IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 22-848

WESTFIELD INSURANCE COMPANY,

Petitioner,

v.

SISTERSVILLE TANK WORKS, INC., ROBERT N. EDWARDS, E. JANE PRICE, individually and as Executor of the ESTATE OF ROBERT G. PRICE, DOUGLAS STEELE, CAROL STEELE, GARY THOMAS SANDY, PEGGY SANDY, REAGLE & PADDEN, INC. and DAVID C. PADDEN,

Respondents.

From the United States Court of Appeals for the Fourth Circuit,
Case No. 20-2052

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT SISTERSVILLE TANK WORKS, INC.

Todd A. Mount (WVSB# 6939)
SHAFFER & SHAFFER PLLC
330 State Street, P.O. Box 38
Madison, West Virginia 25130
(304) 369-0511
tmount@shafferlaw.net

Courtney C.T. Horrigan*
Dominic I. Rupprecht*
Zachary S. Roman*
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, Pennsylvania 15222
(412) 288-3131
chorrigan@reedsmith.com
drupprecht@reedsmith.com
zroman@reedsmith.com
**Pro Hac Vice* Motion Filed

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INTEREST OF *AMICUS CURIAE*[1]

Effectuating the purpose of insurance and interpreting insurance contracts requires special judicial handling. United Policyholders ("UP") seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists West Virginia businesses and residents through three programs: Roadmap to Recovery® (disaster recovery and claim help), Roadmap to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of policyholders). UP hosts on its website a library of informational publications and videos related to personal and commercial insurance products, coverage, and the claims process. *See* United Policyholders Home Page, www.uphelp.org (last visited June 28, 2023). UP communicates with the West Virginia Insurance Commissioner, Allan L. McVey, on a regular basis during meetings of the National Association of Insurance Commissioners, where UP's Executive Director, Amy Bach, Esq., serves as an official consumer representative.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as

[1] Pursuant to W. Va. R. App. P. 30, UP states that no counsel for any party authored this amicus curiae brief, in whole or in part, and no party or its counsel made a monetary contribution specifically intended to fund the preparation or submission of this amicus curiae brief.

amicus curiae in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for policyholders' rights in the courts for decades and has submitted amicus briefs in more than 500 cases, including before this Court in *State ex rel. Allstate Ins. Co. v. Madden*, 601 S.E.2d 25 (W. Va. 2004). UP's amicus briefs have been cited with approval in the U.S. Supreme Court and numerous state supreme courts. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 184 N.E.3d 203, 221 (Ill. 2021); *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, 1185–86 (Pa. 2014); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005).

UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped consideration. As commentators have stressed, an *amicus* is often in a superior position "to focus the court's attention on the broad implications of various possible rulings." Robert L. Stern *et al.*, Supreme Court Practice 570–71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

SUMMARY OF THE ARGUMENT

For decades West Virginia circuit courts have uniformly applied a "continuous" trigger of coverage to determine the amount of insurance available to respond to claims seeking damages for bodily injury or property damage of a progressive or deteriorating nature. *See U.S. Silica Co. v. Ace Fire Underwriters Ins. Co.*, No. 06-C-2, 2012 W.V. Cir. LEXIS 4449, at *30 (W. Va. Cir. Ct. Nov. 27, 2012) (applying continuous trigger to claims alleging injuries due to exposure to silica sand); *Wheeling Pittsburgh Corp. v. Am. Ins. Co.*, No. 93-C-340, 2003 W.V. Cir. LEXIS 3, at *42 (W. Va. Cir. Ct. Oct. 28, 2003) (applying continuous trigger to

environmental property damage claims). There is no basis to depart from these decisions, which are consistent with decisions from the clear majority of jurisdictions that have considered this issue, sound public policy, and the language of the at-issue policies.

Accordingly, this Court should take this opportunity to confirm prior precedent, and hold that in cases alleging continuous, progressive bodily injuries or property damage a "continuous trigger" of coverage applies, such that every occurrence-based liability insurance policy in effect from first exposure to the harmful agent through manifestation of the disease or damage must respond to the loss because the "bodily injury" or "property damage" (the trigger of coverage) takes place (or is at least alleged to have taken place) during each of those policy periods.

The continuous trigger coverage rule the District Court applied in this action was first adopted by courts around the country to respond to the tidal wave of litigation arising from progressive diseases caused by exposure to asbestos products and to ensure that funds remained available to compensate injured parties even as the liabilities and costs forced major asbestos producer defendants such as Johns-Manville Corp. into bankruptcy. But the rule has not been limited to that context. Courts have broadly applied the continuous trigger of coverage (sometimes called the triple trigger or multiple trigger) to respond to claims involving a variety of other injuries that develop and worsen over time, *i.e.*, "progressive injuries," including those arising from environmental property damage, Diethylstilbestrol ("DES") exposure, silica exposure, exposure to welding fumes, exposure to electromagnetic fields, noise-induced hearing loss, and others.

The continuous trigger coverage rule is rooted both in the language of "occurrence based" general liability insurance policies – such as those at issue in this case – and in the important public policy interest of maximizing available insurance proceeds to help respond to

mass torts and environmental contamination liabilities. By triggering coverage under all insurance policies in effect during the progression of the disease or environmental contamination, the continuous trigger coverage rule spreads the risk, minimizing the danger that insurance will be unavailable to respond to a given liability due to insurer or defendant insolvency or because a policyholder purchased an insufficient amount of insurance coverage in one given year to respond to catastrophic losses that occur over multiple policy periods.

The continuous trigger coverage rule further guards against the risk that the insurance industry will adopt an exclusion for a class of risks and then attempt to artificially telescope all liabilities for those risks into a policy year in which a coverage exclusion was in place. *See Wheeling Pittsburgh*, 2003 W.V. Cir. LEXIS 3, at *38–39 (citing *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1043, 1046–47 (D.C. Cir. 1981)). The insurance industry first used this tactic in response to the asbestos crisis, adopting asbestos exclusions on an industry-wide basis, and then arguing that even if the alleged disease began and developed in periods where that loss would have been covered, only the insurance policies in effect when the disease was diagnosed (inevitably after the exclusion had been introduced) were potentially triggered. This tactic was repeated with the wave of environmental liability lawsuits that followed the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act's ("CERCLA" or "Superfund Act") retroactive, joint-and-several, strict liability approach to environmental contamination. *E.g.*, *Travelers Indem. Co. v. MTS Transp., LLC*, No. 11-cv-01567, 2012 U.S. Dist. LEXIS 127847, at *47–50 (W.D. Pa. 2012) (summarizing history of the absolute pollution exclusion); Eugene R. Anderson *et al.*, Insurance Coverage Litigation § 15.03 (2d ed., 2023 Supp. 2000). And the insurance industry is now attempting a similar maneuver in response to claims for opioid addiction following the explosion of opioid-related

litigation. *See* Alexander Djazayeri, *The US Opioid Crisis and Its Impact on the Insurance Industry*, HDI Global Insurance Company (June 24, 2021), https://www.hdi.global/en-us/infocenter/insights/2021/the-us-opioid-crisis-and-its-impact-on-the-insurance-industry/.

Application of the manifestation trigger in these high profile, repetitive injury lawsuits would have undermined the availability of critical insurance coverage for significant classes of claims and allowed insurance companies to shift the enormous burden of these liabilities from the insurers to the policyholders – notwithstanding the premiums the policyholders paid to those insurers over multiple policy periods to assume the risk of liability lawsuits – and, due to the volume of claims and potential for bankruptcy, potentially leaving tort victims without compensation for their injuries.

In advocating for a new restrictive manifestation coverage trigger, Appellant Westfield Insurance Company ("Westfield") asks this Court to upend years of West Virginia precedent, undermine important state interests, put West Virginia corporate and individual residents at risk, and ignore the language and design of the occurrence-based insurance coverage it wrote. By arguing insurance coverage is triggered under general liability insurance policies only when the injury or damage becomes "manifest" or is discovered, rather than making insurance proceeds available for all policy periods from the time of first exposure, through development of disease, until manifestation, Westfield effectively asks this Court to convert the "occurrence-based" insurance coverage it wrote – coverage which was designed to trigger multiple insurance policies where damages develop and continue over multiple policy years – into "claims made" insurance coverage – which is designed to only respond to losses that actually manifest into claims during a single policy period.

Accepting Westfield's manifestation trigger and upending established case law supporting application of the continuous trigger to these types of injuries would have a cascade of negative effects: (i) it would deprive policyholders of the insurance they paid for; (ii) it would grant insurers like Westfield a windfall by allowing them to collect substantial premiums and then giving them a get-out-of-jail free card for risks and liabilities they agreed to cover; and (iii) it would undermine important state interests by imperiling the availability of insurance coverage to address critical needs, including compensating tort victims who have suffered serious illness due to exposure to chemicals, providing funds for the remediation of long-term environmental contamination, addressing the opioid crisis, and other significant harms.

Accordingly, UP respectfully requests that this Court reaffirm the long-standing precedent of West Virginia's circuit courts, which is consistent with the majority approach taken in courts across the country, and confirm that under occurrence-based liability policies a continuous trigger of coverage applies to claims arising from progressive bodily injury or property damage. *See U.S. Silica*, 2012 W.V. Cir. LEXIS 4449, at *30; *Wheeling Pittsburgh*, 2003 W.V. Cir. LEXIS 3, at *42.

STATEMENT OF THE CASE

UP adopts the Statement of the Case from the memorandum filed by Respondent, Sistersville Tank Works, Inc. ("STW").

ARGUMENT

The "'trigger of coverage' refers to the event which determines whether a liability insurance policy will cover a particular claim." *U.S. Silica*, 2012 W.V. Cir. LEXIS 4449, at *25. For trigger purposes, liability policies are typically written on either an "occurrence" or "claims made" basis. *See Auber v. Jellen*, 469 S.E.2d 104, 110 (W. Va. 1996). Claims-

made insurance policies are triggered by a claim made within the policy period. *Id.* Occurrence-based insurance policies, such as the general liability insurance policies at issue in this case, are triggered by bodily injury or property damage that occurs during the policy period, regardless of when a claim is actually made. *See id.*; *see also* Jeffrey W. Stempel & Erik S. Knutsen, Stempel and Knutsen on Insurance Coverage § 14.09[A][1] (4th ed., 2023-2 Supp. 2015). Thus, while a given injury can trigger only one claims-made policy, a loss that takes place over extended periods can trigger multiple occurrence-based insurance policies. *See Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 903–04 (Cal. 1995); 20-130 Appleman on Insurance Law & Practice Archive § 130.3 (2d 2011).

The question presented by this case is, under occurrence-based liability insurance policies, what insurance policy or policies are triggered when the underlying bodily injury or property damage occurs over multiple policy periods: (a) the continuous trigger, under which all insurance policies in place from first exposure to the harmful condition, through the progression of the resulting injury, and until manifestation of such injury, are triggered; or (b) the manifestation trigger, under which only the single insurance policy in effect when the bodily injury or property damage manifests is triggered.

The Court of Appeals for the Fourth Circuit correctly acknowledged that the question of which coverage trigger applies for claims seeking damages for bodily injury or property damage of a progressive or deteriorating nature is "a matter of exceptional importance" for this State, given the "long history of West Virginia housing a substantial chemical industry[.]" *Westfield Ins. Co. v. Sistersville Tank Works, Inc.*, No. 20-2052, 2022 U.S. App. LEXIS 31403, at *6–7 (4th Cir. Nov. 14, 2022). As will be addressed further below, application of the continuous trigger of coverage is supported both by the plain language of the occurrence-based insurance

policies at issue and sound public policy concerns. West Virginia's trial courts have uniformly adopted the continuous trigger in similar circumstances,[2] and it is the clear majority rule in jurisdictions nationwide.[3] The manifestation trigger, on the other hand, is the "distinctly minority rule," and contrary to both public policy and the terms of the policies themselves. *See* Anderson *et al.*, Insurance Coverage Litigation § 4.05[A]. Accordingly, this Court should reaffirm West Virginia's longstanding commitment to the continuous trigger of coverage rule for progressive injuries.

I. The Continuous Trigger of Coverage Is the Majority Rule Inside and Outside West Virginia for Progressive Injuries.

The continuous trigger of coverage has been uniformly employed by West Virginia circuit courts, the District Court in this case, and the majority of courts across the country for lawsuits alleging progressive injuries. *See U.S. Silica*, 2012 W.V. Cir. LEXIS 4449, at *30; *Wheeling Pittsburgh*, 2003 W.V. Cir. LEXIS 3, at *42; *Westfield Ins. Co. v. Sistersville Tank Works, Inc.*, 484 F. Supp. 3d 283, 295 (N.D. W. Va. 2020); Anderson *et al.*, Insurance Coverage Litigation § 4.01[A] (collecting cases). The manifestation trigger of coverage, on the other hand, has never been adopted by a West Virginia circuit court and represents a "distinctly minority" view nationwide. *See* Anderson *et al.*, Insurance Coverage Litigation § 4.05[A].

A. West Virginia circuit courts have uniformly adopted the continuous trigger.

West Virginia circuit courts have uniformly applied the continuous trigger of coverage in these exact circumstances – claims involving alleged bodily injury or property damage of a progressive or deteriorating nature. *See U.S. Silica*, 2012 W.V. Cir. LEXIS 4449, at *25–31

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[2] *See U.S. Silica*, 2012 W.V. Cir. LEXIS 4449, at *30 (applying continuous trigger to claims alleging injuries due to exposure to silica); *Wheeling Pittsburgh*, 2003 W.V. Cir. LEXIS 3, at *42 (applying continuous trigger to environmental property damage claims).

[3] *See* Section I(B), *infra*.

(bodily injuries arising from silica exposure); *Wheeling Pittsburgh*, 2003 W.V. Cir. LEXIS 3, at *33–44 (environmental property damage).

In *U.S. Silica*, the Circuit Court of Morgan County, West Virginia applied the continuous trigger where the underlying claimants alleged bodily injuries due to long-term inhalation of silica distributed by the policyholder. 2012 W.V. Cir. LEXIS 4449, at *5–6, *30. The court found persuasive decisions by the Pennsylvania and California Supreme Courts applying the continuous trigger for claims of continuous or progressively deteriorating damage or injury. *See id.* at *9, *29–30 (citing *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993), and *Montrose*, 913 P.2d 878).

The *U.S. Silica* court held that the continuous trigger of coverage applied to the silica claims because "the suits allege[d] continuing or progressively deteriorating bodily injury." *Id.* at *30. Applying the continuous trigger of coverage, the court found that in these cases "bodily injury occurs at the time of first exposure and continues even after exposure has ceased." *Id.* at *30–31. Accordingly, the court held "that insurers are obligated to indemnify [their] insured for costs associated with liability beginning when the first exposure occurred (the beginning of the accident) and until the claim is brought, or until the underlying claimant dies, whichever occurs first." *Id.* (citation omitted).

Similarly, in *Wheeling Pittsburgh*, the Circuit Court of Ohio County, West Virginia applied the continuous trigger of coverage where the underlying claims involved a "continuous, indivisible injurious process resulting from [the insured's] operations and culminating in environmental property damage." 2003 W.V. Cir. LEXIS 3, at *40, *42. The environmental liabilities at issue in *Wheeling Pittsburgh* involved "alleged contamination of certain sites owned and operated by [the insured] dating back as early as 1917 and extending to [2003]" where the

EPA determined that "property damage to the sites at issue occurred continuously over the course of many years." *Id.* at *35.

The court held that the continuous trigger of coverage applied, because the alleged property damage was "the result of a continuous, progressive process spanning numerous years and encompassing multiple successive insurance policies." *Id.* at *41. Accordingly, all of the insurance policies in effect during the period beginning when the alleged pollutants were released or discharged and continuing until the sites were remediated were triggered to provide coverage for the property damage. *Id.* at *42. In adopting the continuous trigger, the court cited the opinions of "numerous other jurisdictions" applying the continuous trigger in cases alleging continuous or progressively deteriorating damages. *Id.* (collecting cases).

Neither this Court nor any West Virginia circuit court has ever questioned these well-reasoned decisions or applied a contrary rule. Instead, for more than two decades the rule in West Virginia has been to apply a continuous trigger of coverage under occurrence-based liability policies for lawsuits involving progressive injuries.

B. The continuous trigger of coverage is the majority rule nationwide.

Consistent with the decisions of the West Virginia circuit courts, the continuous trigger of coverage is the majority rule nationwide as well. *See* Anderson *et al.*, Insurance Coverage Litigation § 4.01. State supreme courts across the country have adopted the continuous trigger of coverage to maximize insurance coverage for a variety of progressive injury cases, for example:

- The Pennsylvania Supreme Court adopted the continuous trigger rule for asbestos and silica-related lawsuits, holding that all stages of disease process are bodily injury sufficient to trigger the insurers' coverage obligation because all phases independently meet the policy definition of bodily injury. *See J.H. France*, 626 A.2d at 507.

- The California Supreme Court adopted the continuous trigger of coverage for third-party liability insurance cases involving continuous or progressively deteriorating losses and held that alleged bodily injury and property damage that is continuous or progressively deteriorating throughout several policy periods triggers all insurance policies in effect during those periods. *Montrose*, 913 P.2d at 901–02.

- The New Jersey Supreme Court adopted the continuous trigger coverage rule for asbestos-related property damage and bodily injury lawsuits, *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994), as well as lawsuits alleging long-term environmental contamination, *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116, 1121 (N.J. 1998).

- The Colorado Supreme Court adopted the continuous trigger rule in cases where the alleged property damage is continuous and gradual and results from many events happening over a long period of time. *Public Serv. Co. v. Wallis & Cos.*, 986 P.2d 924, 939–40 (Colo. 1999).

- The Kansas Supreme Court adopted the continuous trigger rule in a case involving long-term exposure to excessive noise causing hearing loss. *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 71 P.3d 1097, 1100, 1125–1127 (Kan. 2003).

- The Wisconsin Supreme Court adopted a continuous trigger in a construction defect case where the resulting property damage was alleged to have occurred progressively over more than one policy period. *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 84 (Wis. 2004).

- The Vermont Supreme Court adopted the continuous trigger rule in a pollution liability case, holding that injuries and property damage that are continuous or progressively deteriorating throughout successive insurance policy periods are covered by the occurrence-based insurance policies in effect during those periods. *Towns v. N. Sec. Ins. Co.*, 964 A.2d 1150, 1165 (Vt. 2008).

- The Indiana Supreme Court adopted the continuous trigger rule in a pharmaceutical drug case, holding that coverage is triggered at any point between the alleged ingestion of DES and the manifestation of a DES-related disease. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 471 (Ind. 1985).

Lower courts have similarly applied the continuous trigger coverage rule – and rejected the manifestation trigger theory – in a broad array of progressive injury lawsuits. Courts have applied the continuous trigger to bodily injury and property damage cases arising from asbestos exposure, for example:

- *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968, 971–73 (3d Cir. 1985);
- *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1042–50 (D.C. Cir. 1981);
- *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 766–69 (E.D. Pa. 1989), *rev'd in part on other grounds*, 25 F.3d 177 (3d Cir. 1994);
- *Reading Co. v. Travelers Indem. Co.*, No. 87-2021, 1988 U.S. Dist. LEXIS 1408, at *4–8 (E.D. Pa. Feb. 18, 1988);
- *Dayton Indep. Sch. Dist. v. Nat'l Gypsum Co.*, 682 F. Supp. 1403, 1409–10 (E.D. Tex. 1988), *rev'd on other grounds sub nom.*, *W.R. Grace & Co. v. Cont'l Cas. Co.*, 896 F.2d 865 (5th Cir. 1990);
- *Lac D'Amiante Du Quebec, Ltee. v. Am. Home Assurance Co.*, 613 F. Supp. 1549, 1556–59 (D.N.J. 1985);
- *Owens-Illinois, Inc. v. Aetna Cas. & Surety Co.*, 597 F. Supp. 1515, 1520–21 (D.D.C. 1984);
- *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 625–27 (Wis. 2009);
- *R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co.*, 156 A.3d 539, 571–74 (Conn. App. Ct. 2017);
- *Mayor of Baltimore v. Utica Mut. Ins. Co.*, 802 A.2d 1070, 1094–1100 (Md. App. Ct. 2002);
- *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622, 627 (Ill. App. Ct. 1999);
- *Armstrong World Indus., Inc. v. Aetna Cas. & Surety Co.*, 45 Cal. App. 4th 1, 48 (Cal. Ct. App. 1996);
- *U.S. Gypsum Co. v. Admiral Ins. Co.*, 643 N.E.2d 1226, 1256–57 (Ill. App. Ct. 1995); and
- *Owens-Corning Fiberglas Corp. v. Am. Centennial Ins. Co.*, 660 N.E.2d 770, 791 (Ohio C.P. 1995).

Courts have also regularly applied the continuous trigger of coverage rule to property damage claims arising from alleged environmental contamination, for example:

- *Wheeling Pittsburgh Corp. v. Am. Ins. Co.*, No. 93-C-340, 2003 W.V. Cir. LEXIS 3, at *33–44 (W. Va. Cir. Ct. Oct. 28, 2003);

- *Towns v. N. Sec. Ins. Co.*, 964 A.2d 1150, 1164–65 (Vt. 2008);
- *Public Serv. Co. v. Wallis & Cos.*, 986 P.2d 924, 939–40 (Colo. 1999);
- *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 901 (Cal. 1995);
- *Citizens Commc'ns Co. v. Am. Home Assurance Co.*, No. CV-02-237, 2004 Me. Super. LEXIS 28, at *7 (Me. Super. Ct. Feb. 9, 2004); and
- *E. I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, No. 89C-AU-99, 1995 Del. Super. LEXIS 488, at *25–33 (Del. Super. Ct. Oct. 27, 1995).

And courts have applied the continuous trigger coverage rule to a variety of other progressive injury lawsuits from silica exposure to noise-induced hearing loss, and from exposure to welding fumes to damages from exposure to DES, for example:

- *U.S. Silica Co. v. Ace Fire Underwriters Ins. Co.*, No. 06-C-2, 2012 W.V. Cir. LEXIS 4449, at *25–31 (W. Va. Cir. Ct. Nov. 27, 2012) (silica exposure);
- *Air Prods. & Chems. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 768–69 (E.D. Pa. 1989), *rev'd in part on other grounds*, 25 F.3d 177 (3d Cir. 1994) (exposure to welding fumes);
- *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.*, 71 P.3d 1097, 1125–1127 (Kan. 2003) (noise-induced hearing loss);
- *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506–07 (Pa. 1993) (silica exposure);
- *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 471 (Ind. 1985) (DES exposure);
- *Associated Aviation Underwriters v. Wood*, 98 P.3d 572, 602 (Ariz. Ct. App. 2004) (trichloroethylene exposure); and
- *Wisc. Elec. Power Co. v. Cal. Union Ins. Co.*, 419 N.W.2d 255, 257–59 (Wis. Ct. App. 1987) (exposure to stray voltage from electric power supply).

In sum, "[t]he continuous trigger is the predominant rule in cases involving progressive bodily injury and disease. It also has been applied in property damage coverage cases, including those involving environmental contamination and asbestos-related property damage." *See*

Anderson *et al.*, Insurance Coverage Litigation § 4.01 (collecting cases). The manifestation trigger theory, on the other hand, has been uniformly rejected in these same circumstances. *See id.* (collecting cases). There is no reason for West Virginia to depart from this consensus or its own prior precedent.

II. Sound Public Policy Supports Application of the Continuous Trigger Rule to Maximize Insurance Coverage for Progressive Injuries.

Courts across the country recognize important public policy reasons to impose a continuous trigger to claims alleging progressive bodily injuries or property damage. *See, e.g.*, *Honeywell*, 188 A.3d at 320–21 (summarizing public policy rationale underlying the continuous trigger). Those considerations are indisputably present here.

First, and most importantly, the continuous trigger of coverage has the effect of maximizing insurance coverage to respond to mass torts and environmental liabilities, spreading the risk to "all insurance policies in effect during the entire process of injury or damage[.]" *E.g.*, *Wheeling Pittsburgh*, 2003 W.V. Cir. LEXIS 3, at *36–37. "Spreading the risk" under the continuous trigger coverage rule "is conceptually more efficient" than a manifestation trigger, *Owens-Illinois*, 650 A.2d at 992, as it "eliminates arbitrariness, from the carrier's perspective, of telescoping all damage in a continuing injury case into a single policy period," thus minimizing the danger that insurance will be unavailable to respond to catastrophic losses due to insurer or defendant insolvency or because a policyholder purchased an insufficient amount of insurance coverage in a given policy year. *See Associated Aviation Underwriters*, 98 P.3d at 602 (internal quotations and citation omitted).

Whereas the continuous trigger rule maximizes coverage and spreads the risk to all policies in place when bodily injury or property damage occurred, thus ensuring that insurance coverage is available to compensate victims and remediate harms, the manifestation trigger

theory artificially "imposes a coverage obligation only on those policies in effect at the time injury or damage becomes manifested[.]" *Wheeling Pittsburgh*, 2003 W.V. Cir. LEXIS 3, at *36 (citation omitted).

Second, another "overriding" reason that the majority of courts reject the restrictive "manifestation" trigger theory that Westfield advocates for progressive injuries is that applying a manifestation trigger "would allow insurance companies to terminate coverage during the long latency period" of the disease, "effectively shifting the burden of future claims away from the insurer to the insured . . . even though the exposure causing injury occurred during periods of insurance coverage." *See Consulting Eng'rs, Inc. v. Ins. Co. of N. Am.*, 710 A.2d 82, 87 (Pa. Super. Ct. 1998) (citing *Keene*, 667 F.2d 1034); *see also Wheeling Pittsburgh*, 2003 W.V. Cir. LEXIS 3, at *38–39 (applying same reasoning to environmental contamination). Courts have recognized that failure to apply a continuous trigger in such cases could effectively allow insurers to retroactively eliminate coverage for entire classes of claims by funneling those liabilities into years where coverage is unavailable (because the industry adopted an exclusion), and barring coverage during the period of alleged product exposure and progression of the disease or bodily injury. *See Consulting Eng'rs*, 710 A.2d at 87.

This concern was first raised in the asbestos context. In the face of thousands of lawsuits seeking damages for asbestos bodily injuries that occurred gradually over decades, the insurance industry uniformly adopted absolute asbestos exclusions to apply to all general liability insurance policies. *See* Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 Conn. Ins. L.J. 349, 349–50, 464 (2006). Insurers then asked courts to adopt a restrictive "manifestation trigger" that limited coverage for such claims to the policy year in which the disease was diagnosed – which would be the last

year in the chain of occurrence-based insurance policies that would otherwise make their limits available to satisfy the liabilities. In effect, the industry attempted to funnel asbestos liabilities into a single future policy year when the disease "manifested," and during which insurance would be unavailable because the industry had adopted an absolute bar to such claims despite the fact that the disease (*i.e.*, the bodily injury) had been developing in prior policy years.

Courts routinely rejected the insurance industry's invitation to restrict coverage after-the-fact and potentially leave injured parties uncompensated. The seminal decision addressing this issue is *Keene Corp. v. Insurance Company of North America*, 667 F.2d 1034, 1045–46 (D.C. Cir. 1981). *Keene*, and the many cases following it, rejected application of the first manifestation trigger theory for the avalanche of asbestos cases because a manifestation trigger would have effectively resulted in the *en masse* cancellation of occurrence-based liability insurance policies for those claims. *See id.* Had courts adopted the manifestation trigger it would have wiped out insurance coverage for asbestos claims, likely bankrupting many corporate policyholders (in fact, some policyholders were bankrupted by these liabilities anyway), leaving innocent tort victims without compensation for their injuries.

The insurance industry repeated this same tactic to respond to environmental liabilities following the passage of CERCLA. In the face of policyholders' staggering environmental liabilities, insurers enacted absolute pollution exclusions to bar all coverage for future environmental claims under those policies. *See Travelers*, 2012 U.S. Dist. LEXIS 127847, at *47–50 (summarizing the history of the absolute pollution exclusion and explaining that as a result of the liabilities associated with CERCLA "the insurance industry resorted to the 'absolute pollution exclusion' to exclude coverage for the high costs of government cleanup of long-term industrial environmental pollution"). The insurance industry then argued for a manifestation

trigger, asserting that only the insurance policy in force when the pollution was discovered should be triggered, even if the polluting events and resulting property damage had in fact occurred during prior policy years (and in policy periods when such liabilities were not excluded from coverage).

Recognizing this reality, when confronted with these same insurance industry arguments in response to cases alleging progressive environmental contamination, courts, including the *Wheeling Pittsburgh* court in this state, concluded that a continuous trigger should apply to such progressive property damage claims. *See Wheeling Pittsburgh*, 2003 W.V. Cir. LEXIS 3, at *33–42 (collecting cases); *Montrose*, 913 P.2d at 897 n.18, 901.

Even today the industry is undertaking a similar tactic in response to liabilities arising from the opioid crisis. In the face of thousands of lawsuits alleging billions of dollars in damages, the insurance industry broadly began introducing opioid liability exclusions beginning in approximately 2018.[4] At the same time, insurers are arguing that the manifestation trigger should apply to the progressive disease of addiction, even if the alleged exposure and progression of the disease took place in prior insurance policy periods. All this in the hope of minimizing insurance obligations (and retaining the profits on the premiums the insurance industries invested) by eliminating coverage under all but the last policy period at issue.[5]

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[4] *See* Alexander Djazayeri, *The US Opioid Crisis and Its Impact on the Insurance Industry*, HDI Global Insurance Company (June 24, 2021), https://www.hdi.global/en-us/infocenter/insights/2021/the-us-opioid-crisis-and-its-impact-on-the-insurance-industry/.

[5] Given that the insurance industry itself fostered the use of opioids by excluding from coverage non-opioid alternatives from medical formularies, thereby driving up the rates of opioid prescriptions, the industry's arguments here are truly unconscionable. *See* Tanvi Rao *et al.*, *Association of Formulary Exclusions and Restrictions for Opioid Alternatives with Opioid Prescribing Among Medicare Beneficiaries,* JAMA Network Open. 2020;3(3):e200274 (Mar. 2, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7052746/.

Thus, applying a manifestation trigger to progressive injuries would effectively enable the insurance industry to avoid liability on a retroactive basis for whole classes of significant liabilities impacting the public. Only the continuous trigger theory "holds insurers responsible for the losses that actually occur on their watch, using a formula that approximates 'a scientific assessment of the amount of injury,' even if the actual injury manifests later," and prevents insurers from effectively retroactively avoiding coverage for entire classes of covered claims. *See Honeywell*, 188 A.3d at 322 (quoting *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 843 A.2d 1094, 1105 (N.J. 2004)).

Third, adoption of the manifestation trigger, as urged by Westfield, would "unduly transform" the "occurrence-based" insurance policies at issue here into "claims-made" policies. *See Montrose*, 913 P.2d at 903. The insurance industry developed the "claims-made" insurance policy form as an alternative to the standard occurrence form, to limit coverage for any given claim to the single policy year in which a claim is made against the policyholder, no matter when the bodily injury or property damage occurred. *Id.* The industry began writing claims-made coverage for certain types of claims decades ago, and introduced the claims-made general liability policy form as an alternative to the standard occurrence-based policy in 1986. *Id.* at n.24 (citations omitted).

Insurers that elected to continue writing coverage on the occurrence form, rather than on a claims-made form, charged policyholders higher premiums precisely because occurrence-based insurance policies are designed to respond to injuries that may trigger multiple policy periods and may result in claims years after a given policy period ends:

> Claims made policies were specifically developed to limit an insurer's risk by restricting coverage to the single policy in effect at the time a claim was asserted against the insured, *without regard to the timing of the damage or injury*, thus permitting the carrier

> to establish reserves without regard to possibilities of inflation, upward-spiraling jury awards, or enlargements of tort liability after the policy period. The insurance industry's introduction of "claims made" policies into the area of comprehensive liability insurance itself attests to the industry's understanding that the standard occurrence-based CGL policy provides coverage for injury or damage that may not be discovered or manifested until after expiration of the policy period. That understanding is clearly reflected in the higher premiums that must be paid for occurrence-based coverage to offset the increased exposure.

Id. at 903–04 (emphasis in original, internal citation and footnote omitted). Thus, applying a manifestation trigger to an occurrence-based general liability insurance policy would unfairly enable insurers to have their cake (*i.e.*, charge higher premiums associated with the occurrence form) and eat it too (*i.e.*, deny claims based on the "claims made" rationales underlying the manifestation trigger).

The result is not, however, only unfair to policyholders. Commentators have recognized that applying a manifestation trigger to occurrence-based policies is also unfair to the insurer that happens to be on the risk the year when the injury manifested:

> The manifestation standard is disfavored by many because it tends to place the burden of payment on the policyholder's most recent insurers largely for events that happened years earlier. Although this result is perfectly proper for claims-made insurance, it seems unfair when applied to occurrence policies.

See Stempel & Knutsen, Stempel and Knutsen on Insurance Coverage § 14.09[B].

In short, the merits of claims-made versus occurrence-based coverage can be fairly debated. But having written occurrence-based coverage, an insurer should not be permitted to *post hoc* attempt to transform that coverage into a pseudo-claims-made policy in the hopes of avoiding responsibility for an otherwise covered lawsuit. *See Auber*, 469 S.E.2d at 111 ("[T]his Court will not read into either policy any language that would reduce the coverage afforded by the policies by their express terms.").

Fourth, adopting the manifestation trigger theory would have negative downstream effects on potential tort victims. Insurance does not just benefit the policyholder. It provides critical guarantees that tort victims will be able to collect on judgments and obtain compensation for their injuries. It is for this reason that many states, including West Virginia, have financial responsibility laws and compulsory insurance statutes. *See Dalton v. Childress Serv. Corp.*, 432 S.E.2d 98, 101 (W. Va. 1993) (explaining that West Virginia "public policy encourages both the allocation of risks and the purchase of insurance"); 1 New Appleman on Insurance Law Library Edition § 2.07 (2023) ("The primary purpose of financial responsibility laws and other state statutes mandating liability insurance is to ensure that tort victims have a source of recovery."); 18-126 Appleman on Insurance Law & Practice Archive § 126.2 (2d 2011) ("Under state 'financial responsibility laws' as well as 'compulsory insurance' statutes, citizens are recognized as intended third-party beneficiaries. A financial responsibility statute is considered to be passed largely for the benefit of persons injured.").

"[T]he law's solicitousness for victims of mass toxic torts and other environmental contamination is entirely consistent with choosing that conceptually viable trigger theory affording the greatest ultimate redress," *i.e.*, the continuous trigger. *Winding Hills Condo. Ass'n, Inc. v. N. Am. Specialty Ins. Co.*, 752 A.2d 837, 840 (N.J. Super. Ct. App. Div. 2000); *see also Erie Ins. Exch. v. Moore*, 228 A.3d 258, 267 (Pa. 2020) (holding that an insurer's improper denial of coverage "would unnecessarily withhold compensation to tort victims"). Because the continuous trigger requires "the sharing of the indemnification obligation by all carriers who are on the risk at any time from the date of exposure to the date of manifestation," application of the continuous trigger maximizes the insurance coverage available "for the protection of the public." *Winding Hills*, 752 A.2d at 840.

The continuous trigger, therefore, fulfills the important public policy goals of "(1) encouraging the acquisition of insurance and spreading costs throughout the industry; (2) promoting the efficient use of insurance resources to make more money available to respond in catastrophic circumstances; (3) compelling insurers to minimize their costs; and (4) advancing principles of simple justice." *Honeywell*, 188 A.3d at 320–21 (citation omitted).

III. The Policy Language Supports Application of the Continuous Trigger Rule to Lawsuits Alleging Progressive Injuries.

In addition to being consistent with sound public policy, the continuous trigger rule is firmly rooted in the language of occurrence-based liability insurance policies. The policies are not triggered by diagnosis or manifestation of an injury. Rather, they cover liabilities arising from bodily injury or property damage that happens during the policy period, without reference to when the alleged injury or damage first becomes manifest.

For example, the insuring agreement at issue in this case provides:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> * * *
>
> This insurance applies only to "bodily injury" and "property damage" which occurs during the policy period. The "bodily injury" or "property damage" must be caused by an "occurrence." The "occurrence" must take place in the "coverage territory."

See JA 354. The policy defines "occurrence" to include "continuous or repeated exposure to substantially the same general harmful conditions" and defines "bodily injury" to include "bodily injury, sickness or disease[.]" *See* JA 360, 362.

This language does not tie coverage to a diagnosis of a particular illness. Rather, as the Pennsylvania Supreme Court held, this language "encompasses the progression of the disease throughout and after the period of exposure until, ultimately, the manifestation of recognizable

incapacitation constitutes the final 'injury'" and, therefore, all insurers on the risk through these stages of disease are liable for coverage. *See J.H. France*, 626 A.2d at 506.

Accordingly, when the occurrence-based insurance policy form was first approved, the drafters acknowledged "that 'in some exposure type cases involving cumulative injuries it is possible that more than one policy will afford coverage.'" *See Montrose,* 913 P.2d at 891–92 (quoting Richard H. Elliott, *The New Comprehensive General Liability Policy*, *in* Liability Insurance Disputes (PLI, Schreiber ed. 1968)); *see also Owens-Illinois*, 650 A.2d at 990 (citing Eugene R. Anderson, *et al.*, *Liability Insurance Coverage for Pollution Claims*, 59 Miss. L.J. 699, 729–30 (1989), and noting that the drafters of the occurrence-based general liability policy form acknowledged that "[w]hen the injury is gradual, resulting from continuous or repeated exposures, and occurs over a period of time, coverage may be afforded under more than one policy"). It was not until the advent of mass long-tail liabilities, such as asbestos and environmental contamination claims, that the insurance industry attempted to shirk its coverage obligations by asking courts to graft a manifestation limitation onto its general liability policies. As discussed above, courts have generally soundly rejected such efforts.

In contrast to the continuous trigger, which is firmly supported by the plain language of the policies, "[m]ost courts have rejected a manifestation-only trigger under standard-form [general liability] policy language finding that the policy language does not support such an interpretation." *See* Anderson *et al.*, Insurance Coverage Litigation § 4.05[A] (collecting cases).

As the District Court correctly explained, under the manifestation trigger "the fact the claimant may have been exposed to harmful substances during the policy period is immaterial." *Westfield*, 484 F. Supp. 3d at 294. "Likewise, the fact that claimant's associated disease process

may have begun or progressed during the policy period is immaterial." *Id.* "Under the manifestation trigger, the date of claimant's diagnosis is all that matters." *Id.* (citation omitted). "Diagnosis" is not, however actually tied to the policy language included in the standard form general liability coverage. Therefore, as multiple courts have recognized, the manifestation trigger simply is not supported by the policy language. *See Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co.*, 534 N.W.2d 28, 35–36 (N.D. 1995) (noting that "[t]he policy language does not even hint that property damage must be known to anyone in order to trigger coverage," and that "[w]e will not rewrite this contract of insurance to exclude coverage on the basis of a manifestation theory") (citations omitted).

Of course, if Westfield and other general liability insurers had wanted to tie coverage to manifestation of injury they could have done so – indeed many insurers have.[6] What Westfield cannot do is write and accept premiums for policies that cover claims for "injury, sickness, or disease" that occurs during the policy period, and then when the time comes to pay claims argue that the policies only provide coverage if there is a "diagnosis" during the policy period. No such limitation on coverage appears in the policy. And imposing such a limitation to retroactively alter the parties' contract is contrary to blackletter West Virginia law. *See Auber*, 469 S.E.2d at 111 ("[T]his Court will not read into either policy any language that would reduce the coverage afforded by the policies by their express terms.").

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[6] For example, *Morrow Corp. v. Harleysville Mutual Insurance Co.*, 110 F. Supp. 2d 441 (E.D. Va. 2000) addressed insurance policies that expressly tied the trigger to "the date on which bodily injury or property damage first manifests itself." *Id.* at 445. Further, where insurers wish to limit liabilities to a single policy year, the insurance industry developed a "claims made" insurance product where coverage is triggered in the policy year where a specific claim is made against the insured.

CONCLUSION

UP respectfully requests that this Court reaffirm the long-standing precedent of West Virginia's circuit courts and hold that a continuous trigger of coverage applies to claims stemming from chemical exposure or other analogous harms that contributed to development of a progressive injury, illness, or property damage.

Dated this the 29th day of June, 2023.

/s/ Todd A. Mount
Todd A. Mount (WVSB# 6939)
SHAFFER & SHAFFER PLLC
330 State Street, P.O. Box 38
Madison, West Virginia 25130
(304) 369-0511
tmount@shafferlaw.net

Courtney C.T. Horrigan*
Dominic I. Rupprecht*
Zachary S. Roman*
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, Pennsylvania 15222
(412) 288-3131
chorrigan@reedsmith.com
drupprecht@reedsmith.com
zroman@reedsmith.com
**Pro Hac Vice* Motion Filed

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of June, 2023, a copy of the foregoing Brief of Amicus Curiae was served upon all counsel via File&ServeXpress.

/s/ Todd A. Mount
Todd A. Mount