SUPREME COURT
OF THE
STATE OF CONNECTICUT

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S.C. 20000, S.C. 20001

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R.T. VANDERBILT COMPANY, INC.

V.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, ET AL.

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PLAINTIFF-APPELLEE R.T. VANDERBILT COMPANY, INC.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers to compete in the global economy and to create jobs across the United States.

The NAM regularly participates as *amicus curiae* in cases of particular importance to the manufacturing industry. This litigation raises issues of direct concern to the NAM and its members, many of which have paid large premiums to insurance providers for extensive insurance programs promising millions and often billions of dollars in coverage. As policyholders and major employers, the NAM's members have a vital interest in the predictable, consistent, and fair interpretation of insurance policies in Connecticut and across the United States.

[1] The National Association of Manufacturers ("NAM") has no direct financial interest in the outcome of this litigation. No persons, other than the NAM and its counsel, made monetary contributions related to the preparation of this brief. No counsel for a party to this case wrote this brief in whole or in part and no such counsel or a party contributed to the cost of the preparation or submission of this brief. The fees for this brief will be paid solely by the NAM.

INTRODUCTION

Manufacturers purchase insurance programs to transfer and mitigate risk for their business operations and activities. These insurance programs generally consist of policies that span discrete (usually annual) time periods. The risks covered by the policies—including toxic tort and environmental liabilities—often span multiple years and may not emerge until long after a given insurance policy has expired. The Appellate Court correctly ruled that, under Connecticut's "pro-rata" allocation rule, liability should be allocated among insurers that sold policies covering the liabilities, and should not be allocated to policyholders for years in which insurance was not available. The Appellate Court also properly determined that, given the well-established progressive nature of asbestos-related injury, Connecticut should apply the "continuous trigger" theory as a matter of law in asbestos bodily injury cases. Finally, the Appellate Court in this case appropriately interpreted the "Pollution Exclusions" in the policies not to exclude coverage for asbestos-related bodily injury claims.

ARGUMENT

I. Under Connecticut's Pro-Rata Allocation Rule, Liability for Long-Term, Indivisible Damages such as Asbestos Bodily Injury Should Be Allocated Only Across Periods in which Insurance Was Available.

When property damage or bodily injury develops over time—as in the case at bar—it may span across several policy periods, implicating multiple policies. In the typical case of this sort, whether it involves environmental property damage or bodily injury due to asbestos or another agent with a long latency period, it is not possible to determine the amount of damage or injury that resulted during a specific policy period. To address the question of how to allocate the insured's loss among implicated policy periods, courts have developed two approaches. The first approach—referred to as "all sums" allocation, based

on insuring-agreement language in standard-form policies—allows the insured to choose any triggered policy and require the insurer to pay up to the policy's limits. The second approach—referred to as "pro-rata" allocation, without reference to any contract provision—spreads liability among the policies over time: It allocates the liability across triggered policies, in most jurisdictions dividing the liability evenly over time. Connecticut employs the "pro-rata" approach. *See Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 264 Conn. 688, 720 (2003).

Sometimes a latent injury has continued to develop during a period when the insured did not have insurance, either because the policyholder chose not to buy insurance or because insurance was not available for the risk in the relevant time period. Under pro-rata allocation, the question arises whether to allocate a portion of the loss to that period of no insurance, thereby obligating the insured to bear a portion of the loss itself. This question frequently arises in connection with asbestos-related injuries, because no manufacturer or other policyholder has been able to buy insurance for asbestos injuries for decades, and because individuals who were exposed to asbestos decades ago have injuries that are progressive and thus have continued to develop during those decades. It also arises in connection with cleanup of environmental contamination that may have been released decades ago, but will continue to leach into groundwater or otherwise cause property damage for perhaps decades more, because, among other things, after the pollution is identified, the policyholder is unable to buy insurance for the ongoing damage.

Again, courts have developed two approaches to answering this question. The first—the "availability" approach—allocates no liability to time periods during which insurance for the risk was not available. Under the "availability approach," courts allocate

the insured's liability over the years in which (i) injury was occurring and (ii) insurance was available to the insured. *See, e.g.*, *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 234 N.J. 23 (2018). The second approach spreads liability across every year in which the injury continued to develop, and allocates loss to policyholders for years in which insurance was not available to the policyholder.[2]

This Court should affirm the Appellate Court's adoption of the "availability approach." The "availability approach" follows from the most appropriate construction of the policies, accords with the reasonable expectations of policyholders, and furthers sound public policy by promoting clear policy drafting, transferring risk efficiently, and promoting the full compensation of asbestos or other victims. Insurers favor the other approach because it progressively reduces their exposure for covered injury or damage. But spreading liability across every year of injury regardless of whether insurance was available would have devastating consequences for manufacturers and other policyholders that acted responsibly by purchasing occurrence-based coverage when it was available.

A. The Availability Approach Adopted by the Appellate Court Best Interprets and Applies the Relevant Policy Language.

If, as some States (including Connecticut) do, one rejects the proposition that an insurance policy's promise to pay "all sums" means just that, one must conclude that standard-form language in insurance policies like those at issue in this case left the issue of allocation unresolved. *See, e.g.*, *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 468 (1994) (courts have been "unable to find the answer to allocation in the language of the

[2] *See Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.*, 31 N.Y.3d 51 (2018). Unlike most States, although New York requires "all sums" allocation for many policies, it permits pro-rata allocation for other policies. *See In re Viking Pump, Inc.*, 27 N.Y.3d 244, 264 (2016).

policies"). For example, the policies at issue in this case do not mandate pro-rata allocation, much less address whether loss should be allocated only across years of insurance (including voluntary self-insurance) or instead spread to include years, and potentially decades, in which no insurance was available.

Where an insurance policy is ambiguous, it should be interpreted in favor of coverage. *See, e.g.*, *Lexington Ins. Co. v. Lexington Healthcare Grp., Inc.*, 311 Conn. 29, 38 (2014). Having declined to specify a formula in their policies, insurers should not be permitted to insist on the one among several options that will most dramatically shrink their coverage obligations. *See, e.g.*, *Boon v. Aetna Ins. Co.*, 40 Conn. 575, 586 (1874) ("[I]t is the duty of an insurance company seeking to limit the operation of its contract of insurance by special provisos or exceptions, to make such limitations in clear terms and not leave the insured in a condition to be misled.").

Contrary to the insurers' suggestion, although the insurance policies refer to injury "during the policy period," that phrase does not limit the portion of injury that is covered by the policy. *See* Travelers at 5. Rather, that phrase appears in the definition of "Occurrence." *Id.* Each policy at issue indicates that the policy will be triggered by injury "during the policy period." The standard Comprehensive General Liability form is the source of this language. The drafters of this form language recognized that indivisible, long-term damage or injuries like those caused by asbestos could trigger multiple policies. *See Owens-Illinois*, 138 N.J. at 468. As one drafter noted, long-term liabilities "could produce losses on each side of the renewal date, and in fact over a period of years, with a separate policy applying each year." *Id.* (citation and internal quotation marks omitted); *see also id.* at 468-469 (claims manual recognized 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") (citation and internal quotation marks omitted).

Having recognized that standard policies would cover indivisible injury across policy periods, the insurance industry debated whether to include in those policies a formula for allocating such liability. *See* G. Gillespie, "The Allocation of Coverage Responsibility Among Multiple Triggered Commercial General Liability Policies in Environmental Cases: Life After *Owens-Illinois*," 15 Va. Envt'l. L.J. 525, 570 (1996). But the insurance-industry drafters could not agree on an allocation formula and so left the method of allocation out of their policy form. As one drafter explained of the policy language, "[T]here is no pro-ration formula in the policy, as it seemed impossible to develop a formula which would handle every possible situation with complete equity." *Owens-Illinois*, 138 N.J. at 469 (citation and internal quotation marks omitted). In fact, the drafters stated that they sought to "allow some latitude in each case for the courts to make an equitable decision on the facts." *Id.* (citation and internal quotation marks omitted).

In keeping with Connecticut law, this ambiguous policy language, which does not address or determine this question, should be read to adopt the availability approach, which favors coverage. *See Lexington*, 311 Conn. at 38. Having decided not to make clear how so-called "long-tail" liabilities would be allocated, insurers should not now create an allocation scheme that applies to the detriment of policyholders.

B. The Availability Approach Respects the Reasonable Expectations of the Insured and Is an Equitable and Sound Rule.

1. The Availability Approach Conforms with the Reasonable Expectations of the Insured.

"[A]mbiguous language should be construed in accordance with the reasonable expectations of the insured" at the time that the insured entered into the policy. *Travelers*

Cas. & Sur. Co. of Am. v. Netherlands Ins. Co., 312 Conn. 714, 740 (2014). The availability approach followed by the Appellate Court in this case—no allocation to the insured for periods when coverage was unavailable—aligns with a policyholder's reasonable expectations (again, in a jurisdiction that has already declined to use the "all sums" method). Proration to the insured is not reasonable for periods when "coverage for a risk [was] not available." *Owens-Illinois*, 138 N.J. at 479. Manufacturers that purchased insurance when it was available decades ago did not expect that an ever-increasing share of liability for progressive injuries would be allocated to them—and not to their insurers—simply because of the passage of time.

2. The Availability Approach Would Promote Sound Public Policy.

There is no sound reason in public policy for reducing a policyholder's recovery under triggered policies where the absence of insurance in other periods was imposed on the policyholder by the insurance industry. Such an approach undermines the fundamental risk-transfer purpose of insurance, creates poor incentives for insurers and the insured, and threatens the vital public policy interest in ensuring adequate funding to compensate injured tort plaintiffs. By contrast, limiting the allocation period to when insurance was available "maximiz[es] insurance resources, encourag[es] the spreading of risk throughout the insurance industry, promot[es] the purchase of insurance when available, and [promotes] simple justice." *Honeywell*, 234 N.J. at 68.

Conversely, adopting the allocation formula proposed by the insurers would create perverse incentives for insurers. First, it would reward insurers for their deliberate decision not to address the allocation issue in their policies, giving future insurers an incentive not to draft clear policies in the hope that courts will later create rules that protect the insurers.

Second, insurers would have a perverse incentive to delay paying claims, as the more time goes by while progressive injury or damage continues, the less insurers have to pay.

a) Efficient Transfer of Risk

Reducing coverage for a policyholder that acted responsibly by purchasing insurance when it was available undermines the fundamental purpose of insurance: to transfer risk from the policyholder to the insurer. *See, e.g.*, *Sec. Ins. Co. of Hartford*, 264 Conn. at 709 ("[T]he theory of insurance is that of transferring risks.") (citing *Owens-Illinois*, 138 N.J. at 472-73). As this Court has noted, "[b]ecause insurance companies can spread costs throughout an industry and thus achieve cost efficiency, the law should, at a minimum, not provide disincentives to parties to acquire insurance when available to cover their risks. Spreading the risk is conceptually more efficient." *Id.* (quoting *Owens-Illinois*, 138 N.J. at 472-73). Courts should not endorse an allocation formula like the one proposed by the insurers here, which would *concentrate* risk by transferring a significant portion of the risk back to a policyholder, and which also diminishes the value of what the insured bought.

b) Incentives for Policyholders and Insurers

There is no public policy reason to penalize an insured when that insured purchased insurance covering a given risk and had no ability to purchase additional periods of insurance for that risk—*i.e.*, when the insured did not elect to assume the risk. The Complex Insurance Claims Litigation Association ("CICLA") argues (at 3) that the availability approach "would incentivize risky behavior on the part of the policyholders" because more of the covered liability would be allocated to the insurers, instead of being left uninsured. But that argument is not about incentives; it is a bald argument against insurance, and therefore is flatly inconsistent with public policy, which favors maximizing

insurance. Moreover, the argument fails the "common sense" test: A company that cannot buy insurance has every incentive *not* to undertake risky activities, because the company would have no insurance at all with respect to any newly injured persons or property.

CICLA suggests (at 3) that the setting and payment of premiums is the proper way to spread risk. But it is the availability approach that encourages the proper setting and payment of premiums, because the parties would agree on premiums that properly reflect the risk of long-term progressive injuries or damage—rather than reflecting only a portion of that risk, leaving the rest uninsured and potentially uncollectible by injured persons.

c) Underfunding for Injured Asbestos Plaintiffs

The allocation formula proposed by the insurers will have profound practical consequences for manufacturers and anyone with a stake in compensation for long-term injury in Connecticut. Many asbestos claims based on exposure decades ago are still being filed today, and many more such claims are likely to be filed well into the future. Under the insurers' preferred approach, as a consequence of the insurance industry's decision to stop selling coverage for asbestos in or about 1985, a significant portion—probably the lion's share—of liability would be shifted back to policyholders whose claims are governed by Connecticut law. Given the large number of companies with asbestos liability that have already declared bankruptcy, this approach is likely to prevent full compensation for individuals suffering from asbestos-related injuries. *See* U.S. Government Accountability Office, *Asbestos Injury Compensation: the Role and Administration of Asbestos Trusts* 2 (Sept. 2011) (noting, years ago, that approximately 100 companies had declared bankruptcy due at least in part to asbestos liability); S. Todd Brown, "How Long Is Forever This Time? The Broken Promise of Bankruptcy Trusts," 61 Buff. L. Rev. 537, 539 (2013) (noting that the amount of payments by asbestos bankruptcy trusts has declined as much

as 93%, posing a risk that future victims whose diseases have not yet been diagnosed will be severely undercompensated).

II. The Appellate Court Properly Applied a "Continuous Trigger" for Asbestos-Related Disease Claims as a Matter Of Law.

The Appellate Court properly affirmed the trial court's use of a "continuous trigger" for asbestos-related disease claims. The "continuous trigger" rule holds that because asbestos injury is progressive, some injury occurred continuously in the body of anyone suffering from an asbestos-related disease or illness, beginning shortly after first exposure. *See, e.g.*, *Honeywell*, 234 N.J. at 65 (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.'") (citation omitted); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 37 (1996).

Applying the "continuous trigger" rule to asbestos-related disease claims eliminates a substantial waste of Connecticut's limited judicial resources: pointless and repetitive trials applying the same legal principles and considering the same evidence to arrive at the same result. A recent 2017 trial in California illustrates this point. In *Cannon Electric, Inc. v. ACE Property and Casualty Company*, the court held a trial to address when asbestos-related "bodily injury" occurs. No. BC 290354 (Cal. Super. Ct., Aug. 17, 2017). The court found that the policyholder's experts' testimony "clearly and overwhelmingly established that asbestos bodily injury occurs upon first exposure and causes continuous and progressive injury to the human body for decades before ultimately developing into a diagnosable condition" and that the insurers' experts were "wholly unpersuasive or not credible in their testimony." *Id.*, slip op. at 26, 27. In light of the clear evidence, the court concluded that the continuous trigger rule should apply. *Id.*, slip op. at 29. The insurers had claimed to have new evidence

undermining the continuous trigger, but the trial court held that the insurers' experts presented nothing new. To require an expensive, expert-laden trial on this same issue in every insurance case would burden the court system and the public, and impose an enormous burden on policyholders facing the well-funded insurance industry. Connecticut should apply the "continuous trigger" rule as a matter of law.

III. The Appellate Court Properly Interpreted the Pollution Exclusion Clauses.

The Appellate Court properly held that "pollution exclusions" are inapplicable to claims arising from asbestos exposure in indoor working environments. If the pollution exclusions at issue in this case—which are common among Commercial General Liability policies—were read to exclude coverage for asbestos, the underfunding risk described in Section I.B.2.c. above would materialize. Additionally, ambiguous exclusionary clauses should be interpreted narrowly. *Liberty Mut. Ins. Co. v. Lone Star Indus., Inc.*, 290 Conn. 767, 796 (2009) (The "rule of construction favorable to the insured extends to exclusion clauses.") (citation omitted). The insurance industry recognized in the 1980s that its policies did not unambiguously exclude asbestos injury, so it adopted the asbestos exclusion. *See, e.g.*, 11 S. Plitt et al., Couch on Ins. § 155:83 (3d ed. Dec. 2018) (insurers excluded asbestos to address potential ambiguity as to whether coverage extends to damages caused by these substances). This Court should not retroactively amend standard policies to apply "pollution exclusions" in a radically expansive way that is at odds with the industry's own understanding.

CONCLUSION

This Court should affirm the Appellate Court's decision relating to the availability exception, trigger of coverage, and the pollution exclusion.

THE NATIONAL ASSOCIATION OF MANUFACTURERS

Dated: January 10, 2019

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CERTIFICATION OF COMPLIANCE

The undersigned attorney hereby certifies that the foregoing brief complies with all of the provisions of Connecticut Rule of Appellate Procedure § 67-2, specifically § 67-2(g),(i), and (j) as follows:

§ 67-2(g):

1. that on this date, January 10, 2019, the electronically submitted brief has been delivered electronically to the last known email address of each counsel of record for whom an e-mail address has been provided; and

2. the electronically submitted brief has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law.

§ 67-2(i):

1. that on this date, January 10, 2019, a copy of the brief has been sent by first-class mail, postage prepaid, to each counsel of record at the addresses listed on the attached service list, and to any trial judge (the Honorable Dan Shaban) who rendered a decision that is the subject of the appeal; and

2. the brief being filed with the appellate clerk is a true copy of the brief that was submitted electronically; and

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§ 67-2(j): a copy of the electronic confirmation receipt indicating that the brief was submitted electronically is accompanying the original brief.

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