E-FILED
Transaction ID: 1-23-1631
File Date: 3/1/2024 3:29 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-23-1631

In the
Appellate Court of Illinois
First Judicial District

WESTROCK CP, LLC,

Plaintiff-Appellant-Petitioner

v.

LEXINGTON INSURANCE COMPANY
and INDIAN HARBOR INSURANCE COMPANY,

Defendants-Appellees-Respondents

Appeal from the Circuit Court of Cook County, Illinois
Case No. 2019 CH 9052
The Honorable Cecilia A. Horan, Judge Presiding

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE* UNITED POLICYHOLDERS

United Policyholders ("UP") respectfully submits this brief as *amicus curiae* in support of Appellant WestRock CP, LLC and urges that this Court reverse the circuit court's ruling granting summary judgment to Respondent Lexington Insurance Company and remand the case for further proceedings.

UP is a 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.

In furtherance of its mission, UP appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases. UP's *amicus* briefs have been cited with approval by the U.S. Supreme Court, *see Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), as well as the Illinois Supreme Court, *see Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446, ¶ 53 (2021). UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing courts' attention to law that may have escaped consideration.

This appeal presents the novel issue of when pollution conditions should be considered "related" under a pollution legal liability policy. No Illinois appellate court appears to have addressed this question. The circuit court erred by interpreting "related" so broadly as to undermine the objectively reasonable expectations of the policyholder. Indeed, the circuit court's ruling in favor of Lexington deviates from principles of Illinois law concerning the interpretation of insurance policy language. UP, which has a strong interest in protecting purchasers of insurance and ensuring that the Illinois rules of insurance policy interpretation are applied to all policyholder-insurer disputes, therefore respectfully requests permission to file this brief *amicus curiae* in support of Appellant WestRock.

ARGUMENT

WestRock purchased a pollution insurance policy from Lexington (the "Lexington Policy") specifically to insure against risks arising from pollution conditions at the former Smurfit-Stone paper mill in Montana (the "Frenchtown Site" or "Site"). The Lexington Policy has a limit of liability of $5 million for "Each Incident," which is defined as "the same, related, or continuous Pollution Condition," and an aggregate limit of $10 million for all covered "Incidents." (C 77 V1) (bolding of defined policy terms omitted throughout brief).

The insured paper mill site was massive—3200 acres, or roughly five square miles. Over the course of its 52 years of operation, the paper mill experienced two pollution "Incidents." Those "Incidents" resulted from

different processes at the paper mill (the pulping of paper vs. the treatment and storage of wastewater), involved different pollutants, and occurred at different locations at the Site. But the circuit court held that these "Incidents" were "related, if not the same or continuous" simply because the pollution "originated from operation of the mill." (C 1825–26 V1). That ruling limited WestRock's maximum recovery under the Lexington Policy to only a single $5 million limit, rather than the entire $10 million aggregate limit.

This Court should reverse. The circuit court's interpretation of "related" is so expansive that it renders meaningless the aggregate coverage that WestRock purchased, contravening Illinois's rules of insurance policy construction, which require courts to (1) give meaning to all of the words in the insurance policy and (2) interpret ambiguous insurance policy terms in favor of coverage to protect the objectively reasonable expectations of the insured. *See Whitt v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 658, 662 (2000) ("Policy language must be read with reference to the facts at hand and in conjunction with the insured's reasonable expectations and the coverage intended by the policy.").

Because the Lexington Policy insures pollution at only a single paper mill, any pollution occurring at that mill would necessarily "arise"—at the most general level—from the operations of that paper mill. But if all pollution resulting from the paper mill's operations were deemed to be "related" for that reason alone, as the circuit court concluded, the policy language providing

additional limits of liability for separate "Incidents" at the same paper mill would be rendered a nullity, contrary to established Illinois law and WestRock's reasonable expectations of coverage.

I. The Circuit Court's Broad Interpretation of "Related" "Incidents" Cannot Be Reconciled with Illinois Principles of Policy Interpretation.

The decision below contradicts a hornbook principle of Illinois insurance policy interpretation by rendering policy language a nullity. Through its over-expansive interpretation of the term "related," the circuit court construed the insurance policy to eliminate half of the coverage that WestRock bought from Lexington, that is, to insure against up to $10 million in aggregate liability for multiple pollution claims arising from operations at the Site.

The Lexington Policy covers losses that WestRock "is legally obligated to pay as a result of a Claim initiated by a governmental entity for Clean-Up Costs resulting from a Pollution Condition on or under the Insured Property." (C 87 V1). The Site is the only "Insured Property." (C 87 V1).

The relevant coverage grant (Coverage A) has a limit of liability of $5 million for "Each Incident," which is defined as "the same, related, or continuous Pollution Condition." (C 77 V1). "Pollution Condition," in turn, means the "discharge, dispersal, release or escape … of any solid, liquid, gaseous or thermal irritant or contaminant…." (C 79 V1). The Policy provides an overall (or "aggregate") limit of liability of $10 million for all "Incidents" insured under the relevant coverage grant. (C 62 V1). By providing this

separate aggregate limit, the Policy contemplates multiple "Incidents" triggering separate per-"Incident" limits may arise from the Site.

In finding only a single, "related" Incident, the circuit court concluded that "the contamination at the Site, including contamination at" different locations at the Site (Operable Unit 2 and Operable Unit 3), "is at least related, if not the same or continuous, as it originated from operation of the mill." (C 33068 V18; R 174) (stating at the hearing on Lexington's motion that "*all* of the pollution arising from the pulping process [is] at least related") (emphasis added). But that reading of "related" means that WestRock could *never* receive coverage for more than one "Incident," since the Lexington Policy insures only a single site, and so *all* resulting pollution must originate from the operation of the mill in some way.

If the test for aggregating Incidents is that the pollution at different Operable Units originated from operations at the site, then the $10 million aggregate limit would be rendered a nullity because there would never be multiple "Incidents" for any individual site. But Lexington included an aggregate limit in its insurance policy, so it could not have intended "Incident" to refer to polluting events arising from any operations at a single site, as the circuit court ruled. That is because Illinois law does not permit a construction that renders an entire policy provision meaningless. *See Cincinnati Ins. Co. v. Gateway Constr. Co.*, 372 Ill. App. 3d 148, 152 (2007) (courts may not interpret an insurance policy in such a way that any of its terms are rendered

meaningless or superfluous); *Pekin Ins. Co. v. Wilson*, 391 Ill. App. 3d 505, 512 (2009) (rejecting policy interpretation that would render a term "largely a nullity and without any meaning").

The hypothetical proposed by the circuit court does not salvage some meaning for the aggregate limits provision. The circuit court suggested that a fire at the Site "would . . . trigger another [E]ach [I]ncident limit," and so provide a circumstance where the $10 million aggregate limit could apply. (R172-174). But this hypothetical ignores that the relevant coverage grant under the Lexington Policy only covers governmental claims for cleanup of "*pre-existing* conditions"—*i.e.*, pollution that "commenced" prior to the start of the policy period on May 3, 2011. (C 63) (emphasis added). Any fire occurring after the insurance policy incepted would not be covered. And of course, a fire at the Site during its operation would necessarily have resulted from its operations and so—under the circuit court's ruling—would be part of the same single "related" Incident.[1]

In addition to its hypothetical, the circuit court relied heavily on a Texas case, *Pennzoil-Quaker State Co. v. American International Specialty Lines*

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[1] For this reason, the trial court's interpretation also contravenes the Illinois rule of insurance policy interpretation that precludes a reading of insurance policy language that renders coverage "illusory." *See, e.g., Ill. Farmers Ins. Co. v. Keyser* 2011 IL App (3d) 090484, ¶¶ 14-15 (declining to interpret a policy such that it "would be providing coverage in one sentence and then taking it away"); *Cincinnati Ins. Co. v. Am. Hardware Mfrs. Ass'n*, 387 Ill. App. 3d 85, 112 (2008) (finding policy illusory where it "purports to provide coverage for intentional tort claims, and on the other hand…denies coverage for those same claims") (citation omitted).

Insurance Co., 653 F. Supp. 2d 690, 703 (S.D. Tex. 2009). But *Pennzoil* supports WestRock's interpretation of "related," not the interpretation adopted by the circuit court. In that case, Pennzoil moved for summary judgment on the ground that certain polluting conditions were related in light of their "focus on the alleged release of pollutants over time from Pennzoil's refinery." *Id.* at 701–02. The insurer took the position that the five lawsuits contained four unrelated pollution conditions: pollution from a fire and an explosion in 2000; a November 2001 release of pollutants; long-term continuous releases of pollutants; and long-term, continuous contamination of subsurface water. *Id.* at 702. The district court denied Pennzoil's motion for summary judgment because it could not "conclude as a matter of law that there was a single related Pollution Condition." *Id.* at 708.

Pennzoil thus does not support the circuit court's ruling here that the releases at the site were "related" simply because they resulted from the operations at a single site. To the contrary, the reasoning of *Pennzoil* supports WestRock's position that multiple pollution conditions may arise from a single site's operations. Had the court in *Pennzoil* applied the same standard as the circuit court below, it could and would have found a single related incident, as all of the pollution resulted from the operations at the Pennzoil refinery. Instead, the court in *Pennzoil* held that "determining whether there are multiple liability-triggering events" requires looking to "the specific events that allegedly give rise to the insured's liabilit[ies]," rather than an

"overarching cause." *Id.* at 707. That directly contradicts the circuit court's ruling in this case.

Because Illinois law does not permit the construction of the term "related" adopted by the circuit court, the decision below should be reversed on this ground alone.

II. The Circuit Court's Broad Interpretation of "Related" "Incidents" Cannot Be Reconciled with the Policyholder's Objectively Reasonable Expectations.

The decision below is also at odds with the policyholder's reasonable expectations of coverage. An insured would reasonably expect that pollution arising from different processes, different pollutants, and different locations—even if they occurred within the same insured site—would not be deemed "related" when it purchased additional coverage for multiple "Incidents" arising out of the same location. *See, e.g., Whitt*, 315 Ill. App. 3d at 662 ("Policy language must be read with reference to the facts at hand and in conjunction with the insured's reasonable expectations and the coverage intended by the policy."); *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 873, 855 P. 2d 1263 (1993) (claims cannot be interrelated when an "objectively reasonable insured could not have expected they would be treated as a single claim under the policy").

For example, no reasonable policyholder would expect—in the employment context—that a sexual harassment claim made by an employee in the sales department and a racial discrimination claim made by an employee working in the mail room would constitute a single "related" incident merely

because—viewed most broadly—both claims resulted from the insured's business operations at the same large office building. Nor would a law firm expect that malpractice in drafting a will by a trusts and estates attorney to be part of the same "related" incident as malpractice by a litigator at trial simply because both errors resulted from the law firm's operations generally. But that is the same logic that the circuit court applied to the term "related" in this case. Nothing in the Lexington Policy or Illinois law requires the expansive interpretation of "related" adopted by the circuit court. At the very least, WestRock's narrower interpretation of "related" is reasonable.

A finding that WestRock's interpretation of "related" is reasonable would be dispositive here because insurance policy language that is subject to more than one reasonable interpretation is "ambiguous." *United States Fid. & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 74 (1991). Ambiguous policy terms "must be liberally construed in favor of the insured." *Id.* Because the term "related" is—at best for Lexington—ambiguous in the context of the Lexington Policy, the Court "is not permitted to choose which interpretation it will follow." *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 141 (1999). Rather, it must adopt the interpretation that affords greater coverage to the insured—in this case, WestRock's. *See id.* at 141-42 ("Since Wausau's interpretation affords less coverage to Ehlco, we would be required to reject it.").

III. EPA's Investigation of the Site Involved Two Pollution Conditions.

The EPA's decision to investigate and remediate pollution at the Site as two distinct Operating Units confirms that WestRock's interpretation of the Lexington Policy is at least "reasonable" and so must be interpreted in favor of coverage.

In 2011, WestRock purchased the Site outside of Missoula, Montana, which contained a defunct pulp mill that had ceased operations in 2010. The Site spans approximately 3200 acres of land, of which approximately 1000 acres constituted potential sources of contamination. (C 2887 V2). The EPA initiated an investigation of the Site, identified WestRock as a Potentially Responsible Party, and ultimately demanded that WestRock participate in and reimburse the costs of a remedial investigation.

Critically, the EPA enforcement action identified two distinct zones of pollution at the Site: Operative Unit 2, the approximately 100-acre "core industrial footprint," where wood had been turned into corrugated cardboard, and Operative Unit 3, the wastewater treatment and storage area, which is more than 900 acres. (C 1020 V1). The EPA's decision to recognize two separate Operating Units reflects that the pollution at the Site resulted from different processes, affected different locations, and would be investigated and

potentially remediated in different ways—*i.e.*, separate problems requiring separate solutions.[2]

In fact, when WestRock and the EPA entered into an Administrative Settlement Agreement in 2015, it identified three distinct sources of pollutants across the two zones of the Site: historical mill operations, wastewater treatment and solid waste basins, and treated water holding ponds. (C 1091 V1). The EPA used "historical . . . [m]ill operations" to refer solely to the pulping process: turning wood chips into a paper product in the Site's core industrial footprint. (C 1073 V1). Separately, the wastewater treatment and solid waste basins were located in the wastewater treatment and storage area. (C1074 V1).

The EPA's repeated and consistent treatment of the pollution conditions at the Site as two discrete Operating Units strongly supports the reasonableness of WestRock's interpretation of the undefined term "related" in the Lexington Policy.

CONCLUSION

For the foregoing reasons, UP respectfully requests that this Court reverse the circuit court's granting summary judgment to Lexington and enter

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[2] *See, e.g.,* 40 C.F.R. § 300.5 (defining "Operable unit" to "mean[] a discrete action that comprises an incremental step toward comprehensively addressing site problems. This discrete portion of a remedial response manages migration, or eliminates or mitigates a release, threat of a release, or pathway of exposure").

an order granting judgment to WestRock and finding that the two pollution conditions at issue were not "related" under the Lexington Policy.

Dated: March 1, 2024

Respectfully submitted,

UNITED POLICYHOLDERS

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 12 pages or 2,685 words.

/s/ Robert H. Muriel
Robert H. Muriel

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NOTICE OF FILING

To: See attached Service List

PLEASE TAKE NOTICE that on March 1, 2024, I filed with the Clerk of the Illinois Appellate Court, First District, the attached ***Amicus Curiae* Brief In Support of Appellant Westrock CP, LLP**, a copy of which is attached and hereby served on you.

Dated: March 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, and Ill. S. Ct. R. 12, hereby certifies and affirms that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be, and that he caused the foregoing ***AMICUS CURIAE*** **BRIEF IN SUPPORT OF APPELLANT WESTROCK CP, LLC**, to be sent to the parties listed in the attached Service List on this 1st Day of March 2024, by electronic mail and electronically through Odyssey E-File, before the hour of 5:00 P.M.

Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail 5 copies of the brief to the Clerk of the Appellate Court of Illinois, First District, 160 North LaSalle Street, Chicago, IL 60601.

/s/ Robert H. Muriel

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