

IN THE
INDIANA SUPREME COURT
CAUSE NO. _____

HARSCO CORPORATION,) Court of Appeals No. 21A-PL-02483
)
Plaintiff/Appellee,) Appeal from the Marion County, Indiana
) Superior Court
v.)
) Trial Court No.
SCOTTSDALE INSURANCE) 49D01-1001-PL-002227
COMPANY, <i>et al.</i> ,)
Defendants/Appellants.) The Honorable Heather Welch, Judge
)

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF UNITED
POLICYHOLDERS AND ASSOCIATED GENERAL CONTRACTORS OF
INDIANA IN SUPPORT OF APPELLEE HARSCO CORPORATION AND
REVERSAL OF THE COURT OF APPEALS**

Pursuant to Ind. R. App. P. 41, *amici curiae* United Policyholders and Associated General Contractors of Indiana (“AGC of Indiana”) respectfully request leave of this Court to file an *amicus* brief in support of Appellee Harsco Corporation (“Harsco”). United Policyholders’ and AGC of Indiana’s proposed brief is attached as Exhibit A. In support of this motion, United Policyholders and AGC of Indiana state:

1. United Policyholders is a unique non-profit, tax-exempt, charitable organization founded in 1991 that educates and assists individual and business consumers on insurance matters and works to secure the loss indemnity objective for which people buy insurance. United Policyholders monitors legal developments

in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. United Policyholders helps preserve the integrity of the insurance system by advocating for fair sales and claims practices. Grants, donations and volunteers support the organization's work. United Policyholders does not accept funding from insurance companies.

2. In furtherance of its mission, United Policyholders cautiously chooses cases and regularly appears as amicus curiae in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. United Policyholders has been advocating for insureds' rights in the courts for decades. Since 1991 United Policyholders has filed amicus curiae briefs in federal and state appellate courts across 42 states and in over 450 cases. Amicus briefs filed by United Policyholders have been expressly cited in the opinions of state supreme courts as well as the U.S. Supreme Court. See *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014). UP's amicus brief has also been referenced by the Indiana Court of Appeals in *Commonwealth Land Title Ins. Co. v. Robertson*, 5 N.E.3d 394 (Ind. Ct. App. 2014).

3. American General Contractors of Indiana ("AGC of Indiana") is a chartered chapter affiliate of AGC of Indiana. AGC of Indiana is an association of commercial and industrial general contractors, specialty contractors, and supply and service firms, with 91 contractor members. The mission of AGC of Indiana is to

be the voice of construction and the recognized leader in providing education, training, resources, and advocacy for its members. On issues of importance to the construction industry and market, AGC of Indiana advocates sound public policies on behalf of its members in legislative and regulatory forums and files amicus curiae briefs in significant cases.

4. United Policyholders and AGC of Indiana seek to file a brief as *amici curiae* addressing the harmful consequences of the Court of Appeals' holding below that the policy language at issue should not be interpreted pursuant to Indiana's normal rules of policy interpretation. Under those normal rules, ambiguous policy language is construed "to further the policy's basic purpose of indemnity", *G&G Oil Co. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 87 (Ind. 2021). The Court of Appeals held that the policy should instead be interpreted from a "neutral stance." Slip Op. at 19, ¶31. The Court of Appeals' reason for this holding is that Appellee Harsco, who is an "additional insured" under a policy sold by Appellant Scottsdale Insurance Company ("Scottsdale") to Metro Elevator Company, Inc. ("Metro"), did not pay the premiums directly to Scottsdale.

5. As set forth more fully in the attached brief, the Court should reject this "neutral stance" rule. For more than a century, Indiana courts have construed insurance policies "liberally, so as to give it effect rather than to make [them] void", *Northwestern Mut. Life Ins. Co. v. Hazelett*, 4 N.E. 582, 584 (Ind. 1886). But in *Indiana Lumbermens Mutual Insurance Company v. Statesman Insurance Company*, 260 Ind. 32; 291 N.E.2d 897 (Ind. 1973), this Court—for the first and only

time in its history—deviated from this rule. There, because “[t]he party claiming to be an insured...never paid a penny’s premium to the insurer...”, *Lumbermens* reasoned that “[w]e are therefore not in a situation where we must construe the contract language any certain way and can seek out the general intent of the contract from a neutral stance.” 260 Ind. at 34.

6. This deviation from the normal rules of policy interpretation is not sound policy. It fails to encourage insurers to draft clear policy language. It has led to inconsistent application by lower courts. And it bases rules of policy interpretation on what is often happenstance or commercial convenience—which party in a complex commercial relationship made the payment directly to the insurer. No other states have adopted the “neutral stance” rule, and this Court has never again followed it.

7. In detailing the society-widen negative impacts of the neutral stance rule, United Policyholders and AGC of Indiana seek to fulfill the classic role of *amici curiae*, in a case of general interest: supplementing the efforts of counsel and drawing the Court’s attention to issues that may otherwise escape consideration. This is an appropriate role for *amici curiae*. As commentators have stressed, *amici* are often in a superior position to “focus the court’s attention on the broad implications of various possible rulings.” R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice, 570-71 (1986) (*quoting* Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)).

Dated: January 5, 2023

Respectfully submitted,

/s/ Gregory M. Gotwald

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VERIFICATION

I affirm under the penalties for perjury that the foregoing factual representations are true.

/s/ Gregory M. Gotwald

CERTIFICATE OF SERVICE

I certify that on January 5, 2023 the foregoing brief was filed through the Indiana E-filing System (“IEFS”) and was served electronically to counsel of record. All e-filed documents are deemed served when they are electronically served through the IEFS in accordance with Rule 68(F)(1).

/s/ Gregory M. Gotwald