No. 16-638 TWENTY-SIXTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

RADIATOR SPECIALTY COMPANY, Plaintiff, v. FIREMAN'S FUND INSURANCE COMPANY *et al.*, Defendants.	))))))))))	<u>From Mecklenburg County</u> No. 13 CVS 2271

****

BRIEF OF PROPOSED *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT RADIATOR SPECIALTY COMPANY

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INTRODUCTION

In this brief, United Policyholders ("UP") seeks to fulfill the "classic role of *amicus curiae* by assisting 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. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators often have stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stem, E. Greggnian & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603 608 (1984)).

UP supports the position of Radiator Specialty Company ("RSC") that the terms of the standard commercial general liability ("CGL") policy compels "all sums" allocation. UP writes separately to bring to the Court's attention the extensive drafting history of the insurance industry, which confirms that the standard CGL policy, once triggered by injury or damage happening during the policy period, is intended to provide coverage for a policyholder's liability in full up to the policy limits, rather than some lesser, prorated amount :

> 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.

Charles Berryman & Richard Ingegnesi, Memorandum of Meeting of Discussion Group, Asbestosis, held under the auspices of the American Mutual Insurance Alliance and American Insurance Association (May 20, 1977).[1]

FACTUAL BACKGROUND

UP adopts and incorporates the Statement of Facts contained in Appellant RSC's submissions.

ARGUMENT

I. "ALL SUMS" IS THE APPROPRIATE ALLOCATION RULE

(a) The Primary Goal of North Carolina Courts Is To Discern The Intent Of The Drafters, Which Compels Application of the "All Sums" Rule

Like all other jurisdictions, North Carolina has clear rules of contract interpretation that apply to insurance contracts, many of which are consistent with those in other jurisdictions. This Court's interpretation of the allocation provisions in this case could have far-reaching implications in other jurisdictions, since such language was in wide use in CGL form policies for decades.

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[1] Quoted in Lorelie S. Masters, Jordan S. Stanzler & Eugene R. Anderson, Insurance Coverage Litigation at § 4.07[A][2], at 4.128-4.129 (Wolters Kluwer Law & Business, 2000 & Supp. 2015) (hereafter "Masters, Stanzler & Anderson") (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).

The Court's "primary goal in interpreting an insurance policy is *to discern the intent of the parties* at the time the policy was issued." *Register v. White*, 358 N.C. 691, 695 (2004) (internal citations and quotations omitted) (emphasis added). Provisions in an insurance policy that grant coverage must be construed liberally so as to afford coverage to the policyholder whenever possible through reasonable construction of the policy language. *See State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249, 254 (4th Cir. 2003) (citing *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 702 (1992)). "If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.'" *Register*, 358 N.C. at 695 (internal quotations and citations omitted).

The trial court's ruling that "pro rata allocation most reasonably interprets the policy language in the subject policies," (R pp 267-268), cannot be squared with North Carolina's cannons of construction. Notwithstanding the violence that "pro rata" allocation does to the plain language of the standard CGL policy, or at the very least, the error in not construing any perceived ambiguity in favor of RSC, *amicus* addresses herein the well-documented record of the intent of the drafters of the standard CGL form, which necessitates reversal of the trial court's "pro rata" determination.

This historical record shows that the insurers and 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.

The drafters of the standard general liability insurance forms[2] clearly understood that the promise to indemnify "all sums" required insurance companies

[2] 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 to engage 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.

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 1966 form CGL insurance policy and Assistant Counsel of Liberty Mutual Insurance Company, told an insurance industry conference in 1965 that more than one policy period could be 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 Masters, Stanzler & Anderson at § 4.07[A][2], at 4.128-4.129). 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:

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.*, 913 P.2d 878, 891 (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.

> [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.

Masters, Stanzler & Anderson at§ 4.07[A][2], at 4.127.

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:

> 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. *See* May 20, 1977 Memorandum of Meeting of Discussion Group, Asbestosis, *supra* p. 2.

The policy provisions governing trigger and allocation remained the same in the revised 1973 form. In the late 1970s, an effort emerged to draft a proration formula for the standard CGL policy when a number of insurance companies renewed concerns that the policy language in the 1973 CGL Form was "not desirable because it pyramids the limits available to the insured for losses resulting from continuous or repeated exposures over multiple policy periods." Graham Boyd, Jr., ISO "Memorandum to Members of the General Liability Rules and Forms Committee," at 5 (Apr. 18, 1978) (enclosing minutes of March 28, 1978 meeting) (quoted in Masters & Stanzler § 4.07[A][2], at 14.130-14.131).

As shown in meeting minutes, the April 21, 1977 meeting of the Enterprise Liability Study Group (the "discussion group" created by the insurance industry to discuss the industry's response to potential asbestos-related liabilities) concluded that each insurance policy triggered by continuing injury or damage may be liable in full to pay for the policyholder's liability with no proration of limits:

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

Charles Berryman & Richard Ingegneri, Memorandum of Meeting of Discussion Group – Asbestosis 1 (May 20, 1977) (quoted in Masters & Stanzler at § 4.07[A][2], at 14-130) (emphasis added in quotation from Masters & Stanzler).

Thus, the industry's Enterprise Liability Study Group recognized that in the asbestos injury context each insurer's standard CGL policy during any part of the extended period of an asbestos-related injury claim "could be fully responsible for the cost of defense and loss" for that claim. In March 1978, the members of the industry's General Liability Rules and Forms Committee again recognized that the then-current standard CGL policy language was "not desirable because it pyramids the limits available to the insured for losses resulting from continuous or repeated exposures over multiple policy periods." As the minutes of this industry drafting committee reflect, however, the committee *again* declined to add proration language to the standard CGL form or otherwise to prevent the perceived "pyramiding" of limits problem in the context of asbestos and other long-tail claims.

Thus, the drafting history shows that the insurance industry consistently refused to implement pro rata allocation that they now advocate; this after collecting premiums for decades knowing that the forms provided broader "all sums" coverage.

(b) Pro-Rata Allocation Schemes Are Unfair, Unworkable And Cause Unnecessary Complication.

The trial court's vague disapproving public policy reference to "further procedures inherent in the all sums approach" appears to relate to the insurers' argument that adoption of all sums encourages "serial litigation" if insurers who are targeted to pay have the right to sue other potentially available insurers in a separate "equitable contribution" action. (R pp 200-01, 268). The trial court concluded that pro rata "appropriately and judiciously addresses the factors that are generally encountered where there are multiple coverages addressing progressive disease claims," and recognized that "implicit" in its ruling was that RSC would be liable for, *inter alia*, "insolvent or lost policies, as well as periods where RSC was uninsured, underinsured or self-insured." *Id.* at 268. The suggestion that a policyholder should receive less than the amount promised to it by contract, and for which it paid, to avoid the alleged inefficiency of a subsequent equitable reckoning among insurers is not grounded in North Carolina's public policy and is suspect.

Further, the notion that pro rata is the more "judicious" approach also is belied by experience and common sense, and ignores not only policyholders' interests but also the insurance policy language which the insurance industry drafted, to which all parties agreed, and on which premiums were collected. 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, 994-95 (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 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. Am. Home Assur. Co.*, 704 F.3d 89 (2d Cir. 2012).

As an initial matter, any attempt to prorate defense costs, such as the costs of defending the claims that have been brought against RSC, 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. 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 were added to virtually all general liability insurance policies in 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).

<u>Method for Pro-Rating Liabilities</u>. *Pro rata* jurisdictions have imposed numerous, inconsistent allocation formulas, since they inevitably ignore insurance policy language in favor of judicially-created attempts to do "equity." Indeed, one leading *pro rata* jurisdiction – New Jersey – has admitted that it follows a *pro rata* approach that "eliminate[s] reliance on particular contract language . . . and on traditional rules of interpretation[.]" *Spaulding Composites Co. v. Aetna Cas. & Sur. Co.*, 819 A.2d 410, 420 (N.J. 2003). The California Supreme Court has criticized several leading proration decisions as failing to base their analysis on contract language, instead having "strayed . . . in the direction of vague 'fairness' and rough 'justice.'" *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909, 925 n.14, 930 n.22 (Cal. 1997) (criticizing *General Acc. Ins. Co. v. State Dept. of Environ.*, 143 N.J. 462 (N.J. 1996); *Ins. Co. of N.A. v. Forty-Eight Insulations*, 633 F.2d 1212, 1224-25 (6th Cir. 1980); *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 140-42 (Utah 1997); *Owens-Illinois*, 650 A.2d at 995; *Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 372 (5th Cir. 1993)).

Because a *pro rata* method of allocation is not based on policy language, but is merely a creation of the judiciary, courts have fashioned numerous, inconsistent ways to implement a *pro rata* allocation. *See Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 312 (Mass. 2009) ("Determining the proper method for prorating losses raises a myriad of issues, which have caused courts to adopt several different pro rata allocation methods in cases involving long-tail claims."); *Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co.*, 774 N.E.2d 687, 695 (N.Y. 2002) ("[T]here are different ways to prorate liability among successive policies."); *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589, 600 (S.C. 2011) ("Pro rata theorists have developed several different methods for calculating each insurer's pro rata portion of the loss, each supported by its own notions of fairness[.]"). Indeed, some courts prorate liability based on the amount of time policies were in effect in comparison to the overall duration of the loss; others multiply the number of years the insurer provided coverage by the limits of the policies and hold that each insurer is liable for that portion of the liability corresponding to the ratio of total coverage provided by that insurer to the total coverage provided by all the policies in effect; and still others prorate coverage based on the proportion of injuries suffered during relevant policy periods. *See generally Consol. Edison Co.*, 774 N.E.2d at 695 (listing numerous inconsistent *pro rata* formulae that courts have imposed). The inconsistency among *pro rata* authorities illustrates that these cases are not enforcing an allocation method set forth in policy language. Instead, *pro rata* courts have invented extra-contractual approaches to match their own views of fairness.

The end result of such efforts, however, would be to deprive North Carolina policyholders of coverage they would have under the promise to pay all sums, and burden the courts with additional, time-consuming litigation between policyholders and their insurance companies.[3]

II. CONCLUSION

United Policyholders respectfully urges this Court to reverse the Superior Court's decision on allocation.

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[3] Sirius America's contention that *pro rata* allocation is the "overwhelming trend" is incorrect. R pp 193-94. At least thirteen states apply "all sums" (though Sirius America cites only eight in its motion. *Id.* Further, as discussed, so-called *pro rata* jurisdictions are in fact imposing numerous, inconsistent allocation formulae.

Respectfully submitted this 12th day of September, 2016.

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for *Amicus Curiae* certifies that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, index, table of authorities, case caption, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 12th day of September, 2016.

Electronically Submitted
R. Steven DeGeorge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing on counsel of record by depositing a copy, contained in a first-class mail postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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