puritan Insurance Company; LEXINGTON INSURANCE COMPANY; CENTENNIAL INSURANCE COMPANY; HARTFORD ACCIDENT And INDEMNITY CO; GOVERNMENT EMPLOYEES INSURANCE CO; REPUBLIC INSURANCE COMPANY; SENTRY INSURANCE, Successor to, or, f/k/a Vanliner Insurance Company, f/k/a Great SW Fire Insurance Co; AMERICAN INTERNATIONAL INS. CO; AIU INSURANCE COMPANY; HARBOR INSURANCE COMPANY; TRAVELERS CASUALTY & SURETY CO, Successor to, or f/k/a Aetna Casualty & Surety Company; AMERICAN EMPIRE INSURANCE CO; WESTCHESTER FIRE INSURANCE CO
TRAVELERS SURETY AND CASUALTY COMPANY (f/k/a The Aetna Casualty and Surety Company), Defendants-Appellants

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On Appeal from the United States District Court for the
Eastern District of Pennsylvania, Case No. 2:04-cv-03509-LFR
Hon. L. Felipe Restrepo

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-APPELLEE GENERAL REFRACTORIES

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CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae*, United Policyholders states that it is a non-profit 501(c)(3) charitable organization, and that it does not have a parent corporation or shareholders.

INTEREST OF *AMICUS CURIAE*

United Policyholders was founded in 1991 and is a non-profit organization dedicated to educating the public on insurance issues and consumer rights. It protects the interests and presents the positions of policyholders through participation as *amicus curiae* in insurance coverage cases throughout the country. The organization is tax-exempt under Internal Revenue Code § 501(c)(3) and is funded by donations and grants from individuals, businesses and foundations.

United Policyholders is an information resource on sales, coverage, claims and litigation-related issues pertaining to the full range of personal and commercial lines insurance products. An average of 20,000 monthly visitors read articles and tips at www.unitedpolicyholders.org. The organization participates in proceedings of the National Association of Insurance Commissioners and receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders and policyholder advocates communicate on a regular basis with United Policyholders. By processing these communications and monitoring the insurance marketplace and the industry in general, United Policyholders is able to submit pertinent and accurate information to courts throughout the country via *amicus* briefs. United Policyholders has participated as *amicus curiae* in approximately 400 cases across the country involving significant

insurance issues. The organization's reputation as a reliable friend of the court was enhanced when its *amicus curiae* brief was cited in the United States Supreme Court's opinion in Humana, Inc. v. Forsyth, 525 U.S. 299 (1999), and its arguments were adopted by the California Supreme Court in Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999) and in TRB Investments, Inc. v. Fireman's Fund Ins. Co., 145 P.3d 472 (Cal. 2006).

United Policyholders has appeared in many Pennsylvania Supreme Court cases, including: Allstate Property & Casualty Co. v. Jared Wolfe 105 A.3d 1181 (Pa. 2014) (United Policyholder's *amicus* brief cited throughout); The Babcock & Wilcox Co. v. American Nuclear Insurers, 2015 WL 4430352 (Pa. July 21,2015); ACE American Insurance Co. v. Underwriters at Lloyds & Cos., 971 A.2d 1121 (Pa. 2009); American & Foreign Ins. Co. v. Jerry's Sport Center, Inc., 2 A.3d 526 (Pa. 2010); and Sunbeam Corp. v. Liberty Mutual Insurance Co., 781 A.2d 1189 (Pa. 2001).

United Policyholders has also appeared in many cases in the Third Circuit Court of Appeal, including: Hussey Copper, Ltd. v. Arrowood Indemnity Co., 391 F. App'x 207 (3d Cir. 2010); Weiss v. UnumProvident, 482 F.3d 254 (3d Cir. 2007); and Willow Inn, Inc. v. Public Service Mutual Insurance Co., 399 F.3d 224 (3d Cir. 2005). A complete listing of all cases in which UP has appeared as *amicus*

curiae can be found in our online Amicus Project library at www.uphelp.org/amicus.

UP seeks to assist courts as *amicus curiae* in appellate proceedings throughout the United States, particularly in cases such as this one, which involve insurance principles that are likely to impact a large segment of the public.

SUMMARY OF ARGUMENT

Having failed to fulfill its burden of proving that the asbestos exclusion on which it had denied coverage to General Refractories Company ("GRC"), a seller of asbestos-containing products, unambiguously applied to exclude coverage for losses from exposure to asbestos-containing products, Travelers Casualty & Surety Co. ("Travelers") now argues that district court erred in disregarding the plain meaning of the exclusionary term "asbestos" and in improperly considering extrinsic custom and usage evidence adduced by GRC to support its reasonable interpretation of the term. However, it is Travelers, and not the court below, which has got Pennsylvania's rules of insurance policy interpretation wrong.

Pennsylvania law puts the burden on insurance companies, as the parties seeking to avoid coverage, to prove the applicability of exclusions, and this burden is especially high, where, as here, the exclusion is contained in a standard form policy drafted by the carrier and not negotiated by the policyholder. Travelers, taking the position that the asbestos exclusion applied to losses for injuries related to asbestos in any form, failed to carry its burden, relying solely on assertions of counsel that the exclusion was unambiguous and self-serving extrinsic evidence of GRC's corporate records and communications with Travelers and brokers.

GRC, on the other hand, adduced extrinsic custom and usage evidence to support its reasonable, alternative interpretation that the exclusionary term

"asbestos" referred to asbestos in its mineral form only. The district court properly admitted this evidence, which included, among other things, contemporaneous Travelers policies that expressly excluded losses for injuries from asbestos-containing products. Further, the district court, in accordance with Pennsylvania's laws of insurance policy interpretation, properly held that GRC's interpretation was reasonable, and, in light of the parties' competing reasonable interpretations, properly construed the ambiguous exclusionary language against Travelers, as the drafter of the policy.

In pursuit of a reversal, Travelers seeks to confuse the issue, arguing that the district court's error in finding the exclusion to be ambiguous led it to apply an incorrect legal standard to GRC's custom and usage evidence. Contrary to Travelers' arguments, the district court properly considered GRC's custom and usage evidence in confirming that the exclusionary term contained a latent ambiguity and in concluding that GRC's construction of the exclusionary term was reasonable.

ARGUMENT

1. The District Court Properly Declined to Rule that the Asbestos Exclusion in the Policies Operates to Exclude Coverage for Losses for Bodily Injury Resulting from Exposure to Asbestos-Containing Products.

(a) Insurance Companies Seeking to Avoid Coverage Based on an Exclusion Face a Heavy Burden Under Pennsylvania Law.

"The insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense." Koppers Co. v. Aetna Cas. & Sur. Co., 98 F.3d 1440, 1446 (3d Cir. 1996); see also McEwing v. Lititz Mut. Ins. Co., 77 A.3d 639, 646 (Pa. Super Ct. 2013). Specifically, insurance companies asserting an exclusionary defense are obliged to prove that the exclusion is clear and unambiguous. See Bishops, Inc. v. Penn. Nat'l Ins., 984 A.2d 982, 991 (Pa. Super. Ct. 2009) (opining that where insurer seeks to deny coverage on basis of exclusion it bears burden of proof to show that exclusion is unambiguous).

This is because Pennsylvania law demands that exclusions be clearly worded and that they "unequivocally indicate coverage or non-coverage." Twp. of Ctr., Butler Cty., Pa. v. First Mercury Syndicate, Inc., 117 F.3d 115, 117 (3d Cir. 1997). If they do not, they will be construed against the insurance company, as the party that drafted them. See, e.g., Nationwide Mut. Ins. Co. v. Cosenza, 258 F.3d 197, 206-07 (3d Cir. 2001) ("[E]xclusions are always strictly construed against the

insurer and in favor of the insured."); Swarner v. Mut. Benefit Grp., 72 A.3d 641, 645 (Pa. Super. Ct. 2013).

In fact, it is settled law in Pennsylvania that when the interpretation of an exclusionary or coverage-limiting clause is at issue, courts must adopt the construction urged by the policyholder so long as that construction is not unreasonable. See Ramara, Inc. v. Westfield Ins. Co., No. 15-1003, 2016 WL 624801, at *12 (3d Cir. Feb. 17, 2016) ("'[A]ny reasonable interpretation offered by the insured must control.' Pennsylvania courts apply this rule liberally.") (quoting Med. Protective Co. v. Watkins, 198 F.3d 100, 104 (3d Cir. 1999)) (internal citations omitted). This is particularly so, as in this case, where the exclusion is contained in a standard form policy, which does not allow for negotiation by the policyholder. See Lexington Ins. Co. v. Charter Oak Fire Ins. Co., 81 A.3d 903 (Pa. Super. Ct. 2013) (stating that where policy language is ambiguous it must be construed against insurer because insurer is party that drafted language); but see Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 235 (3d Cir. 2002) (stating that rationale for construing insurance policy in favor of insured has little application where policy is on manuscript form negotiated by insured). Notably, the briefs of both Travelers and its *amici* fail to even address this key foundational interpretation requirement for exclusions.

(b) Travelers Failed to Meet Its Burden of Proving that the Only Reasonable Interpretation of the Asbestos Exclusion Was that It Excludes Coverage for Losses for Bodily Injuries Caused by Asbestos-Containing Products.

The Policies exclude coverage for "EXCESS NET LOSS arising out of asbestos, including but not limited to bodily injury arising out of asbestosis or related diseases or to property damage." General Refractories Co. v. First State Ins. Co., 94 F. Supp. 3d 649, 654 (E.D. Pa. 2015). Notably, the Policies do not define the term "asbestos," id. at 662, although the dictionaries consulted by the district court define "asbestos" as its mineral form. Id. at 658. Also of note is the fact that the Policies sold by Travelers were standard form policies, which were not specially crafted for GRC, and in which GRC had no role in negotiating. Id.

In the lower court, Travelers took the position that the asbestos exclusion excludes losses for bodily injuries related to asbestos in any form. Id. at 652. Thus, according to Travelers, the asbestos exclusion excludes losses for injuries arising from exposure to products containing some asbestos, just as it excludes losses for injuries arising from mining, milling or manufacturing raw asbestos. Id. at 653.

The sole evidence adduced by Travelers in support of its argument was extrinsic evidence of GRC's corporate records, GRC's communications with Travelers and communications by brokers. Id. at 656. Travelers argued that these materials evidenced GRC's acquiescence of Travelers' interpretation of the

asbestos exclusion as applying to all losses from injuries related to asbestos in any form. Id. at 663.

The district court held that Travelers' evidence was not sufficient to prove the plain meaning that Travelers ascribed to the asbestos exclusion. Id. at 664. Specifically, the court reasoned that Travelers' extrinsic evidence was improper, using purported evidence of GRC's own subjective beliefs to attempt to prove its own understanding of the exclusionary term "asbestos." Id. at 663-64.

The district court's ruling is proper under Pennsylvania law, which holds that undisclosed communications and subjective understandings are not credible extrinsic evidence and may not be used by the court to determine the parties' mutual intent. See Bohler-Udderholm Am., Inc. v. Ellwood Grp., Inc., 247 F.3d 79, 93 (3d Cir. 2001) (opining that contract may be construed by its express language, meaning advanced by counsel and objective evidence offered in support of that meaning but not evidence of the parties' subjective intent). Moreover, Pennsylvania follows the Restatement Second of Contracts, which, while according great weight to course of performance evidence in interpreting contractual language, does not apply to the "action of only one party only; in such cases . . . self-serving conduct is not entitled to weight." RESTATEMENT SECOND OF CONTRACTS § 202(4), cmt. g.

Travelers, which was faced with the burden of proving not only that its own

interpretation of the asbestos exclusion was reasonable, but also that GRC's interpretation was not reasonable, failed to carry its burden. See Little v. MGIC Indem. Corp., 836 F.2d 789, 794 (3d Cir. 1987) (reasoning that job of court is not merely to determine whether insurance company's interpretation is reasonable, but whether policyholder has also advanced reasonable interpretation, and if the latter, policyholder's reasonable interpretation controls).

Travelers argues that the district court erred in allowing GRC to introduce extrinsic custom and usage evidence in support of its interpretation of the asbestos exclusion. Under Travelers' rationale, policyholders like GRC should not be afforded the opportunity to rebut an insurance company's reasonable interpretation of a policy exclusion. However, Travelers' scheme does not accord with Pennsylvania's rules of policy interpretation, which require that policyholders like GRC be permitted to articulate their own interpretation of policy language, and if reasonable, that the policyholder's interpretation controls. Further, affording policyholders the opportunity to introduce custom and usage evidence is especially important where, as here, the policyholder was sold a standard form insurance policy whose terms the policyholder had no chance to negotiate.

2. The District Court Properly Considered the Extrinsic Evidence Adduced by GRC Supporting Its Reasonable Interpretation that the Asbestos Exclusion Excludes Losses from Bodily Injury Caused by Asbestos in Its Mineral Form Only.

(a) Extrinsic Evidence Is Admissible under Pennsylvania Law to Assist the Court in Determining whether a Latent Ambiguity Exists.

Whereas "a patent ambiguity appears on the face of the instrument, 'a latent ambiguity arises from extraneous or collateral facts which make the meaning of a written agreement uncertain although the language thereof, on its face, appears clean and unambiguous.'" Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 93 (3d Cir. 2001) (quoting Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 614 (3d Cir. 1995)). While Travelers and its *amici* argue that the asbestos exclusion in the Policies is unambiguous as a matter of law, the asbestos exclusion, in fact, contains, at the very least, a latent ambiguity. As noted by the district court, this latent ambiguity was demonstrated by the plain meaning of the term and separately by the extrinsic evidence adduced by GRC.

Under Pennsylvania law, a court may examine extrinsic evidence in analyzing whether a contractual term contains a latent ambiguity. Id. at 93. "Although Pennsylvania law provides that 'parol evidence' may not be introduced unless the language of the written agreement is ambiguous on its face, extrinsic facts and circumstances may be proved to show that language apparently clear and unambiguous on its face is, in fact, latently ambiguous." Baney v. Eoute, 784 A.2d

132, 135 (Pa. Super. Ct. 2001); see also Duquense Light Co., 66 F.3d at 614 ("'[E]xtrinsic evidence may be utilized to demonstrate the existence of a latent ambiguity.'") (quoting Samuel Rappaport P'ship v. Meridian Bank, 657 A.2d 17, 22 (Pa. Super. Ct. 1995)).

By way of example, this Court has stated that extrinsic evidence would be admissible to demonstrate that a contract calling for payment in dollars is latently ambiguous in that it the reference to dollars is to Canadian dollars rather than to U.S. dollars. See id. As such, "when a contract term is reasonably argued to be ambiguous, the [best] approach, and the one that is consistent with the weight of controlling authority, is to allow the parties to proffer evidence in support of alternative interpretations of the term so that the court may properly address the purported ambiguity." Baldwin v. Univ. of Pittsburgh Med. Ctr., 636 F.3d 69, 78 (3d Cir. 2011). Here, given GRC's reasonable argument that the term "asbestos" referred to asbestos in its mineral form only, the district court properly considered GRC's extrinsic evidence of the meaning of the term.

(b) Pennsylvania Law Permits the Introduction of Evidence of Trade Usage and Custom to Explain Specialized Industry Contract Language.

Further, under Pennsylvania law, evidence of trade usage and course of conduct is admissible to explain, supplement, or qualify a term or an agreement. See Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1189, 1193 (Pa. 2001)

("[C]ustom in the industry or usage in the trade is always relevant and admissible in construing commercial contracts . . . ."); Nationwide Life Ins. Co. v. Commw. Land Title Ins. Co., 579 F.3d 304, 308 (3d Cir. 2009) (stating that custom and usage evidence may be considered in the process of ascertaining the parties' intent by examining the policy as a whole). In fact, a specialized industry or trade term may require extrinsic evidence of the commonly understood meaning of the term within a particular industry. See USX Corp. v. Liberty Mut. Ins. Co., 444 F.3d 192, 198 (3d Cir. 2006) ("In construing policy language, courts should consider any special usage '[w]here terms are used in a contract which are known and understood by a particular class of persons in a certain special or peculiar sense [.]'") (quoting Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1189, 1193 (Pa. 2001)).

This is because the determination of whether policy language is ambiguous cannot be made in a vacuum; "'[r]ather, contractual terms are ambiguous if they are subject to more than one reasonable interpretation when applied to a particular set of facts.'" Prudential Prop. & Cas. Ins. Co. v. Sartno, 903 A.2d 1170, 1174 (Pa. 2006) (quoting Madison Constr. Co. v. Harleysville Mut. Ins. Co., 735 A.2d 100, 106 (Pa. 1999)). Accordingly, while extrinsic evidence of the parties' intent is not admissible to create an ambiguity, a contract may be read in light of the surrounding circumstances to determine whether an ambiguity exists. See Int'l

Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co., 188 F.3d 130, 145 (3d Cir. 1999).

Relying on this Court's decision in AstenJohnson, Inc. v. Columbia Casualty Co., 562 F.3d. 213 (3d Cir. 2009), Travelers and its *amici* argue that any insurance industry custom and usage evidence that GRC introduced at trial needed to be universal in order to be admissible. See Appellant's Br. at 45; Amicus Br. at 15-16. Such an argument, however, overlooks the nuances of AstenJohnson as applied to the facts of this case. AstenJohnson stands for the proposition that in order to elucidate a reasonable interpretation of a policy's plain meaning, "trade usage evidence need not demonstrate that a particular term always carries a particular meaning or that a particular meaning claimed cannot be otherwise stated." 562 F.3d at 222; see also Sunbeam, 781 A.2d at 1193 (stating that admission of custom and usage evidence "does not depend on any obvious ambiguity in the words of a contract.").

This is exactly what the custom and usage evidence adduced by GRC did here—that evidence supported GRC's reasonable interpretation of the exclusionary term "asbestos" as used in the Policies. Contrary to Travelers' arguments, GRC did not introduce the custom and usage evidence to alter an unambiguous policy term. Rather, GRC introduced and the district court relied on custom and usage evidence to demonstrate that the term "asbestos" was ambiguous and to support the

conclusion that GRC's understanding of that term was reasonable.

Within this framework, the district court properly considered evidence of the insurance industry's own usage of the terms "asbestos" and "asbestos-containing products" as well as the phrasing of asbestos exclusions in other policies, including those issued by Travelers, in determining that GRC's interpretation of the exclusionary term "asbestos" as referring to asbestos in its mineral form only was reasonable.

3. In Light of the Two Competing Reasonable Interpretations of the Asbestos Exclusion Advanced by the Parties, the District Court Properly Ruled that the Asbestos Exclusion Was Ambiguous and Construed it in Favor of Coverage.

"Contractual language is ambiguous 'if it is reasonably susceptible …of being understood in more than one sense.'" Prudential Prop. and Cas. Ins. Co. v. Sartno, 903 A.2d 1170, 1174 (Pa. 2006) (quoting Hutchison v. Sunbeam Coal Co., 519 A.2d 385, 390 (Pa. 1986)); see also Ramara, Inc. v. Westfield Ins. Co., No. 15-1003, 2016 WL 624801, at *12 (3d Cir. Feb. 17, 2016). As stated by the Pennsylvania Supreme Court, " [w]hen a provision in a policy is ambiguous . . . the policy is to be construed in favor of the insured to further the contract's prime purpose of indemnification and against the insurer, as the insurer drafts the policy, and controls coverage.'" 401 Fourth St., Inc. v. Investors Ins. Grp., 879 A.2d 166, 171 (Pa. 2005)); see also Med. Protective Co. v. Watkins, 198 F.3d 100, 104 (3d Cir. 1999) ("Ambiguous provisions in an insurance policy must be construed

against the insurer and in favor of the insured; any reasonable interpretation offered by the insured, therefore, must control.").

This Court has explained that two pragmatic justifications support the rule of interpretation that construes insurance policy ambiguities against the insurer: (1) "'The insurer is an expert in its field and its varied and complex instruments are prepared by it unilaterally whereas the assured ... is a layperson unversed in insurance provisions and practices.'"; and (2) "courts apply 'the familiar contract rule interpreting ambiguity against the scrivener, recalling the hoary maxim *ambigua responsio contra proferentem est accipienda*—that is, [a]n ambiguous answer is to be taken against him who offers it.'" Watkins, 198 F.3d at 104 (quoting Allen v. Metro. Life Ins. Co., 208 A.2d 638, 644 (N.J. 1965)); see also Sykes v. Nationwide Mut. Ins. Co., 198 A.2d 844, 845 (Pa. 1964) (The person who writes with ink which spreads and simultaneously produces two conflicting versions of the same proposition cannot complain if the person affected by both propositions chooses to accept that which is more helpful to him and which is against the interests of the contract writer.").

Indeed, even if the interpretation offered by Travelers and its *amici curiae* is reasonable, the alternative, reasonable interpretation advanced by GRC confirms the ambiguity of the asbestos exclusion. Consistent with Pennsylvania law, that ambiguity must be interpreted in favor of the insured. As aptly stated by the

Pennsylvania Supreme Court, "[r]egardless of which [interpretation] is 'right' or 'wrong,' the fact is that because each interpretation is reasonable, the exclusionary term is ambiguous, and we must construe it in favor of the insured." Sartno, 903 A.2d at 1177.

In this case, the ambiguity of the asbestos exclusion is established by:

A. the custom and usage evidence adduced by GRC and discussed above;

B. the multiple dictionary definitions of the word "asbestos;" and

C. the insurance industry's failure to use more precise language.

These latter two indicia of ambiguity are discussed, in turn, immediately below.

(a) In Everyday Usage, The Word "Asbestos" Refers to Asbestos in Its Mineral Form Only.

Travelers and its *amici curiae's* interpretation of the asbestos exclusion rests on the assertion that the word "asbestos" unambiguously includes asbestos in all its forms, including asbestos-containing products. While that interpretation may be reasonable, it is not the only reasonable interpretation of the word "asbestos."

An examination of the plain and ordinary meaning of the noun "asbestos," as set forth in numerous dictionaries, and recounted by the district court in its opinion, confirms this fact: the definition of "asbestos" is restricted to its mineral form, and does not include all products made of, containing or resembling asbestos. See General Refractories Co. v. First State Ins. Co., 94 F. Supp. 3d 649, 658 (E.D. Pa. 2015). Under Pennsylvania law, courts are free to consult dictionaries to

ascertaining the meaning of a term used in an insurance policy. See Ramara, 2016 WL 624801, at *12 ("A court construes commonly used words and phrases 'in their natural, plain, and ordinary sense, with [the] court free to consult a dictionary to inform its understanding of terms.'") (quoting Am. Auto. Ins. Co. v. Murray, 658 F.3d 311, 320-21 (3d Cir. 2011)); see also Wolfson v. Med. Care Availability & Reduction of Error Fund, 39 A.3d 551, 557 (Pa. Commw. Ct. 2012) ("[A] court may inform its understanding on [insurance policy] terms by considering their dictionary definitions.").

That many dictionaries limit the definition of the term "asbestos" to its mineral form only establishes GRC's position as a reasonable construction of the operative language of the asbestos exclusion. Moreover, the fact that the term "asbestos" has a widely accepted definition that contrasts so sharply with Travelers' interpretation of the same word demonstrates clearly that, at a minimum, the term "asbestos" is ambiguous.

(b) Travelers Could Have Avoided the Ambiguity Inherent in the Asbestos Exclusion by Using the More Precise Language that it Used in Other Policies.

It is well-established in Pennsylvania that "in determining whether an ambiguity exists, the court may consider 'whether alternative or more precise language, if used, would have put the matter beyond reasonable question.'" Celley v. Mut. Benefit Health & Acc. Ass'n, 324 A.2d 430, 434 (Pa. Super. Ct. 1974)

(quotation and citation omitted); see also McMillan v. State Mut. Life Assur. Co. of Am., 922 F.2d 1073, 1077 (3d Cir. 1990) ("An insurer's failure to utilize more distinct language which is available reinforces a conclusion of ambiguity under Pennsylvania law.") (citation omitted).[1] In Sartno, the Pennsylvania Supreme Court concluded that an exclusion was ambiguous based, in part, on the insurer's failure to use more precise language. Sartno, 903 A.2d at 1177 n.7 ("Appellants correctly note that 'the insurance industry has already drafted a broader exclusion that [the insurer] could have used, but chose not to.'") (quotation omitted).

If Travelers intended the word "asbestos" to have a meaning different from its dictionary definition, it should have precisely worded its insurance policies to achieve that result. "The burden of precisely drafting the policy rest[s] with the insurance company and scrivener, … and it [i]s free to employ more precise language." Medical Protective Co. v. Watkins, 198 F.3d 100, 104-05 (3d Cir. 1999); see also McMillan v. State Mut. Life. Assur. Co. of Am., 922 F.2d 1073, 1076-77 (3d Cir. 1990) ("The burden of drafting with precision rests with the insurance company, the scrivener of the policy. If [the insurer] desired to limit its

[1] Moreover, "[w]here one party [to a contract] has special expertise in the subject matter of the contract, silence in the contract will be construed against him or her in order to prevent overreaching of the less-knowledgeable party." Hertzog v. Jung, 526 A.2d 425, 429 (Pa. Super. Ct. 1987) (citation omitted). To the extent that the ambiguity in the asbestos exclusion is the result of an insurance company's decision not to define the term in the policy, the exclusion must be construed against the insurer, which obviously has special expertise in the area of insurance.

liability . . . it was certainly at liberty to adopt more precise language to accomplish that purpose.").

Travelers, however, failed to include explicit language – as it was required to do – making clear that its Policies did not provide coverage for bodily injuries arising out of asbestos-containing products, such as those produced by GRC. Travelers, as the drafter of the excess Policies and the asbestos exclusion contained therein, should bear the costs of failing to use precise language, rather than GRC. That such an exclusion was available in the insurance market (and was in fact being used in other policies Travelers sold to different policyholders) but was not included in the Policies is strong evidence that the Policies' asbestos exclusion was ***not*** intended to preclude coverage for claims alleging bodily injury arising out of exposure to asbestos-containing products.

For example, in Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., the U.S. Court of Appeals for the Second Circuit was tasked with determining whether certain policy exclusions precluded coverage for the hijacking of an airplane. 505 F.2d 989 (2d Cir. 1974). At the outset, that court observed, "[v]arious exclusionary terms in use or being considered for use prior to the present loss would have excluded the loss had they been employed." Id. at 1000. After considering various, more exacting versions of an exclusion which the insurers had considered and could have used – and which "might well have

excluded the present loss" – the Second Circuit concluded that when the insurers failed to include the more precise language in their exclusions, "they acted at their own peril." Id. at 1001 (footnote omitted).

In coming to that conclusion, the Second Circuit observed that "[t]he evidence indicates that the risk of a hijacking was well known to the all risk insurers." Id. at 1000. Such considerations similarly strengthen the inference here that Travelers' failure to use available language to expressly exclude liability for asbestos-containing products means that the parties intended not to so limit coverage.

Even though Travelers was aware of GRC's status as a seller of asbestos-containing products, that liability from asbestos-containing products was a threat at that time, and that exclusions for asbestos-containing products were in fact available on the marketplace (and included in other policies that Travelers sold to policyholders other than GRC), Travelers still chose not to expressly exclude losses due to asbestos-containing products in the Policies it sold to GRC. As such, "[a]n insurer's failure to utilize more distinct language which is available reinforces a conclusion of ambiguity under Pennsylvania law." See McMillan, 922 F.2d at 1077. In other words, by failing to use the available asbestos-containing products exclusion, Travelers acted at its own peril.

Absent the inclusion of an express exclusion for asbestos-containing products in its policies, GRC could have reasonably believed that the policy Travelers sold to GRC would provide coverage for loss from bodily injury resulting from exposure to its asbestos-containing products. See, e.g., Indian Harbor Ins. Co. v. F&M Equip., Ltd., 804 F.3d 310, 313 (3d Cir. 2015) ("[I]nsurance contracts must be interpreted in light of the insured's reasonable expectations."). Here, it would have been reasonable for GRC to believe that if Travelers had wanted to exclude coverage for loss arising from exposure to its asbestos-containing products, Travelers would have drafted an exclusion that expressly did so, especially since such an exclusion was already available and in use in the insurance market by Travelers itself.

It is not for this Court now – or for any court – to rewrite these Policies to contain an exclusion (*i.e.*, an asbestos-containing products exclusion) which was available to Travelers but which Travelers chose not to incorporate in the Policies. As the U.S. District Court for the Eastern District of Pennsylvania explained, "[A] court should not impute to an insurance company, 'the benefit of … language which it chose not to adopt.'" Nationwide Mut. Ins. Co. v. Shoemaker, 965 F. Supp. 700, 703 (E.D. Pa. 1997), aff'd, 149 F.3d 1165 (3d Cir. 1998).

The position of Travelers and its *amici* that the district court's ruling will lead to uncertainty is without basis. The district court was interpreting only the

term "asbestos" in a single exclusion contained in a set of Policies sold by one insurance company to one policyholder. The district court's holding is thus restricted to the interpretation of the term "asbestos" in the context of the Travelers Policies and in light of the custom and usage evidence presented by GRC. Moreover, as noted by the district court, its ruling was consistent with Pennsylvania insurance law, which is designed to protect policyholders and third-party claimants for their losses and injuries. See Gen. Refractories, 94 F. Supp. 3d at 663 ("'The primary aim of third-party insurance is to defend and indemnify insureds against liability for claims made against them as a result of their own conduct.' Here, the exclusion is construed to protect the policyholder, GRC, against liability claims for injuries to others caused by the refractory products that GRC made.") (quoting Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 233 (3d Cir. 2002)).

CONCLUSION

For the reasons stated herein, *Amicus Curiae* United Policyholders respectfully requests that this Court affirm the judgment of the district court, holding that Travelers failed to meet its burden of proving that the asbestos exclusion unambiguously excludes coverage for asbestos-containing products.

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the Bar of this Court.

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CERTIFICATION OF SERVICE

I hereby certify that on March 28, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that, as required, I will submit on March 28, 2016, I will submit the required number of paper copies of this brief to the Clerk of this Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a) AND LAR 31.1(c)

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. Appx. P. 29(d) and 32(a)(7)(B) because this brief contains 5188 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief utilizes 14-point Time New Roman, a proportionally space typeface, prepared in Microsoft Word 2010.

3. The text of the electronic version of this brief is identical to the text in the paper copies. The undersigned further certifies that a virus detection program, Trend Micro Office Scan, has been run on the electronic version of the brief and hat no virus was detected.

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