IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT - DIVISION 3

MAREMONT CORPORATION, Plaintiff-Appellant vs. EDWARD WILLIAM CHESIRE, et al., Defendants-Respondents	No: 96-0146

On Appeal From The Circuit Court Of Cook County Illinois, The Honorable Chief Justice J. Dunne, Presiding

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-APPELLANT MAREMONT CORPORATION'S APPEAL

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INTRODUCTION

Amicus Curiae, United Policyholders, submits this memorandum in support of the position of appellant, Maremont Corporation ("Maremont"), on its appeal from the order of the Cook County Circuit Court, dated December 5, 1995.

STATEMENT OF INTEREST

Amicus Curiae United Policyholders is a non-profit corporation dedicated to educating the courts and policyholders regarding insurance company obligations and policyholder rights under insurance policies. Specifically, United Policyholders engages in charitable and educational activities by promoting greater public understanding of insurance issues and consumer rights. United Policyholders' activities include organizing meetings, distributing written materials and responding to requests for information from individuals, elected officials and government entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae has a vital interest in assuring that standard form insurance policies, like the comprehensive general liability ("CGL") insurance policies (sometimes referred to as "all risk" insurance policies) at issue herein, are interpreted properly and consistently by insurance companies and courts.

SUMMARY OF ARGUMENT

> *Truth is not a weather vane.*
>
> *It does not veer when the winds of self-interest change.*
>
> *It remains constant.*

<u>Department of Transp. v. Coe</u>, *112 Ill. App. 3d 506, 507 445 N.E.2d 506 (4th Dist. 1983) (emphasis added).*

Insurance companies should not be permitted to present inconsistent statements to the courts, state regulatory agencies, and to the public solely based upon their pecuniary interests. Such conduct violates basic principles of Illinois law and is an affront to the integrity of the judicial system. Instead, insurance companies must be bound by their prior representations.

In the present case, the court below agreed with the positions the defendant insurance companies chose to advance in this case, <u>i.e.</u>, that (i) the "law of the site" should apply, rather than Illinois law, the law of the state in which the policyholder is located; and (ii) clean-up costs are not covered "damages." When it has suited their pecuniary interests, however, insurance companies have sworn to the courts, testified before state regulatory agencies, and asserted to each other and the general public that the "law of the site" does not apply, and that cleanup costs are covered "damages." Such inconsistencies in interpretation on the part of the very entities that drafted the insurance policies sold to policyholders like Maremont should not be countenanced.

At best, these inconsistencies underscore the fact that the insurance policies are ambiguous and, therefore, should be

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construed in favor of the policyholder and insurance coverage. At worst, they demonstrate insurance companies' willingness to play "fast and loose with the courts"[1] for their own gain.

1. Goldstein v. Scott, 108 Ill. App. 3d 867, 872, 439 N.E.2d 1039, 1043 (1st Dist. 1982).

ARGUMENT

Point I.

THE INSURANCE COMPANY DEFENDANTS SHOULD BE ESTOPPED FROM TAKING INCONSISTENT POSITIONS REGARDING THE PROPER INTERPRETATION OF THEIR INSURANCE POLICIES

The positions advanced by the insurance companies in this action with respect to both choice of law and cleanup costs, if accepted, would allow defendants to "renounce" and contradict important factual and legal representations that the insurance industry has made to other courts, state regulatory agencies, and to the general public. Specifically, many insurance companies have represented to courts in other states that the law of the state where the policyholder is located is applicable and that the meaning of the word "damages" in the standard-form CGL insurance policies at issue was intended to provide policyholders with broad coverage -- broad enough to cover cleanup costs sought as a result of environmental damage.

Indeed, many of the courts to whom the insurance companies made these representations have relied on such representations in deciding the issues of choice of law and cleanup costs. In fact, so far as it is known, insurance companies have been successful in obtaining insurance coverage for cleanup costs or "mitigation" of damage costs in every single case in which they have sought such recovery.

Several of the defendant insurance companies now wish to contradict these earlier assertions. Such conduct should not be countenanced by this Court.

A. The Insurance Company Defendants Should Be Estopped From Taking Inconsistent Positions With Respect To Choice Of Law

Where standard form CGL insurance policies, like those at issue, are silent on choice of law, insurance companies, including certain of the defendants herein, have repeatedly taken conflicting positions on choice of law depending upon their particular pecuniary interests. Insurance companies, including certain defendants, have argued, among other things, that under the standard form CGL insurance policies they drafted, the law of the state in which the policyholder is located should apply. In light of that assertion, the insurance company defendants should be estopped to argue that the law of the site applies in this action.

For example, in FMC Corp. v. Liberty Mutual Insurance Co., No. 643058, Memorandum Decision And Order Re Motion For Summary Adjudication On The Issue Of Late Notice (Cal. Super. Ct. December 15,1988),[2] the insurance companies argued that the law of Illinois should apply because Illinois was the policyholder's principal place of business. The insurance companies took a similar position in Segua Corp. v. Aetna Casualty & Surety Co., No. 89-234-JRR, Memorandum Opinion (D. Del. January 18, 1990),[3] wherein they argued that an environmental insurance coverage action which had been filed in Delaware should be transferred to

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2. A copy of the decision in FMC Corp. v. Liberty Mutual Insurance Co., is annexed as Exhibit 1 to the Affidavit of Tara A. Griffin, sworn to on September 12, 1996 (hereinafter the "Griffin Aff.").

3. See Griffin Aff., Exh. 2.

the state of the policyholder's principal place of business. Further, in United National Insurance Co. v. Dunbar & Sullivan Dredging Co., No. 89-C-8922, 1990 WL 139269, Memorandum Opinion And Order (N.D. Ill. September 17, 1990),[4] the insurance company argued that the location of the policyholder's principle place of business should control the issue of choice of law.

Likewise, Lumbermens Mutual Casualty Company (an affiliate of American Motorists Insurance Company ("AMICO") a defendant in this case) argued in Lumbermens Mutual Casualty Co. v. Connecticut Bank & Trust Co., N.A., 806 F.2d 411 (2d Cir. 1986), that the legal issues in that case should be governed by the law of the state where the policyholder was incorporated and headquartered.[5]

Even where the underlying claims arose in other jurisdictions, insurance companies have advanced the position that the law of the policyholder's principal place of business should apply. See, e.g., Eli Lilly & Co. v. Home Ins. Co., No. 82-0669 (D.D.C. Sept. 30, 1982) (insurance companies argued that an insurance coverage dispute arising out of nationwide claims for bodily injury against the policyholder should be litigated in the state of the policyholder's principal place of business).

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4. See Griffin Aff., Exh. 3.

5. AMICO made a similar argument in Parker Hannifin Corp. v. Aetna Casualty & Surety Co., No. 83-2268 (D.D.C.).

B. The Insurance Company Defendants Should Be Estopped From Taking Inconsistent Positions With Respect To The "Clean-Up Costs As Damages" Issue

1. Insurance Company Defendants in Other Insurance Coverage Cases Have Argued Explicitly to Courts that Clean-up Costs Are Covered Damages

Insurance companies, including, in some instances, some of the defendants in this case, have themselves argued successfully that government-mandated clean-up costs are covered "damages." See, e.g., Upjohn v. New Hampshire Ins. Co., 444 N.W.2d 813 (Mich. 1989), app. gr. motion gr., 435 Mich. 862 (1990) ("Upjohn"); Compass Ins. Co. v. Cravens, Dargen & Co., 748 P.2d 724 (Wyo. 1988) ("Compass"); U.S. Fidelity and Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988) ("Thomas Solvent")[6]; Centennial Ins. Co. v. Lumbermens Mut. Casualty Co., 677 F. Supp. 342 (E.D. Pa. 1987) ("Centennial"); Federal Ins. Co. v. Emery Mining Corp., No. 86-C-696G (D. Utah Aug. 31, 1989) (reprinted in Mealey's Lit. Rpts. -- Ins. Sept. 26, 1989 at F-1) ("Emery Mining").[7]

For example, Hartford Accident & Indemnity Company ("Hartford"), a defendant in this case, First State Insurance Company ("First State"), and Twin City Fire Insurance Company ("Twin City"), are members of the Hartford Insurance Group. In Upjohn, First State successfully argued before a Michigan state appellate court, that clean-up costs constitute covered damages.

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6. U.S. Fidelity & Guaranty Company is a defendant in this action.

7. See Griffin Aff., Exh. 4.

In so doing, it relied upon a number of pro-policyholder decisions. First State was joined in arguing for insurance coverage for clean-up costs by John Russell Butler, representing the London Market defendants who also are defendants in this case.

Despite the positions taken in Upjohn, Hartford and the London Market defendants now are attempting to avoid their insurance coverage obligations by denying insurance coverage for clean-up costs.[8]

2. Illinois Law Precludes the Insurance Company Defendants From Asserting Inconsistent Positions Before This Court

Litigants should not be permitted to take whatever position suits them at the time, only to change their story as they move from courtroom to courtroom. The courts of this State have long held that the doctrine of judicial estoppel precludes a party from asserting a position to a court which is inconsistent with a position successfully presented by that party in a prior judicial proceeding. In Garden City Sand Co. v. Christley, 289 Ill. 617, 124 N.E. 729 (1919), the Illinois Supreme Court held that a party could not argue in one action that property was owned by a debtor and held in trust by the creditor and in a subsequent action argue that the property was actually owned by the creditor. The Court stated that the party:

> cannot blow hot and cold on that question. Having recovered [on the ground that the

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8. First State eventually repudiated many of the pro-policyholder positions it originally took and obtained a dismissal "*ab initio*" from the trial court.

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> property belonged to the debtor] it will not now be heard to say that the property belonged to [the creditor].

124 N.E. at 730.

Since Garden City Sand, Illinois courts have, on numerous occasions, denied litigants the license to take contradictory positions according to their pecuniary interests at the moment. See, e.g., Finley v. Kesling, 105 Ill. App. 3d 1, 433 N.E.2d 1112 (1st Dist. 1982) ("Finley"); Coe, 112 Ill. App. 3d 506; Mijatov v. Graves, 188 Ill. App. 3d 792, 544 N.E.2d 809 (2d Dist. 1989), appeal denied, 129 Ill. 2d 565, 550 N.E.2d 558 (1990) ("Mijatov").

In Mijatov, the court held that the plaintiff was judicially estopped from arguing that her injuries were sustained outside the scope of her employment where, in a previous action, she had gained a favorable settlement by arguing that she sustained her injuries during the course of her employment. The court reasoned that **"the judicial estoppel doctrine was designed to promote the truth and prevent litigants from deliberately shifting positions to suit the exigencies of the moment."** 544 N.E.2d at 812 (citing Coe, 112 Ill. App. 3d at 510).[9]

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9. Judicial estoppel does not require that the party invoking the doctrine be the same as the party against whom the prior inconsistent position was asserted. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982).

In Goldstein v. Scott, 108 Ill. App. 3d 867, 439 N.E.2d 1039 (1st Dist. 1982), the prior assertion was made in a separate litigation in federal court against a third party which was distinct from the defendant in the subject litigation. The court, however, did not let this absence of privity prevent application of judicial estoppel. Rather, the court confirmed the principle that "[w]hen a party assumes a certain position in (continued...)

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Allowing insurance companies to argue that clean-up costs are not damages in this case after they succeeded in arguing that cleanup costs are damages would violate the public policy of this State. Such conduct gives the appearance of control and manipulation of the judiciary, and should not be tolerated.

Thus, defendants Hartford and London Market should be estopped from denying insurance coverage here, since they previously have contended with success that clean-up costs are covered damages.

3. **The Regulatory and Drafting History and Sworn Testimony of Insurance Company Representatives Demonstrate That The Insurance Industry Intended That Clean-up Costs Are Covered Damages**

Many courts have noted, and most insurance companies now concede, that the term "damages" as used in the CGL insurance policies at issue is standard language developed by industry drafting committees.[10] These drafters left behind an enormous written "regulatory and drafting history" of their deliberations and their contemporaneous interpretations of the meaning of the language employed. Courts that have examined the regulatory and

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(...continued)
a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position." 439 N.E.2d at 1043. (citations omitted).

10. For a discussion of the regulatory and drafting history and background of the industry's standard comprehensive liability policy language, see American 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); Shell Oil Co. v. Accident & Casualty Ins. Co. of Winterthur, No. 278953 (Cal. Sup. Ct., San Mateo Cty., July 13, 1988). Griffin Aff., Exh. 5.

drafting history have found overwhelming support for the fact that the insurance industry intended to cover cleanup costs as damages.

For example, after a lengthy trial during which detailed testimony and documentary evidence on underwriting intent was introduced, the court in Shell Oil Co. v. Accident & Casualty Insurance Co. of Winterthur, No. 278953 (Cal. Sup. Ct. San Mateo Co. July 13, 1988) ("Shell"), held that clean-up costs were covered.[11] In so doing, the Shell court expressly "relie[d] on the testimony of numerous underwriters and drafters of insurance provisions, that there can be insurance coverage for clean-up costs . . ." Shell, slip op. at 76 (citations omitted), Griffin Aff., Exh. 5. See also Just v. Land Reclamation, Ltd., 456 N.W.2d 570 (Wis. 1990) (where the Supreme Court of Wisconsin relied heavily on drafting history in finding coverage for environmental liability).

Moreover, the drafting history associated with the industry-wide 1970 qualified "pollution exclusion" also contradicts defendants' present assertion that the scope of insured "damages" does not include clean-up costs. The "pollution exclusion" was developed for use in standard form liability insurance policies, and was first discussed at an

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11. At issue in that case, among other things, were the insurance policies sold by the London Market. The "London Market" refers to Certain Underwriters at Lloyd's and London market insurance companies and includes certain of the insurance company defendants herein. On this issue, the London Market policies are indistinguishable from the standard form CGL insurance policies at issue herein.

Insurance Rating Board meeting held on October 28, 1969.[12] That standard form "pollution exclusion" is contained in some of the insurance policies that insurance companies in this case sold after 1972. The minutes of that meeting reveal insurance statements that "**damages, including the cost of clean-up**, may be catastrophic" in connection with offshore oil spill incidents, and that consideration should be given to excluding such claims from liability coverage. Thus, before 1970, the insurance industry explicitly recognized that the existing standard liability insurance policy language provided insurance coverage for environmental clean-up costs. This admission is an explicit recognition that after 1970, to the extent that pollution-related liabilities in general remained covered, clean-up costs remained covered as well.

4. Insurance Companies Have Argued to Congress That Clean-up Costs Are Damages

In addition to the representations to courts and state regulatory agencies noted above, the insurance industry told the Congress of the United States, in no uncertain terms, that clean-up costs <u>are damages</u>. For example, the American Insurance Association ("AIA"), the insurance industry's principal lobbying organization and frequent sponsor of pro-insurance industry and

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12. For further discussion of regulatory and drafting history showing that "damages" was never a word of limitation, <u>see</u> Bradbury, "Original Intent, Revisionism, and the Meaning of the CGL Policies," <u>Environmental Claims Journal</u>, Vol. 1, No. 3, 1989, 279, 287-90; Kalis, "Forum Non Conveniens: A Case Management Tool for Comprehensive Environmental Insurance Coverage Actions?" 92 W. Va. L. Rev. 391, 409-10 n.74 (Winter 1989-90). Bradbury and Kalis are attorneys who represent policyholders in insurance coverage actions.

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anti-policyholder briefs, submitted a proposal to Congress which treated clean-up costs and damages synonymously.[13]

In addition, Leslie Cheek, III, a vice president of the Crum & Forster Insurance Companies told the United States Senate in 1980 that, if Congress enacted S 1480 (the bill that later became CERCLA), insurance companies would face the large and unpredictable burden of payment of "remedial action" costs as mandated by the Senate's version of the bill:

> Determination as to whether such costs are reasonable or necessary is entirely out of the hands either of the discharger or his insurer, but his liability for them is virtually absolute.

96 Cong. Rec. S. 12918 (daily ed. Sept. 18, 1980).[14]

The above-noted evidence of drafting and regulatory history, sworn testimony, and internal industry documents demonstrates quite clearly that the insurance industry, itself, has characterized clean-up costs as "damages." Thus, such costs are covered. Now, however, defendants are seeking to avoid their obligations. As a United States district judge has said in another insurance coverage context:

> **With the growth of claims that have taken years to manifest themselves and the size of the class of potential claimants, many insurance companies faced with such claims have run for cover rather than coverage.**

Sandoz, Inc. v. Employer's Liab. Assur. Corp., 554 F. Supp. 257, 258 (D.N.J. 1983) (emphasis added). The insurance company

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13. See, e.g., Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co., Inc., 842 F.2d 977 (8th Cir.) (en banc), cert. denied, 488 U.S. 821 (1988).

14. See Griffin Aff., Exh.6.

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defendants here should not be allowed to behave in such a way before this or any court.

Point II.

AT A MINIMUM, THE STANDARD FORM CGL INSURANCE POLICIES AT ISSUE ARE AMBIGUOUS AND SHOULD BE CONSTRUED IN FAVOR OF COVERAGE

A. The CGL Policies At Issue Are Inherently Ambiguous With Respect To Choice Of Law

Standard form CGL insurance policies are silent regarding choice of law. Thus, they are inherently ambiguous on their face with respect to this issue. Moreover, as discussed above, supra,[15] insurance companies, under numerous self-serving "theories," have taken multiple inconsistent positions regarding choice of law, arguing at various times to courts throughout this country that the standard form CGL insurance policy should be interpreted to apply the law of the state in which: (i) the policyholder's principal place of business is located;[16] (ii) the insurance policy was delivered to the broker;[17] (iii) the premiums were paid;[18] or (iv) the underlying liability arose.[19] The inability of insurance companies to articulate a single, consistent choice of law position in parallel factual situations

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15. See discussion at pages 6-8 herein.

16. Id.

17. See American Motorists Ins. Co. v. Levolor Lorentzen, Inc., D.C. Civ. A. No. 88-1994 (3rd Cir. July 11, 1989), Griffin Aff., Exh. 7.

18. See Carrier Corp. v. The Home Ins. Co., No. CV 88-352383S, Memorandum of Decision Re Choice Of Law (Ct. Sup. Ct. July 15, 1994), Griffin Aff., Exh. 8.

19. See Sharon Steel Corp. v. Aetna Cas. & Sur. Co., Nos. C-87-2306, C-87-2311, Memorandum Decision (Utah Dist. Ct. July 20, 1988), Griffin Aff., Exh. 9.

underscores the fact that the insurance policies at issue are ambiguous regarding choice of law.

B. At A Minimum, The Term "Damages" Is Ambiguous And Must Be Construed In Favor Of Providing Insurance Coverage

As was the case with respect to the issue of choice of law, and as demonstrated above, the insurance industry has asserted several conflicting interpretations of the term "damages." Thus, at a minimum, the term "damages" is ambiguous because it is susceptible to more than one reasonable interpretation.[20] The courts should not permit the insurance companies to take advantage of any potential ambiguity of the

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20. Under Illinois law, and the law of many other jurisdictions, the fact that courts have derived contradictory meanings from the same insurance policy language is proof of the ambiguity of that language:

> We think it is clear that the language in the policy in the instant case is ambiguous, **as demonstrated by the contrariety of the opinions of the courts where language in the policies involved is almost identical with the language in the policy before us.** And under the rule of law we must construe the policy in terms most favorable to the insured and against the company.

<u>O'Rourke v. Prudential Ins. Co.</u>, 294 Ill. App. 30, 13 N.E.2d 287, 288 (1st Dist. 1938) (emphasis added). <u>See also</u> <u>Cohen v. Erie Indem. Co.</u>, 432 A.2d 596, 599 (Pa. Super. 1981) (the "fact that several appellate courts have ruled in favor of a construction denying coverage, and several others have reached directly contrary conclusions, viewing almost identical policy provisions, itself creates the inescapable conclusion that the provision in issue is susceptible of more than one interpretation"); <u>Nabor v. Occidental Life Ins. Co.</u>, 78 Ill. App. 3d 288, 396 N.E.2d 1267 (1st Dist. 1979). <u>Accord</u> <u>Security Ins. Co. v. Houser</u>, 552 P.2d 308 (Colo. 1976) ("The division of opinion expressed by [conflicting] cases illustrates the ambiguity of the . . . clause."). <u>See generally</u> <u>Division of Opinion Among Judges on the Same Court or Among Courts or Jurisdictions Considering Same Questions, As Evidence That Particular Clause of Insurance Policy is Ambiguous</u>, 4 A.L.R. 4th 1253 (1981).

term "damages." Rather, the courts should require insurance companies to maintain a single, consistent interpretation of the term "damages" that fulfills the dominant underlying purpose of the insurance policy -- to indemnify the policyholder. This is so because insurance companies owe special duties of good faith and fair dealing to their policyholders which require that they place their policyholders' interests at least as high as their own. See, e.g., Roberts v. Western-Southern Life Insurance Co., 568 F. Supp. 536 (N.D. Ill. 1983).

Point III.

PUBLIC POLICY FAVORS FINDING INSURANCE COVERAGE IN THIS CASE

A. State Attorneys General And Other Public Entities Unanimously Support Insurance Coverage For Clean-up Costs

In numerous cases throughout the country, the United States Department of Justice, the Environmental Protection Agency and their counterparts in state government, as well as state, county and city officials, have argued forcefully that CERCLA clean-up costs are "damages because of property damage." These entities, charged with protecting and promoting the public interest, have unanimously stated that a ruling in favor of policyholders is correct as a matter of insurance policy interpretation, and is in the public interest. The United States Attorney General, as well as the Attorneys General of the States of California, Indiana, Iowa, Delaware, Pennsylvania, and Missouri, along with other public entities, have filed amicus briefs specifically supporting the policyholders' position urged here, that clean-up costs are covered damages. More than twenty-eight such briefs have been filed throughout the country.[21]

B. Public Policy Requires Upholding Insurance Coverage To Protect The Reasonable Expectations Of Policyholders

Comprehensive general liability insurance policies, such as those at issue herein, cover loss or damage caused by any event not explicitly excluded from insurance coverage. Reserve Ins. Co. v. Pisciotta, 640 P.2d 764, 769 (Cal. 1982) (en banc).

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21. Eugene R. Anderson et al., Environmental Insurance Coverage In New Jersey: A Tale Of Two Stories, 24 Rutgers L.J. 83, 110 n.130 (1992).

The purchaser of a CGL insurance policy intends, or reasonably expects, to receive insurance coverage for all unanticipated liabilities arising from its business, except those specifically and unambiguously excluded. Thus, policyholders expect to receive insurance coverage for clean-up costs. As the court in United States Fidelity & Guaranty Co. v. Specialty Coatings, 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1st Dist.), appeal denied, 127 Ill.2d 643, 545 N.E.2d 133 (1989), emphasized, a policyholder reasonably would expect clean-up costs to be covered:

> [a]n insured ought to be able to rely on the common sense expectation that property damage within the meaning of the policy includes a claim which results in causing him to pay sums of money because his acts or omissions affected adversely the rights of third parties.

Id. at 392 (quoting Thomas Solvent, 683 F. Supp. at 1168).

Insurance companies make their profits by accepting risk of unknown liability, and they are uniquely situated to allocate and distribute societal risks through the economy with maximum efficiency. See R. Keeton, Insurance Law -- Basic Text § 1.2(b), at 6-7 (1971). Both the language of insurance policies and the social policy function of insurance in general militate against any effort to shift back onto the policyholders all of the risks of statutorily-mandated clean-up costs. If the insurance industry does not participate in the environmental clean-up effort, private and public sector policyholders will have to bear the burden of unexpected hazardous waste liabilities alone, notwithstanding the fact that they paid the insurance companies millions of dollars in premiums to accept the risk that

these, and other then nonexistent liabilities, would arise. Such a result would violate the public policy objective of upholding policyholders' reasonable expectations of insurance coverage and should therefore not be reached by this Court.

Moreover, it is virtually uncontroverted that the primary purpose of insurance is to insure (or to provide indemnity). See 13 Appleman, Insurance Law & Practice, Section 7903, at 302-03 (1976). Thus, in addition to interpreting ambiguous policy language in favor of coverage where a conflict of law actually exists, a court should apply the law of the state that will permit insurance coverage on any given issue, where to do otherwise would result in the forfeiture of insurance coverage. Insurance companies should do the same when confronted with requests for coverage by their policyholders that raise choice of law issues.

C. Public Policy Favors The Swift And Efficient Mitigation Of Environmental Damage

If policyholders are denied insurance coverage for complying with orders to pay for prompt, privately-financed clean-up activities, the inevitable result will be needless litigation, greatly increased clean-up costs, and delay in critical remedial action. Public policy favors the swift and efficient mitigation of environmental damage. This very significant public policy concern was articulated by the court in Intel Corp. v. The Hartford Accident & Indemnity Co., 692 F. Supp. 1171 (N.D.Cal. 1988), aff'd in part, rev'd in part, 952 F.2d 1551 (9th Cir. 1991):

> The EPA and Congress have recognized that even with increased appropriations, industry cooperation is essential to begin to combat the nation's hazardous waste problem. **Prospects for PRP cooperation would be undermined if insurer's contributions are made contingent on a government clean-up first, followed by a judgment against the insured, and then a claim against the insurer.**

Id. at 1193 (emphasis added).[22]

There is no basis for denying insurance coverage to policyholders because they act responsibly and expend monies to comply with governmental clean-up orders. Such a result is contrary to public policy and is not supported by the insurance policy language, the case law, the positions taken by insurance companies in other insurance coverage cases, or the insurance industry's own regulatory and drafting history.

D. Public Policy Demands That The Insurance Policies Be Construed In Favor Of Insurance Coverage On Choice Of Law

In summary, insurance companies should not be permitted to profit from any ambiguous insurance policy language. As their

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22. Insurance companies typically argue that construing "damages" to include cleanup costs would eliminate the incentives for the prevention of pollution. This argument is basically anti-insurance. Insurance is sold to cover unintended damage caused by policyholders. Most of the courts that have considered the public policy implications of the "damages" issue have rejected this argument. See FMC Corp. v. Liberty Mut. Ins. Co., No. 643058, slip op. at 14-15 (Cal. App. Dep't Super. Ct. Jan. 3, 1989), appeal pending, Griffin Aff., Exh. 10; see also Thomas Solvent, 683 F. Supp. at 1159-60 n.4, for reasons that conclusively reject the view that public policy is best served by forcing companies, through restrictive interpretations of insurance policies, to "internalize" pollution control costs. In fact, as shown by all of the sites at issue here, a policyholder can be vicariously liable under CERCLA or similar statutes like the Illinois Act for the acts of independent third parties. See United States v. Conservation Chem. Co., 589 F. Supp. 59, 61-62 (W.D. Mo. 1984).

history of inconsistent positions demonstrates, the insurance companies have attempted to use ambiguities in their insurance policies to avoid their insurance coverage obligations. Such conduct violates the fundamental purpose of the insurance policies -- to insure. It is also violative of the public trust held by the insurance industry as recognized by the court in Roberts v. Western-Southern Life Insurance Co., 568 F. Supp. 536 (N.D. Ill. 1983):

> The insurers' obligations are . . . rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements. . . ." The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary. Insurers hold themselves out as fiduciaries, and with the public's trust must go private responsibility consonant with that trust. Furthermore, the relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position.

Id. at 554 (quoting Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 620 P.2d 141 (Cal. 1979), cert. denied, 445 U.S. 912 (1980)).

In light of the foregoing, this Court should reject the insurance companies' attempt to be governed by concepts of financial expediency in interpreting the standard form language of the CGL insurance policies at issue.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* respectfully requests that this Court reverse the ruling of the Court below.

Dated: September 13, 1996

Respectfully submitted

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PROOF OF SERVICE

I hereby certify that I caused a copy of the foregoing Brief of *Amicus Curiae* United Policyholders In Support Of Plaintiff-Appellant Maremont Corporation's Appeal from the Circuit Court of Cook County, Illinois to be placed in an envelope and mailed by regular U.S. Mail postpaid to the following parties:

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT - DIVISION 3

MAREMONT CORPORATION, Plaintiff-Appellant vs. EDWARD WILLIAM CHESIRE, et al., Defendants-Respondents	No: 96-0146

On Appeal From The Circuit Court of Cook County Illinois, The Honorable Chief Justice J. Dunne, Presiding

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

TARA A. GRIFFIN, being duly sworn, deposes and says:

1. I am a member of the law firm of Anderson Kill & Olick, P.C., counsel for amicus curiae, United Policyholders. I have personal knowledge of the following matter and if sworn as a witness, could competently testify thereto.

2. I submit this affidavit in support of United Policyholders' motion for leave to file a brief in support of Plaintiff-Appellant Maremont Corporation's appeal.

3. The purpose of this affidavit is to describe and submit documents cited by United Policyholders in its Memorandum of Law.

4. I hereby attest that attached as Exhibits 1 through 10 hereto are true and correct copies of the following documents obtained from the public records of the courts and of the public records of Congress:

1. FMC Corporation v. Liberty Mutual Insurance Co., No. 643058, Memorandum Decision And Order Re Motion For Summary Adjudication On The Issue Of Late Notice (Cal. Super. CT. December 15, 1988).

2. Segua Corporation v. Aetna Casualty And Surety Co., No.89-234-JRR, Memorandum Opinion (D. Del. January 18, 1990).

3. United National Insurance Co. v. Dunbar & Sullivan Dredging Co., No. 89 C 8922, 1990 WL 139269, Memorandum Opinion And Order (N.D. Ill. September 17, 1990).

4. Federal Insurance Co. v. Emery Mining Corporation, No. 86-C-0696G, Memorandum Decision And Order (D. Utah August 31, 1989).

5. Shell Oil Co. v. Accident & Casualty Insurance Co. of Winterthur, No. 278953, Tentative Decision Concerning Phase I Issues (Cal. Sup. Ct., San Mateo Cty. July 13, 1988).

6. 96 CONG. REC. S12918 (daily ed. Sept. 18, 1980) (statement of Leslie Cheek, III).

7. American Motorists Insurance Co. v. Levolor Lorentzen, Inc., D.C. Civ. A. No. 88-1994 (3rd Cir. July 11, 1989).

8. Carrier Corporation v. The Home Insurance Co., No. CV 88-352383S, Memorandum of Decision Re Choice Of Law (Ct. Sup. Ct. July 15, 1994).

9. Sharon Steel Corporation v. Aetna Casualty & Surety Co., Nos.C-87-2306, C-87-2311, Memorandum Decision (Utah Dist. Ct. July 20, 1988).

10. FMC Corporation v. Liberty Mutual Insurance Co., No. 643058, Memorandum of Intended Decision on Motion of Certain Defendants for Adjudication that CERCLA Clean-Up Costs Do Not Constitute Damages (Cal. Sup. Ct., Santa Clara Cty. January 3, 1989).

TARA A. GRIFFIN

Sworn to before me this
12th day of September, 1996

Notary Public

NAOMI JONES
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