IN THE

Indiana Supreme Court

—

No. 23A-PL-01343

—

NIBCO, INC.,

Appellee

v.

STARR INDEMNITY & LIABILITY COMPANY, STARR SURPLUS LINES INSURANCE COMPANY, OHIO CASUALTY INSURANCE COMPANY, MT. HAWLEY INSURANCE COMPANY, and NATIONAL FIRE MARINE INSURANCE COMPANY,

Appellants.

BRIEF OF UNITED POLICYHOLDERS AS *AMICUS CURIAE* URGING TRANSFER

Appeal from the Elkhart Superior Court 5 – 20D05-1708-PL-178
Hon. Christopher J. Spataro, Judge

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Interest of *Amicus Curiae*

United Policyholders ("UP") sincerely appreciates the Court's order granting it leave to file a belated amicus brief.

UP is a unique non-profit, tax-exempt, charitable organization founded in 1991. It educates and assists individuals and businesses on insurance matters and works to secure the loss indemnity objective for which we buy insurance. UP monitors legal developments in the insurance realm and serves as a voice for policyholders in legislative, judicial, and regulatory forums. UP helps preserve the integrity of the insurance system by advocating for fair sales and claims practices. Grants, donations, and volunteers support UP's work. UP does not accept funding from insurance companies.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as an *amicus curiae* in courts across the country in order to provide policyholders' perspectives on insurance cases likely to have widespread impact. UP has been doing this for decades. Since 1991, it has filed hundreds of *amicus curiae* briefs in state and federal courts across the country. A list of those submissions can be found here: https://up-help.org/advocacy/amicus-library. UP's briefs have been cited in the opinions of state high courts and by the U.S. Supreme Court. *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, 1185-86 (Pa. 2014). The Indiana Court of Appeals has also referenced a UP *amicus* brief. *Commonwealth Land Title Ins. Co. v. Robertson*, 5 N.E.3d 394 (Ind. Ct. App. 2014), *trans. denied*.

Summary of Argument

UP files this brief to highlight one aspect of this case that was presented below but seems to have escaped the Court of Appeals' notice. The insurers fault NIBCO for not responding to the trial court's Rule 41(E) notice or moving to set aside the dismissal sooner than it did. Their appellate submissions imply that NIBCO knew the case was stagnating but just sat there, twiddling its corporate thumbs, until the trial court got tired of waiting and dismissed the case. In the insurers' telling, NIBCO "ignored" that order while the insurers "tried to wake NIBCO from its stupor," until it finally got around to filing a Rule 60(B) motion. (Insurers' App. Vol. II, p.165.)

But at some point, the Court ought to ask: how does this narrative make sense? Why would NIBCO behave like this with tens of millions of dollars in coverage on the line? The answer is simple—it didn't. **The insurers** fought NIBCO to a standstill, insisting on waiting for more facts. (NIBCO App. Vol. II, pp.7–8.) NIBCO acquiesced, keeping in contact with the insurers and updating them as the underlying cases developed, in the hopes that the insurers would then be willing to negotiate. This was to all parties' benefit. It conserved litigation resources while the parties waited to see the scope of damages that NIBCO could seek from these insurers.

As they say, no good deed goes unpunished. The Court of Appeals' decision allowed the insurers to weaponize that cooperation against NIBCO, reversing the trial court's decision to reinstate the case on its own docket. It did not consider the insurers' own contributions to the delay, coupled with their duties of good faith, as a sound, alternative basis for affirming.

The Court should **GRANT** transfer and **AFFIRM** the trial court.

Argument

At stake in this case is nothing less than the attitude the Court wants to foster in parties and attorneys who litigate in its courts. If it wants to encourage cooperation and civility in resolving disputes, then it should vacate the decision below.

A. The insurers, not NIBCO, were responsible for the case being stalled in the first place.

We start out by stating the obvious: Mr. Conway should have seen the orders from the trial court. He did not. This case asks the Court to decide what happens following that nightmare situation, which is the immediate cause of NIBCO's petition. But the missed e-filing notices are not the sole or even the main cause of the timing of NIBCO's Rule 60(B) filing. For that, the Court must look further back, and it should consider the insurers' actions in stalling this case. When it does, it will see that the insurers, not NIBCO, were responsible for "stalling" this case.

This case was filed in 2017 against twenty-three insurer defendants. (Insurers' App., Vol. II, pp.4–11.) A blizzard of litigation ensued over the next two-and-a-half years, resulting in dismissals or settlements as to most defendants by April 2020. (*Id.* pp.11–101.) Complex coverage litigation typically follows this pattern. Some issues are resolved quickly because the insurers have either no defenses or pretty good ones, others settle after some litigation sharpens the dispute, and then there is inevitably one or more holdouts. The term "holdout" is not meant to be pejorative—the nature of coverage litigation is that at least one insurer's policy presents a particularly complex or contentious issue that takes time to resolve.

That was the case here. These insurers sit at the end of the coverage block—they sold the last year of coverage (2016–17) before the alleged defect was uninsurable as a known loss. *Gen. Housewares Corp. v. Nat'l Sur. Corp.*, 741 N.E.2d 408, 416 (Ind. Ct. App. 2020), *trans. not sought.* In those borderline years, "[e]ven if there is a probability of loss, there is some insurable risk, and the known loss doctrine should not apply." *Id.* at 414. It just requires more careful assessment. As a result, these policies have a higher retention for the insured PEX products, which were sold as claims began to emerge. (NIBCO App. Vol. II, p.80.) This raised a cascade of complexities.

One, the PEX retention required NIBCO to spend $750,000 on "[e]ach occurrence" before the insurers would contribute. (*Id.*) The "occurrence" issue is a notoriously frustrating and fact-dependent question—is the occurrence the manufacturing, distribution, or injury-causing event associated with the product? *Thomson Inc. v. Ins. Co. of N. Am.*, 11 N.E.3d 982, 1000–06 (Ind. Ct. App. 2014), *trans. denied*. Until that question was resolved and the retention eroded, these insurers could argue that their policies were not activated yet. *Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405, 410 (Ind. Ct. App. 2008), *trans. denied*.

Two, the property damage caused by the alleged defect may not have occurred during the insurers' policy periods. *Grange Mut. Cas. Co. v. W. Bend Mut. Ins. Co.*, 946 N.E.2d 593, 596–97 (Ind. Ct. App. 2011), *trans. not sought*. Discovery in the underlying cases would illuminate that issue and make it easier for the insurers to calibrate their exposure, and thus their appetite for settlement.

Three, these policies contain "prior knowledge" exclusions, which bar coverage if certain employees "knew that the bodily injury or property damage had occurred, in whole or in part," prior to the inception of the policy. (NIBCO App. Vol. II, p.48.) In mass-tort cases like the PEX litigation, that may be a fact-dependent question because it turns on whether the policyholder knew of the *specific* damage accompanying each of the dozens of claims. *Ind. Ins. Co. v. Kopetsky*, 14 N.E.3d 850, 852–54 (Ind. Ct. App. 2014), *trans. granted*, 23 N.E.3d 612, *trans. vac'd & denied, opinion reinstated*, 27 N.E.3d 1068 (Ind. 2015).

The uncontroverted evidence in the record shows that these "uncertainties regarding the basis and amount of NIBCO's underlying liabilities" made the insurers "unwilling to commit to providing coverage" despite NIBCO's efforts at a mediated settlement in 2019 and 2020. (NIBCO App. pp.7–8, ¶¶2, 5, 7–12; *see also id.* pp.12–15, 22, 43–44.) "These uncertainties have remained extant because the underlying claims are not fully resolved and final claim data is not yet available." (*Id.* p.8, ¶12.) Until that occurred, the insurers would not seek a resolution of the matter, either through settlement or by court decision. (*Id.*)

In other words, the case stalled because **the insurers** insisted on waiting. To be clear, this is not unusual or even necessarily wrong. Liability insurance follows the underlying tort case. When those cases stall, the coverage case often follows suit. Given that reality, neither NIBCO nor the insurers pressed this case. Instead, they waited to see what the underlying cases would bring.

This illuminates why the Court should not take the insurers seriously when they pillory NIBCO for "neglect in prosecuting its claims," "years of delinquency," and "profound disinterest in this case." (Appellant's Br. pp.13, 20.) Nor is it accurate to characterize this as a "moribund lawsuit[]" that would "hang over their heads indefinitely," or that NIBCO "unilaterally and retroactively foisted an indefinite 'stay'" on them. (*Id.*; Insurers' App. Vol. II, p.166.) Litigation stalled because that is what the insurers asked for.

In that light, the insurers' criticisms fall flat. What, exactly, do the insurers think NIBCO should have done? If it had filed a motion for partial summary judgment or declaratory relief on any of these issues, the insurers would have objected—perhaps successfully—that such a motion was premature for all the reasons stated above.

But this is only part of the equation. This informal standstill created the conditions that led to **both** parties overlooking the dismissal notice. The insurers may bristle at the idea that they share fault for the way this case has unfolded, but it is the truth.

B. The insurers share at least half the blame for the delay between the dismissal order and the Rule 60(B) motion.

Throughout their submissions below, the insurers levied harsh and sometimes personal attacks against NIBCO and its counsel, blaming them for the response to the Rule 41(E) orders. (Insurers' App. Vol. II, pp.156, 158, 165, 180; Appellant's Br. p.8, 20, 25, 27, 29; Reply Br. p.6, 8, 13, 22, 23, 24.) They describe NIBCO as "an entirely apathetic and unresponsive plaintiff" who knew the case was languishing, knew a show-cause order was pending, just "ignored its mail and the case docket for years" and could not be "bothered to show up at the scheduled hearing time." (Reply Br. pp.13, 22.) They

also claim that they "tried to wake NIBCO from its stupor" to no avail. (Insurers' App. Vol. II, p.165.)

Setting aside the tone of these arguments, the insurers' claims are not accurate. The insurers bear some responsibility for what happened—which was ultimately an honest mistake by both parties and by the trial court. The Court of Appeals erred by failing to factor that into their analysis.

First, the record demonstrates that litigation was dormant at the insurers' insistence. *Supra* §A. Mr. Conway seems to have missed the E-Notice for that reason. (*See* NIBCO App. Vol. II, pp.5, 7.) Although E-service certainly qualifies as **legally sufficient** notice (even if the lawyer never sees it), neither Mr. Conway nor NIBCO had **actual, subjective** notice of the dismissal until November 2022. (*Id.*) The insurers point out that these two things are the same at law (Reply Br. p.9), but they are emphatically not the same in equity. Stating that NIBCO "repeatedly ignore[d] [the] court's orders," and "ignore[d] a hearing notice" is false, because it imputes a mental state to counsel and the party that is not supported by the record here. (Appellant's Br. p.29.) This is a case where no one truly realized what happened until long after the ordinary period for fixing it had expired. (NIBCO App. Vol. II, pp.4–9.)

Second, the insurers seem to agree that if "no party had notice," then Rule 60(B)(8) would permit relief even after the one-year period for asserting excusable neglect had passed. (Insurers' App., Vol. II, p.162–63 (discussing *Ind. Ins. Co. v. Ins. Co. of N. Am.*, 734 N.E.2d 276, 281 (Ind. Ct. App. 2000)); Reply Br. p.15 (discussing *Moore v. Terre Haute First Nat'l Bank*, 582 N.E.2d 474, 477–78 (Ind. Ct. App. 1991)). This

makes perfect sense. It would be self-defeating to require a Rule 60 motion to be filed within one year of a triggering event that no one had reason to know about. And it would be unjust to punish only one side for the fault of both. Rule 60(B)(8) permits relief after one year for precisely that reason. *See Ind. Ins. Co.*, 734 N.E.2d at 281.

But this case is not far removed from that situation. Here, the insurers lulled everyone into a sense of complacency by insisting that the underlying cases develop before this one proceeded further. To repeat: that was not necessarily a bad idea, as it could save everyone time and money on litigating premature legal issues. But its natural effect was to dull the heightened sense of diligence that normally attends parties in litigation. It would be an exceptional circumstance if a defendant could negotiate an informal, good-faith standstill and then use those acts of cooperation and goodwill "as swords to obtain judgments" against the other party. *Huntington Nat'l Bank v. Car-X Assoc. Corp.*, 39 N.E.2d 652, 658–59 (Ind. 2015) (quotations omitted).

Third, the insurers apparently became aware of the dismissal order after it was issued on March 25, 2021, but before NIBCO noticed it. (Insurers' App., Vol. II, p.125.) We know this because they wrote NIBCO about it in June and July 2022—after the one-year period had expired. (NIBCO App. Vol. II, pp.11, 43.) The record and the briefing do not disclose exactly when the insurers discovered the dismissal, but it is a reason to grant, not deny, transfer, and remand this case for further proceedings.

If the discovery did not occur until after March 25, 2022, then this falls squarely within the logic discussed in our second point above. The insurers, as the parties who insisted on the standstill to begin with, had an obligation to alert NIBCO to that issue

in a way reasonably calculated to get its attention. That obligation is not discharged by merely inserting it deep within a boilerplate reservation-of-rights letter that probably would not be read carefully in its entirety **because of** a standstill designed to avoid wasting the parties' time and money and because the insurers routinely send and re-send reservations-of-rights letter. Once the insurers finally raised the issue directly (on the phone), NIBCO acted promptly. (NIBCO App. Vol. II, pp.2–3, 5.)

If the insurers knew about the dismissal before the one-year period had passed, then that is clearly a reason to set it aside under Rule 60(B)(8). An insurer must deal with its adversary in good faith and refrain from "deceiving its insured." *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 519 (Ind. 1993). This duty remains even after a case enters litigation. *Gooch v. State Farm Mut. Auto. Ins. Co.*, 712 N.E.2d 38, 42–43 (Ind. Ct. App. 1999), *trans. denied*. Withholding highly relevant, potentially case-ending information until after the policyholder was barred from asserting excusable neglect—and in particular doing so after the insurer contributed to the neglect in the first place—is no better than telling an outright lie. If an insurer's lack of good faith can support a tort claim, then it can certainly serve as a basis for relief under Rule 60(B)(8).

It is worth noting that the one-year limit on motions based on the misconduct of an adverse party would not apply in this situation. *See* Trial Rule 60(B)(3). That portion of the rule speaks to misconduct **in obtaining the judgment**, not misconduct in preventing a party from seeking timely relief from it. *Id.* Rule 60(B)(8)'s safety-valve provision would logically apply if the insurers' bad faith prevented it from discovering the dismissal within 1 year of its entry.

NIBCO made these points, in substance, to the trial court in support of Rule 60(B)(8) relief. (Insurers' App. Vol. II, pp.127–30.) It made them again in the Court of Appeals. (Appellee's Br. pp.9–10, 27–28.) In both venues, the insurer-enforced delay was part of NIBCO's basis for relief under Rule 60(B)(8), but the Court of Appeals passed over it, placing the blame entirely on NIBCO. (Op. ¶¶21–24.) That assessment is wrong and warrants examination on transfer.

C. Transfer is warranted because of the case's potential to shape how parties and lawyers conduct themselves in Indiana's courts.

The temperature of the insurers' briefing highlights one more issue that makes this case worthy of transfer. NIBCO missed the Court's dismissal papers because of an honest mistake. The insurers submitted no evidence proving otherwise. Nor have the insurers identified any articulable prejudice to them from a delay—again, a delay the insurers requested so that they could gather more evidence to inform their coverage obligations. Indeed, delay usually means more "free money" for insurers, since their premium dollars remain invested, earning interest and dividends. Jacob Goldstein, *Warren Buffett Explains the Genius of the Float*, NAT'L PUB. RADIO (Mar. 1, 2010).[1]

In these circumstances, civility and courtesy would counsel in favor of an unopposed motion to reinstate the case so it could be resolved on the merits. Such courtesies are plentiful, but the spirit of cooperation between counsel means they never make it into the appellate reporters. This should have been one of those cases.

Instead, the insurers chose to "throw[] even more sand into the gears." *Masimo Corp. v. The Vanderpool Law Firm, Inc.*, 2024 Cal. App. LEXIS 289, *12-14 (May 2,

[1] https://www.npr.org/sections/money/2010/03/warren_buffett_explains_the_ge.html

2024). Though the record does not support it, the insurers decided to portray NIBCO as an abusive litigant who "seeks to be excused for its years of delinquency" and ought to be "held to account for its persistent and inexcusable neglect." (Appellants' Br. p.13; Opp. to Trans. p.7.)

That was neither accurate nor constructive. "All those human hours" consumed by this appeal "could have been put to socially productive uses"—like resolving the merits—but were instead "devoted to th[is] unnecessary war and are lost forever." *Masimo*, 2024 Cal. App. LEXIS 289, *13 (quotations omitted). "All sides lose, as does the justice system, which must supervise the hostilities." *Id.* Indeed, the public loses as well: the Court of Appeals' decision to reverse the reinstatement order eliminates tens of millions of dollars of potential compensation for property owners who may need that money to repair their homes and businesses.

The upshot is this: the courts' application of the rules, no less than the rules themselves, shapes parties' behavior. If this were truly a case of a deadbeat or abusive litigant, then denying reinstatement would be appropriate. But the record shows that this clearly is not such a case. Treating it like one only hardens the noses and sharpens the elbows of the players going into the next case, because they know those devices may work. It erodes the trust that lawyers ought to be able to have in opposing counsel, and it reinforces the perception that litigation is a game to be won rather than a solemn mode for doing justice.

No matter how the Court disposes of this case, it will send a message. Granting transfer and affirming the trial court's decision to reinstate this case will signal that

Indiana will not start privileging form over substance and will maintain its commitment to resolving cases on the merits whenever possible. Denying transfer will telegraph that a party, if it is shrewd enough, will be able to trick its opponent and secure a windfall for its client. Indiana's civil justice system has thrived under the former rule. This case presents no abuse calling for it to change course.

Conclusion

The Court should **GRANT** transfer and **AFFIRM** the trial court.

Respectfully submitted,

/s/ Christopher E. Kozak

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Pursuant to Ind. App. R. 44(E) and (F), I verify that this document, including footnotes and excluding the items set forth in Ind. App. R. 44(C), does not contain more than 4,200 words.

/s/ Christopher E. Kozak

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The undersigned hereby certifies that the foregoing document was served on the following counsel of record by electronic service via the Indiana E-Filing System (IEFS) on May 28, 2024:

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