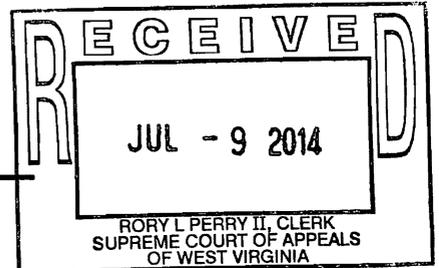


No. 14-0343



In the

SUPREME COURT OF APPEALS OF WEST VIRGINIA

ACE FIRE UNDERWRITERS INSURANCE COMPANY, et al.,

Petitioner,

v.

U.S. SILICA COMPANY

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF MORGAN COUNTY,
WEST VIRGINIA

AMENDED BRIEF OF *AMICI CURIAE* AMERICAN INSURANCE ASSOCIATION AND
COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF
TRAVELERS INDEMNITY COMPANY AND REVERSAL

Herschel H. Rose III (#3179)
Rose Law Office
300 Summers Street, Suite 1440
Charleston, West Virginia 25301
(304) 342-5050
(304) 342-0455 (facsimile)
herschelrose@roselawwv.com

July 9, 2014

*Counsel for Amici Curiae
Complex Insurance Claims Litigation
Association and American Insurance
Association*

TABLE OF CONTENTS

| | |
|---|----|
| INTEREST OF AMICI CURIAE..... | 1 |
| STATEMENT OF FACTS | 2 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT..... | 4 |
| I. THE CIRCUIT COURT ERRED IN HOLDING THAT AN INSURER MUST PAY DEFENSE COSTS A POLICYHOLDER INCURRED YEARS BEFORE NOTIFYING IT OF ANY CLAIMS OR SUITS | 4 |
| A. This Court Should Offer Guidance To West Virginia Courts and Litigants On The Meaning of the “Voluntary Payments” Provision | 4 |
| 1. The Voluntary Payments Provision should be given full effect | 4 |
| 2. The ruling below contravenes the clear language of the Voluntary Payments Provision | 4 |
| 3. The decision below is at odds with the weight of authority nationwide, which holds that pre-tender costs are not covered under liability policies | 6 |
| B. In Denying Summary Judgment on Coverage for Pre-Tender Costs, The Court Below Applied An Improper and Troubling Standard | 11 |
| II. THE COURT SHOULD REVERSE THE EXTRAORDINARY DECISION DENYING SUMMARY JUDGMENT ON THE NOTICE CONDITION WHERE NOTICE WAS SIGNIFICANTLY LATE | 12 |
| III. THE COURT SHOULD ADOPT PRO RATA ALLOCATION IN LONG-TAIL CLAIMS SUCH AS THOSE AT ISSUE HERE..... | 16 |
| A. Allocation Is an Important Question of First Impression under West Virginia Law | 16 |
| B. Pro-Rata Allocation is Consistent with the Policy Terms, and Basic Fairness and Equity..... | 17 |
| CONCLUSION..... | 20 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| Cases | |
| <i>America Mutual Liability Insurance Co. v. Beatrice Cos.</i> , 924 F. Supp. 861 (N.D. Ill. 1996)..... | 9, 10 |
| <i>Anco Insulations, Inc. v. Royal Indemnity Co.</i> , No. 07-657-BAJ, 2010 WL 4394147 (M.D. La. Nov. 1, 2010) | 9 |
| <i>Arch Specialty Insurance Co. v. Go-Mart, Inc.</i> , No. 2:08-0285, 2009 WL 5214916 (S.D.W. Va. Dec. 28, 2009) | 13 |
| <i>Augat, Inc. v. Liberty Mutual Insurance Co.</i> , 410 Mass. 117, 571 N.E.2d 357 (1991)..... | 7 |
| <i>Berryhill v. State Farm Fire & Casualty Co.</i> , 174 Ga. App. 97, 329 S.E.2d 189 (1985) | 15 |
| <i>Blake v. John Skidmore Truck Stop, Inc.</i> , 201 W. Va. 126, 493 S.E.2d 887 (1997)..... | 12 |
| <i>Boardman Petroleum, Inc. v. Federated Mutual Insurance Co.</i> , 926 F. Supp. 1566 (S.D. Ga. 1995), <i>rev'd on other grounds</i> , 150 F.3d 1327 (11th Cir. 1998) | 6 |
| <i>Boston Gas Co. v. Century Indemnity Co.</i> , 454 Mass. 337, 910 N.E.2d 290 (2009)..... | 18 |
| <i>Cellex Biosciences, Inc. v. St. Paul Fire & Marine Insurance Co.</i> , 537 N.W.2d 621 (Minn. Ct. App. 1995)..... | 8 |
| <i>Century Indemnity Co. v. Aero-Motive Co.</i> , 318 F. Supp. 2d 530 (W.D. Mich. 2003) | 9 |
| <i>Champion v. Southern General Insurance Co.</i> , 401 S.E.2d 36 (Ga. Ct. App. 1990)..... | 14 |
| <i>Chesapeake & Ohio Railway Co. v. Certain Underwriters at Lloyd's, London</i> , 834 F. Supp. 456 (D.D.C. 1993)..... | 7 |
| <i>Clemente v. Home Insurance Co.</i> , 791 F. Supp. 118 (E.D. Pa. 1992) <i>aff'd</i> , 981 F.2d 1246 (3d Cir. 1992) | 8 |
| <i>Colonial Gas Energy System v. Unigard Mutual Insurance Co.</i> , 441 F. Supp. 765 (N.D. Cal. 1977)..... | 15 |

TABLE OF AUTHORITIES
(Continued)

| | Page(s) |
|--|----------------|
| <i>Colonial Insurance Co. v. Barrett</i> , 208 W. Va. 706, 542 S.E.2d 869 (2000)..... | 12, 15 |
| <i>Commercial Union Insurance Co. v. Sepco Corp.</i> , 918 F.2d 920 (11th Cir. 1990)..... | 17 |
| <i>Crown Center Redevelopment Corp. v. Occidental Fire & Casualty Co. of North Carolina</i> , 716 S.W.2d 348 (Mo. Ct. App. 1986)..... | 8 |
| <i>CSX Transportation, Inc. v. Commercial Union Insurance Co.</i> , 82 F.3d 478 (D.C. Cir. 1996)..... | 7 |
| <i>Dairyland Insurance Co. v. Voshel</i> , 189 W. Va. 121, 428 S.E.2d 542 (1993)..... | 13 |
| <i>Diocese of Winona v. Interstate Fire & Casualty Co.</i> , 89 F.3d 1386 (8th Cir. 1996)..... | 17 |
| <i>Domtar, Inc. v. Niagara Fire Insurance Co.</i> , 563 N.W.2d 724 (Minn. 1997)..... | 17 |
| <i>Dover Lake Park, Inc. v. Scottsdale Insurance Co.</i> , 2003-Ohio-3312 (Ohio Ct. App. June 25, 2003)..... | 10 |
| <i>Dreaded, Inc. v. St. Paul Guardian Insurance Co.</i> , 904 N.E.2d 1267 (Ind. 2009)..... | 9 |
| <i>E. I. du Pont de Nemours & Co. v. Admiral Insurance Co.</i> , No. 89C-AU-99, 1995 WL 654020 (Del. Super. Oct. 27, 1995)..... | 17 |
| <i>EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd's</i> , 156 N.H. 333, 934 A.2d 517 (2007)..... | 18, 19 |
| <i>Erie Insurance Exchange v. Virgin Islands Enterprises, Inc.</i> , 264 F. Supp. 2d 261 (D.V.I. 2003)..... | 9 |
| <i>Essex Insurance Co. v. Five Star Dye House, Inc.</i> , 38 Cal. 4th 1252, 137 P.3d 192 (2006)..... | 10 |
| <i>Faust v. The Travelers</i> , 55 F.3d 471 (9th Cir. 1995)..... | 9, 10 |
| <i>Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.</i> , 662 F. Supp. 71 (E.D. Mich. 1987)..... | 17 |

TABLE OF AUTHORITIES
(Continued)

| | Page(s) |
|--|----------------|
| <i>First Bank of Turley v. Fidelity & Deposit Insurance Co. of Maryland</i> , 928 P.2d 298 (Okla. 1996)..... | 8 |
| <i>Gerrard Realty Corp. v. American States Insurance Co.</i> , 277 N.W.2d 863 (Wis. 1979)..... | 15 |
| <i>Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherungen A.G.</i> , 3 Cal. 3d 434, 476 P.2d 406 (1970)..... | 7 |
| <i>Gulf Chemical & Metallurgical Corp. v. Associated Metals & Minerals Corp.</i> , 1 F.3d 365 (5th Cir. 1993) | 17 |
| <i>Harwell v. State Farm Mutual Automobile Insurance Co.</i> , 896 S.W.2d 170 (Tex. 1995) | 15 |
| <i>Hooper v. Zurich American Insurance Co.</i> , 552 N.W.2d 31 (Minn. Ct. App. 1996)..... | 14 |
| <i>Ingalls Shipbuilding v. Federal Insurance Co.</i> , 410 F.3d 214 (5th Cir. 2005) | 9 |
| <i>Insua v. Scottsdale Insurance Co.</i> , 104 Cal. App. 4th 737, 129 Cal. Rptr. 2d 138 (2002) | 7 |
| <i>Interface Flooring Systems, Inc. v. Aetna Casualty & Surety Co.</i> , 261 Conn. 601, 804 A.2d 201 (2002) | 7 |
| <i>Jackson v. Putnam County Board of Education</i> , 221 W. Va. 170, 653 S.E.2d 632 (2007)..... | 11 |
| <i>Keffer v. Prudential Insurance Co. of America</i> , 153 W. Va. 813, 172 S.E.2d 714 (1970)..... | 5 |
| <i>Lafarge Corp. v. Hartford Casualty Insurance Co.</i> , 61 F.3d 389 (5th Cir. 1995) | 8 |
| <i>Marks Construction Co. v. Bourt of Education of County of Wood</i> , 185 W. Va. 500, 408 S.E.2d 79 (1991)..... | 12 |
| <i>Metal Bank of America, Inc. v. Insurance Co. of North America</i> , 520 A.2d 493 (Pa. Super. Ct. 1987)..... | 14 |
| <i>Michaud v. Merrimack Mutual Fire Insurance Co.</i> , No. 94-0175B, 1994 WL 774683 (D.R.I. Nov. 16, 1994)..... | 8 |

TABLE OF AUTHORITIES
(Continued)

| | Page(s) |
|---|----------------|
| <i>Miller-Wohl Co. v. Commisionar of Labor & Industry</i> , 694 F.2d 203 (9th Cir. 1982) | 2 |
| <i>Nagel v. Kentucky Central Insurance Co.</i> , 894 S.W.2d 19 (Tex. App. 1994)..... | 8 |
| <i>Nationwide Mutual Insurance Co. v. Lafarge Corp.</i> , 910 F. Supp. 1104 (D. Md. 1996), <i>aff'd</i> , 121 F.3d 699 (4th Cir. 1997) | 17 |
| <i>Navigazione Alta Italia v. Columbia Casualty Co.</i> , 256 F.2d 26 (5th Cir. 1958) | 14 |
| <i>Neckerman v. Progressive Insurance Agency</i> , 659 N.E.2d 843 (1995) | 14 |
| <i>Norfolk Southern Corp. v. California Union Insurance Co.</i> , 859 So. 2d 167 (La. Ct. App. 2003), <i>writ denied.</i> , 861 So. 2d 579 (La. 2003). | 17 |
| <i>Northern Insurance Company of New York v. Allied Mutual Insurance Co.</i> , 955 F.2d 1353 (9th Cir. 1992) | 7 |
| <i>Northern States Power Co. v. Fidelity & Casualty Co. of New York</i> , 523 N.W.2d 657 (Minn. 1994) | 16, 17 |
| <i>Northwest Prosthetic & Orthotic Clinic, Inc. v. Centennial Insurance Co.</i> , 997 P.2d 972 (Wash. Ct. App. 2000)..... | 15 |
| <i>O'Brien Family Trust v. Glen Falls Insurance Co.</i> , 218 Ga. App. 379, 461 S.E.2d 311 (1995) | 9 |
| <i>Owens-Illinois, Inc. v. United Insurance Co.</i> , 650 A.2d 974 (N.J. 1994) | 17 |
| <i>Perini/Tompkins Joint Venture v. Ace American Insurance Co.</i> , 738 F.3d 95 (4th Cir. 2013) | 14 |
| <i>Pittston Co. v. Allianz Insurance Co.</i> , 905 F. Supp. 1279 (D.N.J. 1995), <i>rev'd in part on other grounds</i> , 124 F.3d 508 (3d Cir. 1997) | 9 |
| <i>Porter v. American Optical Corp.</i> , 641 F.2d 1128 (5th Cir. 1981) | 17 |

TABLE OF AUTHORITIES
(Continued)

| | Page(s) |
|---|----------------|
| <i>Prince George’s County v. Local Government Insurance Trust</i> , 879 A.2d 81 (Md. Ct. App. 2005)..... | 14 |
| <i>Public Service Co. of Colorado v. Wallis & Cos.</i> , 986 P.2d 924 (Colo. 1999)..... | 17, 18 |
| <i>Reliance Insurance Co. v. County Line Place, Inc.</i> , 692 F. Supp. 694 (S.D. Miss. 1988) | 8 |
| <i>Sentinel Insurance Co., Ltd. v. First Insurance Co. of Hawai’i, Ltd.</i> , 76 Haw. 277, 875 P.2d 894 (1994) <i>on reconsideration sub nom.</i> , 76 Haw. 453, 879 P.2d 558 (1994)..... | 17 |
| <i>Sharon Steel Corp. v. Aetna Casualty & Surety Co.</i> , 931 P.2d 127 (Utah 1997)..... | 17 |
| <i>Stonewall Insurance Co. v. Asbestos Claims Management Corp.</i> , 73 F.3d 1178 (2d Cir. 1995), <i>reh’g denied and modified on other grounds</i> , 85 F.3d 49 (2d Cir. 1996) | 17, 18 |
| <i>In re Texas E. Transmission Corp. PCB Contamination Insurance Coverage Litigation</i> , 870 F. Supp. 1293 (E.D. Pa. 1992) <i>aff’d</i> , 15 F.3d 1249 (3d Cir. 1994) | 9 |
| <i>Travelers Property Casualty Co. of America v. Hillerich & Bradsby Co.</i> , 598 F.3d 257 (6th Cir. 2010) | 6 |
| <i>Uniroyal, Inc. v. Home Insurance Co.</i> , 707 F. Supp. 1368 (E.D.N.Y. 1988)..... | 17, 18 |
| <i>In re Wallace & Gale Co.</i> , 385 F.3d 820 (4th Cir. 2004) | 17 |
| <i>Watzman v. Unatin</i> , 101 W. Va. 41, 131 S.E. 874 (1926)..... | 14 |
| <i>Wellington Power Corp. v. CNA Surety Corp.</i> , 217 W. Va. 33, 614 S.E.2d 680 (2005)..... | 13 |
| <i>Wheeling Pittsburgh Corp. v. American Insurance Co.</i> , No. Civ. A 93-C-340, 2003 WL 23652106 (W. Va. Cir. Ct. Oct. 18, 2003) | 15 |
| <i>Williams v. Precision Coil, Inc.</i> , 194 W.Va. 52, 459 S.E.2d 329 (1995)..... | 11 |

TABLE OF AUTHORITIES
(Continued)

| | Page(s) |
|--|----------------|
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| Other Authorities | |
| Allan D. Windt, <i>Insurance Claims and Disputes</i> , § 4.44 (6th Ed.) | 8 |
| Insurance Coverage of Construction Disputes § 5:3 (2d ed.) | 7 |
| William P. Shelley, <i>Fundamentals of Insurance Coverage Allocation</i> (Jan. 5, 2000), <i>Mealey's Litigation Reports (Insurance)</i> | 16, 17 |

INTEREST OF AMICI CURIAE

The Complex Insurance Claims Litigation Association (“CICLA”), formerly the Insurance Environmental Litigation Association (“IELA”), is a trade association of major property and casualty insurance companies.¹ CICLA is vitally interested in the outcome of this case. Each CICLA member is licensed to do business in West Virginia, either in its own right or through a subsidiary or affiliate. CICLA’s member companies underwrite a substantial portion of the general liability insurance in the State of West Virginia. Further, CICLA members have entered into numerous insurance contracts in West Virginia and nationally containing provisions similar to the ones at issue here. CICLA seeks to assist courts in resolving important insurance coverage questions by providing a national perspective on judicial trends in interpreting insurance contracts. CICLA also seeks to explain the importance of the proper interpretation of such contracts to the nation’s insurance industry. As an association of insurers, CICLA brings special expertise in, and knowledge of, disputes concerning issues of contract interpretation.

AIA represents approximately 300 insurers that write more than \$117 billion in premiums each year. AIA member companies offer all types of property-casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage for small

¹ No person or entity other than CICLA and AIA has contributed to the authoring or funding of this amended brief. No counsel for any party has authored the brief in whole or in part. No counsel or any party to the appeal has made any monetary contribution specifically intended to fund the preparation or submission of the brief. No person other than *amici curiae* AIA and CICLA has made any such monetary contribution. Travelers Indemnity Company, a party to this action, is a member of CICLA and AIA, trade associations whose combined membership is approximately 300 insurance companies. Travelers Indemnity Company appears through its own counsel in this appeal and this *amici curiae* brief is not submitted on its behalf.

Counsel for the amicus curiae provided counsel of record for all parties with notice of its intention to file a motion for leave to file an amicus curiae brief on July 1, 2014 by electronic mail as required by rule 30 (b) of the West Virginia Rules of Appellate Procedure. Counsel for all parties of record have authorized counsel for this amicus curiae to represent that they have no objection to the adequacy of that notice.

businesses, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums and files *amicus curiae* briefs in significant cases.

In submitting this amended brief, *amici* seek to fulfill “the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of [the parties'] counsel, and drawing the court's attention to law that escaped consideration.” *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

STATEMENT OF FACTS

Amici curiae adopt the Statement of Facts set forth in Petitioner's Brief on Appeal.

SUMMARY OF ARGUMENT

The Court should reverse the judgment of the Circuit Court, which presents significant issues of first impression. This appeal raises the question of whether a policyholder can voluntarily incur defense costs for over thirty years before notifying its insurer and then attempt to saddle its insurer with those costs. It also involves the yet unresolved issue of the proper allocation method in long-tail claims under West Virginia law. Because the rulings below contravene the plain language of the Travelers Policies and place West Virginia law at odds with the weight of authority, the Court should reverse the Circuit Court.

The trial court's ruling that a policyholder may recover pre-tender costs incurred over the course of over thirty years without any attempt to notify the insurer disregards the plain language of the Voluntary Payments Provision of the Travelers Policies, which provides that the policyholder may not, except at its own cost, voluntarily make any payment or incur any expense. That ruling also conflicts with the majority view that pre-tender costs are not recoverable—even in the absence of a voluntary payments provision. Moreover, the trial court

applied an improperly high standard in denying summary judgment to Travelers on the pre-tender costs issue in violation of West Virginia's commitment to prompt disposition of disputes.

The Court should also reverse the trial court's extraordinary decision denying summary judgment to Travelers on the Notice Condition where notice was delayed for decades. The Policies require notice "immediately" of every demand, notice, summons or other process as a condition precedent to coverage. Despite the fact that the lawsuits against the policyholder commenced as early as 1975 and the policyholder did not give notice of the claims until 2008, the Circuit Court nonetheless denied Travelers' motion for summary judgment on the Notice Condition. In this case, notice was not given until most of the lawsuits against the policyholders had been brought, defended, and resolved. Such a delay cannot be reasonable as a matter of law, and courts have acknowledged that as a result of such an unreasonable delay, an insurer is prejudiced as a matter of law when the insurer is simply asked to issue a check. The Circuit Court's contrary ruling raises serious questions about whether West Virginia courts are willing to enforce notice conditions at all.

Finally, the Court should reverse the Circuit Court's adoption of a theory of "joint and several" insurer liability in long-tail claims such as those at issue here. The Circuit Court improperly denied Travelers the benefit of various set offs and credits by rejecting pro rata allocation and instead adopting—without any analysis—a joint and several liability approach. Because that approach contradicts the insurance contract terms, is in conflict with the weight of authority on allocation of loss, and is inconsistent with basic fairness, the Court should reverse the Circuit Court's decision.

ARGUMENT

I. The Circuit Court Erred in Holding That An Insurer Must Pay Defense Costs A Policyholder Incurred Years Before Notifying It of Any Claims or Suits.

A. This Court Should Offer Guidance To West Virginia Courts and Litigants On The Meaning of the “Voluntary Payments” Provision.

The issue of whether an insurer must pay costs incurred by a policyholder before providing notice of a claim or suit to its liability insurer is an important question of first impression under West Virginia law. The Court should reverse the Circuit Court’s decision because the ruling below is in contravention of the clear language of the Travelers Policies and places West Virginia at odds with the weight of authority nationwide, which holds that pre-tender costs are not covered under liability policies.

1. *The Voluntary Payments Provision Should be Given Full Effect.*

The Travelers Policies provide:

The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

Policies, Conditions, Section 5 (the “Voluntary Payments Provision”). West Virginia lacks appellate precedent on coverage for pre-tender costs incurred by the policyholder without the insurer’s knowledge or consent. Further, this Court has never addressed whether—even absent a voluntary payments provision—no insurance coverage is triggered until notice is tendered to the insurer. Not only does the interpretation of the Voluntary Payments Provision present an issue of first impression, but it also presents an important issue repeatedly faced by courts, insurers, and policyholders. This Court should provide clear guidance by reversing the decision below and giving full effect to the Voluntary Payments Provision.

2. *The ruling below contravenes the clear language of the Voluntary Payments Provision.*

The Court should reverse the ruling below because it contravenes the clear language of the Voluntary Payments Provision. The Circuit Court erroneously concluded that a policyholder may choose to defend lawsuits at its own cost for years—in some instances, more than thirty years—without attempting to determine if insurance coverage is available, then demand and recover from its insurer all the costs incurred before tendering notice to its insurer. That determination clearly contravenes the language and intent of the Voluntary Payments Provision.

The Voluntary Payments Provision plainly states that the policyholder “may not, *except at his own cost*, voluntarily make *any payment*, assume *any obligation* or incur *any expense* other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.” (Emphasis added). The straight-forward language of this provision makes it inescapable that *any* costs incurred by the policyholder prior to giving notice to the insurer are voluntary payments that are “at [the policyholder’s] own cost” and are not insured. West Virginia courts have long recognized the importance of enforcing the voluntary obligations of parties to a contract. *Keffer v. Prudential Ins. Co. of Am.*, 153 W. Va. 813, 815-16, 172 S.E.2d 714, 715 (1970) (“This Court has uniformly held that where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.”). In this case, the Circuit Court erred in refusing to enforce the terms of the Voluntary Payments Provision to preclude the policyholder from recovering pre-tender costs.

The policyholder here incurred millions upon millions of dollars in defense costs before ever attempting to determine if insurance coverage was available. Years and millions of dollars later, the policyholder sought, in contravention of the Voluntary Payments Provision, to saddle its insurer with the costs it voluntarily incurred prior to tendering notice to the insurer. But the

very purpose of the Voluntary Payments Provision is to protect insurers from the circumstance where a policyholder precludes its insurer from exercising any of its rights under the policy by failing to tender notice but nonetheless seeks payment of millions of dollars in pre-tender costs. The plain language of the Voluntary Payments Provision precludes such an outcome, and the Circuit Court erred in holding otherwise.

3. *The decision below is at odds with the weight of authority nationwide, which holds that pre-tender costs are not covered under liability policies.*

In addition to contravening the plain language of the Voluntary Payments Provision, the decision below is in conflict with the weight of authority around the country. Numerous courts have interpreted provisions similar to the Voluntary Payments Provision at issue here and concluded that such provisions bar coverage for any costs incurred prior to tender of notice. Indeed, the majority of courts that have addressed the issue have held that *even in the absence of a voluntary payments provision*, coverage is unavailable under liability policies for pre-tender costs. What's more, courts have additionally held that there is no requirement for an insurer to be prejudiced before denying coverage for pre-tender costs, because coverage is not triggered at all prior to tender of notice. The Circuit Court's decision puts West Virginia law at odds with that weight of authority.

Courts across the country have held that, where the insurance contract provides that an insured may not voluntarily incur expenses except at its own cost, coverage is unavailable for pre-tender costs. *See Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 273-74 (6th Cir. 2010) ("the majority of other jurisdictions do not allow recovery for pre-tender costs because those are deemed waived by the insured, especially when an insurance contract prohibits voluntary payments without the consent of the insurer, and so no showing of prejudice is required on the part of the insurer."). Thus, courts have recognized the importance of

voluntary payments clauses and enforced them according to their plain terms. As one court explained:

[T]he cooperation provision's purpose is to make sure that the insurance company has the opportunity to protect and defend its interest, having accepted the risk of the insurance issued. It is fair that the insurer requires the insured to give notice before incurring any costs that the insurer may later be asked to reimburse.

Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 926 F. Supp. 1566, 1583 (S.D. Ga. 1995), *rev'd on other grounds*, 150 F.3d 1327 (11th Cir. 1998) (holding insured not entitled to pre-tender costs). Additionally, courts have found that voluntary payments clauses seek to “give insurers exclusive control over settlement, to prevent collusion between the insured and the injured third party and lower claims cost by utilizing the insurer’s expertise in evaluating and handling liability cases.” *Insurance Coverage of Construction Disputes* § 5:3 (2d ed.).

Based on these rationales, courts have held that cooperation clauses and voluntary payments provisions bar coverage for pre-tender costs. In *Augat, Inc. v. Liberty Mutual Insurance Co.*, for example, the court rejected the policyholder’s argument that its incurrence of environmental cleanup costs prior to tendering notice to its insurer was not “voluntary” because it did not “want” to pay the costs, and the court held that the voluntary payments clause barred coverage for those pre-tender costs. 410 Mass. 117, 122, 571 N.E.2d 357, 360 (1991). Similarly, in *Northern Insurance Company of New York v. Allied Mutual Insurance Co.*, the court held that a voluntary payments provision precluded coverage for defense costs incurred prior to tender of notice to the insurer. 955 F.2d 1353, 1360 (9th Cir. 1992) (“[The] policy has a provision precluding reimbursement for defense costs voluntarily incurred before tender.

California courts have consistently honored these provisions, and will not require insurers to pay for voluntarily incurred pre-tender costs.”). And other courts are in accord.²

Indeed, even in the absence of policy language prohibiting voluntary payments by the policyholder, the majority of courts that have addressed the issue have concluded that liability

² The following courts, among others, have held that voluntary payments provisions bar coverage for pre-tender costs:

- Georgia: *Interface Flooring Sys., Inc. v. Aetna Cas. & Sur. Co.*, 261 Conn. 601, 619, 804 A.2d 201, 211 (2002) (applying Georgia law) (holding that voluntary payment provision supported the conclusion that coverage was unavailable for pre-tender costs).
- Virginia: *Chesapeake & Ohio Ry. Co. v. Certain Underwriters at Lloyd's, London*, 834 F. Supp. 456, 461 (D.D.C. 1993), *aff'd in part, rev'd in part on other grounds, CSX Transp., Inc. v. Commercial Union Ins. Co.*, 82 F.3d 478 (D.C. Cir. 1996) (insurer not liable for pre-tender costs incurred without its consent where policy required consent).
- California: *Insua v. Scottsdale Ins. Co.*, 104 Cal. App. 4th 737, 746, 129 Cal. Rptr. 2d 138, 144 (2002) (no coverage for pre-tender defense costs pursuant to voluntary payment provision); *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherungen A.G.*, 3 Cal. 3d 434, 449, 476 P.2d 406, 415 (1970) (same).
- Pennsylvania: *Clemente v. Home Ins. Co.*, 791 F. Supp. 118, 122 (E.D. Pa. 1992), *aff'd*, 981 F.2d 1246 (3d Cir. 1992) (same).
- Missouri: *Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co. of N. Carolina*, 716 S.W.2d 348, 357 (Mo. Ct. App. 1986) (same).
- Mississippi: *Reliance Ins. Co. v. Cnty. Line Place, Inc.*, 692 F. Supp. 694, 698 (S.D. Miss. 1988) (holding that, even if insured was entitled to defense costs despite its untimely notice, it would not be entitled to pre-tender costs due to the policy's voluntary payment provision).
- Texas: *Lafarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 399 (5th Cir. 1995) (“We agree, however, with [the insurer's] contention that it should not be liable for any defense costs incurred prior to the date [the policyholder] tendered the amended petition because the ‘voluntary payment’ provision of the policy precludes liability for such pre-tender defense costs.”); *Nagel v. Kentucky Cent. Ins. Co.*, 894 S.W.2d 19, 21 (Tex. App. 1994) (holding that voluntary payment provision precluded coverage for pre-tender costs).
- Minnesota: *Cellex Biosciences, Inc. v. St. Paul Fire & Marine Ins. Co.*, 537 N.W.2d 621, 623 (Minn. Ct. App. 1995) (holding insurer not liable for pre-tender costs where policy required insurer's consent to incurrence of defense costs).
- Rhode Island: *Michaud v. Merrimack Mut. Fire Ins. Co.*, No. 94-0175B, 1994 WL 774683, at *6-7 (D.R.I. Nov. 16, 1994) (“[The insureds] voluntarily incurred legal expenses for their defense in the . . . action without [the insurer's] consent in clear violation of unambiguous policy language. These [insureds] are now hard pressed to justify reimbursement for *all* defense costs and expenses since the initiation of the . . . action.”) (emphasis in original).
- Virgin Islands: *Erie Ins. Exch. v. Virgin Islands Enters., Inc.*, 264 F. Supp. 2d 261, 265 (D.V.I. 2003) (“Plaintiff's pre-tender costs associated with the wrongful death suit amount to voluntary contributions per section IV(A)(2)(b)(1) of [the] insurance policy for which [the insurer] owes no duty to indemnify.”).
- Oklahoma: *First Bank of Turley v. Fid. & Deposit Ins. Co. of Md.*, 928 P.2d 298, 304 (Okla.1996).

policies provide no coverage for pre-tender costs, because the policy's coverage is not triggered until notice is tendered. See Allan D. Windt, *Insurance Claims and Disputes*, § 4.44 (6th Ed.) (“[M]ost of the courts that have addressed the issue have held that an insurer is not liable for pre-tender defense costs because (1) the policy coverage is not triggered until such notice is given, and (2) until the policy coverage is triggered, defense costs are not covered.”). In a case involving a voluntary payments provision, in denying coverage for pre-tender costs, the court reasoned that “[t]he insurer’s duty to defend simply does not arise until it receives the foundational information designated in the notice requirement. Until an insurer receives such enabling information, it cannot be held accountable for breaching this duty.” *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*, 904 N.E.2d 1267, 1273 (Ind. 2009). The majority of courts nationwide have similarly held that coverage is not triggered until notice is given, thus precluding coverage for any pre-tender costs.³

³ See, e.g., *Ingalls Shipbuilding v. Fed. Ins. Co.*, 410 F.3d 214, 234 (5th Cir. 2005) (“An insurer has no obligation to force itself onto an insured that has given no indication of its desire for a defense and that has obtained other defense counsel.”); *Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530, 544 (W.D. Mich. 2003) (“... the Court rejects [the insured’s] argument that an insurer is liable for pretender defense costs A contrary result would essentially turn an insurer’s defense obligation into a duty to reimburse, without affording the insurer the opportunity to control the defense and settlement of the underlying obligation.”); *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 870 F. Supp. 1293, 1367 (E.D. Pa. 1992), *aff’d*, 15 F.3d 1249 (3d Cir. 1994) and *aff’d*, 995 F.2d 219 (3d Cir. 1993) *on reh’g*, 15 F.3d 1230 (3d Cir. 1994) and *opinion reinstated in part*, 15 F.3d 1249 (3d Cir. 1994) (duty to defend does not accrue until notice); *O’Brien Family Trust v. Glen Falls Ins. Co.*, 218 Ga. App. 379, 380-81, 461 S.E.2d 311, 313 (1995) (“[The policy obligated [the insurer] to pay the expenses it incurred in providing the [insureds] a defense. . . . However, the policy made no provision for the payment of pre-tender legal expenses. . . . Therefore, we conclude that the policy did not obligate [the insurer] to pay pre-tender legal expenses incurred by the [insureds]. Such a construction would render contractual terms necessary to trigger [the insurer’s] performance under the policy meaningless.”); *Pittston Co. v. Allianz Ins. Co.*, 905 F. Supp. 1279, 1312 (D.N.J. 1995), *rev’d in part on other grounds*, 124 F.3d 508 (3d Cir. 1997) (“There is no duty on the part of an insurer to defend until it receives notice of a claim.”); *Am. Mut. Liab. Ins. Co. v. Beatrice Cos.*, 924 F. Supp. 861, 872 (N.D. Ill. 1996) (Massachusetts law) (holding no duty to pay pre-tender costs, because “[a]s a general rule, an insurer has no duty to defend until it receives notice of a claim.”); *Anco Insulations, Inc. v. Royal Indem. Co.*, No. 07-657-BAJ, 2010 WL 4394147 (M.D. La. Nov. 1, 2010) (denying policyholder’s request for pre-tender costs, because coverage was not triggered until notice was given).

Indeed, even though some courts have imposed a prejudice requirement on an insurer's disclaimer of coverage based on late notice, courts have held that an insurer need not be prejudiced to deny coverage for pre-tender costs. In *Faust v. The Travelers*, for example, the court distinguished an insurer's disclaimer based on late notice from a denial of coverage for pre-tender costs pursuant to a voluntary payments clause. 55 F.3d 471, 472 (9th Cir. 1995). The court noted that "[t]he voluntary payment provision . . . provides only that an insurer will not be held liable for expenses voluntarily incurred by an insured before tendering defense of a suit to the insurer." *Id.* at 472-73. Therefore, the court held the prejudice requirement inapplicable to pre-tender costs. *Id.* at 473. Similarly, the court in *Xebec Development Partners, Ltd. v. National Union Fire Insurance Co.* reasoned that, where the policy requires notice as a condition precedent to coverage for defense costs, "the existence or absence of prejudice to [the insurer] is simply irrelevant to the [insurer's] duty to indemnify costs incurred before notice. . . ." 12 Cal. App. 4th 501, 566, 15 Cal. Rptr. 2d 726, 763 (1993), *disapproved of on other grounds*, *Essex Ins. Co. v. Five Star Dye House, Inc.*, 38 Cal. 4th 1252, 137 P.3d 192 (2006).

Accordingly, "courts have concluded that (at least between sophisticated parties) the 'no pre-tender defense costs' rule remains viable even in jurisdictions that have adopted the 'notice-prejudice' rule." *Am. Mut. Liab. Ins. Co. v. Beatrice Cos.*, 924 F. Supp. 861, 874 (N.D. Ill. 1996); *see also Dover Lake Park, Inc. v. Scottsdale Ins. Co.*, 2003-Ohio-3312 (Ohio Ct. App. June 25, 2003) ("the prejudice inquiry . . . has no application to a determination of whether [the insured's] late notice relieved [the insurer] of its obligation under the policy to provide reimbursement for . . . pre-tender fees and litigation expenses."). In short, the decision below is at odds with the weight of authority and contravenes the plain language of the Policies.

Accordingly, the Court should reverse the Circuit Court's rule and grant judgment in favor of Travelers.

B. In Denying Summary Judgment on Coverage for Pre-Tender Costs, The Court Below Applied An Improper and Troubling Standard.

The Circuit Court conflated the late notice and pre-tender costs issues in denying Travelers' motion for summary judgment and applied an improper standard for summary judgment disposition. There are no factual disputes between the parties on the issue of coverage for pre-tender costs. It is undisputed that U.S. Silica incurred millions of dollars in defense costs beginning in 1975 and spanning the course of over thirty years. It is also undisputed that at no time prior to 2008 did U.S. Silica tender the defense of any of the lawsuits filed against it to Travelers under the Policies. The only disputed issue here is a purely legal one—namely, whether the Voluntary Payments Provision bars coverage for U.S. Silica's pre-tender costs.

In denying Travelers' motion for summary judgment, the Circuit Court concluded that “complex issues of material fact remain, including, but not limited to, whether the Plaintiff's delay in tendering the claims at issue was reasonable under the circumstances here, and if so, whether Defendant was prejudiced by the delay.” But this formulation of the issue conflates the late notice defense with the pre-tender costs issue. The “reasonableness” of an insured's delay in tendering notice is wholly irrelevant to the Voluntary Payments Provision's bar against coverage of pre-tender costs. Thus, the Circuit Court's reasoning for denying summary judgment was improper.

The Circuit Court's decision also imposes an unreasonably high standard for granting summary judgment, thus deferring resolution of matters ripe for summary disposition to resolution by trial. This Court has stated that “[s]ummary judgment is mandated in our courts where, after appropriate discovery, there is no legitimate dispute regarding a genuine issue of

material fact impacting liability apparent from the record before the Circuit Court.” *Jackson v. Putnam Cnty. Bd. of Educ.*, 221 W. Va. 170, 177-78, 653 S.E.2d 632, 639-40 (2007). Summary judgment is a critical tool for effecting an efficient resolution of legal disputes. As Justice Frank D. Cleckley stated in *Williams v. Precision Coil, Inc.*:

Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if there essentially is no real dispute as to salient facts or if it only involves a question of law.

194 W.Va. 52, 459 S.E.2d 329 (1995) (internal quotations and citations omitted). On the other hand, mechanically denying summary judgment where there is no genuine dispute of material fact “frustrates judicial economy by mandating the time and expense of a trial when, plainly, one is not merited.” *Blake v. John Skidmore Truck Stop, Inc.*, 201 W. Va. 126, 137, 493 S.E.2d 887, 898 (1997) (Maynard, J., dissenting); *see also Marks Const. Co. v. Bd. of Educ. of Cnty. of Wood*, 185 W. Va. 500, 504, 408 S.E.2d 79, 83 (1991) (“Summary judgment is a mechanism designed to effect a prompt resolution of controversies”). This Court should reverse the Circuit Court’s improper application of Rule 56 to reaffirm West Virginia’s commitment to prompt disposition of disputes and commitment to the settled standards for use of Rule 56.

II. The Court Should Reverse The Extraordinary Decision Denying Summary Judgment On The Notice Condition Where Notice Was Significantly Late.

The Circuit Court erroneously concluded that Travelers must reimburse U.S. Silica for costs it previously incurred in defending lawsuits—including lawsuits filed more than thirty years ago—notwithstanding that the majority of the lawsuits were brought, defended and resolved years before notice was given to Travelers. This conclusion does not comport with the language of the Travelers Policies or the law. The Court should hold that where an insurer is presented with a *fait accompli* and simply asked to pay, it is presumed to be prejudiced as a matter of law.

The Policies provide that “[i]f a claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.” Policies, Conditions, Section 4. Under West Virginia law, “[t]he satisfaction of the notice provision in an insurance policy is a condition precedent to coverage for the policyholder.” *Colonial Ins. Co. v. Barrett*, 208 W. Va. 706, 711, 542 S.E.2d 869, 874 (2000). Thus, the policyholder must demonstrate that it provided timely notice to its insurer. *Id.* If the policyholder provided late notice, which it indisputably did in this case, the insurer need not demonstrate that it was prejudiced by late notice unless the policyholder’s delay appears to be reasonable in light of the policyholder’s explanation. *Dairyland Ins. Co. v. Voshel*, 189 W. Va. 121, 125, 428 S.E.2d 542, 546 (1993). If the policyholder’s delay appears to be reasonable, the insurer must demonstrate that it was prejudiced by the delayed notice. *Id.*

But a policyholder’s notice can be so late that the insurer is prejudiced as a matter of law. Thus, courts have recognized that an insurer is necessarily prejudiced when it is presented with notice after the resolution of the claims against the policyholder. In *Arch Specialty Insurance Co. v. Go-Mart, Inc.*, after concluding that proof of prejudice was not required due to the unreasonableness of the policyholder’s delay in providing notice, the court concluded that the insurer was prejudiced in any case “inasmuch as it was denied any right to compromise, defend or even assist in the claims against [the policyholder] prior to jury verdict and judgment” No. 2:08-0285, 2009 WL 5214916, at *10 (S.D.W. Va. Dec. 28, 2009). Because the insurer was presented with a *fait accompli* and nothing was left to do but issue a check, the court concluded that prejudice was established. *Id.*

In this case, the policyholder delayed as long as thirty years in some instances before providing notice to its insurer of lawsuits filed against it. Such a delay cannot be reasonable as a matter of law. If the Circuit Court's ruling stands, it would raise serious questions about whether West Virginia courts are willing to enforce notice conditions at all. This Court has long recognized the importance of enforcing voluntary contracts, particularly between sophisticated parties like Travelers and U.S. Silica. Under West Virginia law, "the freedom to contract is a substantial public policy that should not be lightly dismissed." *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 38, 614 S.E.2d 680, 685 (2005). "Under the broad liberty of contract allowed by the law, parties may make performance of any comparatively, or apparently, trivial and unimportant covenant, agreement, or duty under the contract a condition precedent, and, in such case, the contract will be enforced or dealt with as made." *Watzman v. Unatin*, 101 W. Va. 41, 131 S.E. 874, 878 (1926). Given U.S. Silica's extraordinarily lengthy delay in providing notice over the course of several decades, the Court should hold that U.S. Silica's delay was unreasonable as a matter of law.

Courts have recognized that an insurer is deemed to be prejudiced as a matter of law where the policyholder does not provide notice until the claims against it are brought, defended, and resolved. The Fourth Circuit held in a recent decision applying Maryland law that an insurer is prejudiced as a matter of law where it is presented with a *fait accompli*. *Perini/Tompkins Joint Venture v. Ace Am. Ins. Co.*, 738 F.3d 95, 104 (4th Cir. 2013). The court reasoned:

[T]he insured has presented the insurer with a *fait accompli* by delaying notice until after the judgment. The delay vitiates the purpose of the contractual notice requirement, as the insurer cannot exercise any of its rights to investigate, defend, control, or settle the suit. Accordingly, courts have held that the insurer is prejudiced as a matter of law. . . .

By failing to notify the [insurer] of the incident, claim, and lawsuit until after the judgment, the [insured] nullified unilaterally all of the [insurer]'s rights and presented the [insurer] with a *fait accompli*. . . .

Id. (quoting *Prince George's Cnty. v. Local Gov't Ins. Trust*, 879 A.2d 81, 98, 100 (Md. Ct. App. 2005)). And numerous other courts have similarly concluded that an insurer is prejudiced as a matter of law when it is not provided notice until the underlying claims against the policyholder are resolved.⁴

Where—as in this case—the policyholder fails to provide notice until after lawsuits are brought, defended, and resolved, the insurer is left with nothing to do but issue a check. The insurer loses its benefit of the bargain in the insurance contract: while the policyholder receives the full benefit of the contract, the insurer is deprived of any involvement whatsoever in the investigation, defense or resolution of the lawsuits against the policyholder. *See Barrett*, 208 W. Va. at 711 (quoting *Berryhill v. State Farm Fire & Cas. Co.*, 174 Ga. App. 97, 99, 329 S.E.2d 189, 191 (1985)) (noting that the notice condition allows the insurer “an opportunity to investigate and marshal [] defenses at a time when events are fresh in the witnesses’

⁴ *See, e.g., Navigazione Alta Italia v. Columbia Cas. Co.*, 256 F.2d 26, 29 (5th Cir. 1958) (affirming the dismissal of the suit by the insured against the insurer because the insured “depriv[ed] the insurer ... of all opportunity to defend against the claim, and thus completely abrogat[ed] its contract, the insured presents it with a *fait accompli* in the form of a final and satisfied judgment”); *Champion v. S. Gen. Ins. Co.*, 401 S.E.2d 36, 38-39 (Ga. Ct. App. 1990) (holding that the insurer showed prejudice when it established that it received no notice until after a default judgment because it was denied all opportunity to engage in discovery, conduct a defense at trial, and negotiate a settlement); *Hooper v. Zurich Am. Ins. Co.*, 552 N.W.2d 31, 36-37 (Minn. Ct. App. 1996) (holding as a matter of law that the insurer was prejudiced when the insured failed to notify it before an adverse judgment in one suit and a settlement in another); *Neckerman v. Progressive Ins. Agency*, 659 N.E.2d 843, 844 (1995) (holding that the insurer was prejudiced as a matter of law because it was never notified of the lawsuit); *Metal Bank of Am., Inc. v. Ins. Co. of N. Am.*, 520 A.2d 493, 498 (Pa. Super. Ct. 1987) (holding as a matter of law that insurers were prejudiced when the insured notified the insurers of the suit after settlement because the insurers were present with a *fait accompli* and were denied an opportunity to gain early control of the proceedings and to investigate); *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170 (Tex. 1995) (holding that the failure to notify an insurer of a judgment prejudiced the insurer as a matter of law because the insurer could not defend the insured and minimize liability); *Northwest Prosthetic & Orthotic Clinic, Inc. v. Centennial Ins. Co.*, 997 P.2d 972, 973 (Wash. Ct. App. 2000) (holding that summary judgment was appropriate when the insured failed to notify the insurer before the insured settled because the insurer did not have a meaningful opportunity to investigate); *Gerrard Realty Corp. v. Am. States Ins. Co.*, 277 N.W.2d 863, 871 (Wis. 1979) (holding as a matter of law that the insurer was prejudiced by not receiving notice until after trial because the insurer was denied the opportunity to investigate, defend or settle); *Colonial Gas Energy Sys. v. Unigard Mut. Ins. Co.*, 441 F. Supp. 765, 770-71 (N.D. Cal. 1977) (holding that the insurer was prejudiced as a matter of law when the insured notified it of a loss from the repair of a leaking gas tank because the insured precluded any investigation by the insurer when it resealed the tank).

recollections.”). Accordingly, the Court should hold that where the policyholder presents a *fait accompli* to the insurer, the insurer is deemed to be prejudiced as a matter of law.

III. The Court Should Adopt Pro Rata Allocation in Long-Tail Claims Such As Those At Issue Here.

The Court should reverse the decision below on allocation of loss in long-tail insurance claims. Without analysis, the Circuit Court adopted “joint and several” liability for insurers based on a circuit court decision, *Wheeling Pittsburgh Corp. v. American Insurance Co.*, No. Civ. A 93-C-340, 2003 WL 23652106 (W. Va. Cir. Ct. Oct. 18, 2003). By applying joint and several liability, the court improperly denied Travelers the benefit of various set offs and credits. Because that approach is in conflict with the policy terms, as well as the weight of authority on allocation of loss, and is inconsistent with basic fairness, the Court should reverse the Circuit Court’s decision.

A. Allocation Is an Important Question of First Impression under West Virginia Law.

The question of how to allocate loss among insurers in long-tail coverage disputes is one of first impression in West Virginia. While courts around the country are split on the correct approach to allocation, the vast majority of jurisdictions have rejected joint and several liability for insurers. However, to date, this Court has not squarely addressed this issue.

The Court should address and reverse the decision below in order to resolve the issue of allocation under West Virginia law. A statement from this Court on the appropriate allocation method would provide invaluable guidance to lower courts, insurance companies, and policyholders. Courts have acknowledged that in long-tail claims involving continuous exposure, “[t]he stakes . . . can be extremely high.” *N. States Power Co. v. Fid. & Cas. Co. of New York*, 523 N.W.2d 657, 660 (Minn. 1994). Given the potential magnitude of long-tail

claims, resolution of the applicable allocation method would also provide much needed certainty regarding the relative exposures of different insurers on the risk.

B. Pro-Rata Allocation is Consistent with the Policy Terms, and Basic Fairness and Equity.

The Court should reverse the Circuit Court's adoption of joint and several liability. Pro-rata allocation is consistent with the structure and language of liability policies, as well as basic fairness and equity. Joint and several liability, on the other hand, leads to inequitable results, creates perverse incentives, and does not comport with the reasonable expectations of insurers and policyholders alike. It is thus unsurprising that "[t]he vast majority of courts have rejected the joint and several (or 'pick and choose') approach to allocation." William P. Shelley, *Fundamentals of Insurance Coverage Allocation* (Jan. 5, 2000), *Mealey's Litigation Reports (Insurance)* 25, 30.

Like most CGL policies, the Travelers Policies only provide coverage for "accidents which occur during the policy period." Courts have recognized that such limiting language indicates that the parties did not intend to bootstrap the insurer with coverage for damage occurring outside of its policy period. For example, the Minnesota Supreme Court ruled that a joint and several approach was inconsistent with the contract language because it would require insurers to pay for damages incurred because of property damage outside their policy periods. *N. States Power Co.*, 523 N.W.2d at 662. Similarly, a federal district court found that pro-rata allocation comports much more closely with the language and structure of CGL policies. *Uniroyal, Inc.*, 707 F. Supp. at 1393. And the majority of courts agree.⁵

⁵ See, e.g., *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1201-04 (2d Cir. 1995), *reh'g denied and modified on other grounds*, 85 F.3d 49 (2d Cir. 1996); *Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365, 371-72 (5th Cir. 1993); *Commercial Union Ins. Co. v. Sepco Corp.*, 918 F.2d 920, 923-25 (11th Cir. 1990); *Public Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924, 939-40 (Colo. 1999); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 731-

Courts have also recognized that joint and several liability leads to inequitable results. That approach is “extremely unfair [in that] an insurer who was on the risk for a day . . . [might be] burdened with the entire loss incurred over several years.” *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1392 (E.D.N.Y. 1988). As noted by numerous courts and commentators, joint and several liability also “creates a false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage” *Pub. Serv. Co. of Colorado v. Wallis & Cos.*, 986 P.2d 924, 939-40 (Colo. 1999). “By contrast, time-on-the-risk allocation would treat these two hypothetical insureds differently, in accordance with the vastly different insurance protection they had purchased with their respective amounts of insurance premiums.” *Id.*

Under joint and several liability, a policyholder who decides to self-insure for a period of time can nonetheless bootstrap its insurer under a single policy year with the entire cost of damage caused by continuous exposure over multiple years. Such a result is patently unfair. See *Uniroyal, Inc.*, 707 F. Supp. at 1392 (“Self-insurance is called ‘going bare’ for a reason.”); *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 365-66, 910 N.E.2d 290, 311 (2009) (“In our view, pro rata allocation produces a more equitable result than joint and several allocation”). On the other hand, under pro-rata allocation, for periods of self-insurance, “in the context of

34 (Minn. 1997); *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 985-96 (N.J. 1994); *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 140-42 (Utah 1997); see also *Diocese of Winona v. Interstate Fire & Cas. Co.*, 89 F.3d 1386, 1396 (8th Cir. 1996); *Porter v. American Optical Corp.*, 641 F.2d 1128, 1145 (5th Cir. 1981); *Nationwide Mut. Ins. Co. v. Lafarge Corp.*, 910 F. Supp. 1104, 1106 (D. Md. 1996) (applying Texas law), *aff’d*, 121 F.3d 699 (4th Cir. 1997); *Fireman’s Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 76 (E.D. Mich. 1987); *E. I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, No. 89C-AU-99, 1995 WL 654020 (Del. Super. Oct. 27, 1995) (“The presumption of continuous damage logically and fairly requires the imposition of the modified pro rata allocation of damage.”); *Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai’i, Ltd.*, 76 Haw. 277, 302, 875 P.2d 894, 919 (1994) *on reconsideration sub nom. Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai’i, Ltd.*, 76 Haw. 453, 879 P.2d 558 (1994) (“Equity, under the circumstances of this case, dictates that the court allocate contribution among the liable insurers in proportion to the time periods their policies covered.”); *Norfolk S. Corp. v. California Union Ins. Co.*, 859 So. 2d 167 (La. Ct. App. 2003) *writ denied*, 861 So. 2d 579 (La. 2003); *In re Wallace & Gale Co.*, 385 F.3d 820, 835 (4th Cir. 2004).

multiple policies triggered for continuous injuries, proration-to-the-insured is a sensible way to interpret insurance policies that do not squarely resolve the allocation issue.” *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1202-03 (2d Cir. 1995), *opinion modified on denial of reh’g*, 85 F.3d 49 (2d Cir. 1996). Thus, “a pro rata allocation forces companies to internalize part of the costs of long-tail liability and creates incentives for companies to minimize environmental carelessness by not permitting a policyholder who chooses not to be insured for part of the long-tail injury period to recover as if the policyholder had been fully covered for that period.” *EnergyNorth Natural Gas, Inc. v. Certain Underwriters at Lloyd’s*, 156 N.H. 333, 344, 934 A.2d 517, 526 (2007).

Nor does joint and several liability comport with the reasonable expectations of the parties to the insurance contract. Indeed, “there is no logic to support the notion that one single insurance policy among 20 or 30 years worth of policies could be expected to be held liable for the entire time period. Nor is it reasonable to expect that a single-year policy would be liable, for example, if the insured carried no insurance at all for the other years covered by the occurrence.” *Pub. Serv. Co. of Colorado*, 986 P.2d at 940. By contrast, pro-rata allocation is both equitable to the parties and comports with the reasonable expectation that an insurer is only liable for its proportionate share of costs incurred based on its time on the risk.

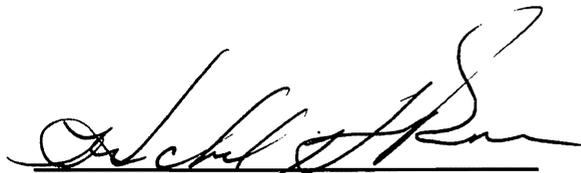
The joint and several liability approach also increases litigation costs unnecessarily and impedes judicial economy by postponing rather than solving the allocation problem. Under that approach, the case is divided into two separate suits: in the first suit, the policyholder selects and sues one of the triggered insurers; in the second suit, the selected insurer sues the other triggered insurers for contribution. *EnergyNorth Natural Gas, Inc.*, 156 N.H. at 345, 934 A.2d at 526-27. As such, “the joint and several method does not decrease litigation costs, does not give courts

guidance as to how to allocate liability, and requires insurers to factor the costs of uncertain liability into their premiums.” *Id.* (internal quotation omitted).

In sum, because the approach adopted by the Circuit Court is at odds with the weight of authority and leads to unfair results, the Court should reverse the decision below.

CONCLUSION

For the reasons above, *amici* respectfully request that this Court reverse the Circuit Court’s judgment and enter judgment in favor of Travelers.



Herschel H. Rose III (#3179)
Rose Law Office
300 Summers Street, Suite 1440
Charleston, West Virginia 25301
(304) 342-5050
(304) 342-0455 (facsimile)
herschelrose@roselawwv.com

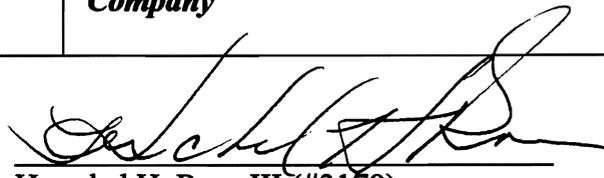
July 9, 2014

*Counsel for Amici Curiae
Complex Insurance Claims Litigation
Association and American Insurance
Association*

CERTIFICATE OF SERVICE

I, Herschel H. Rose III, do hereby certify that on the 9th day of July, 2014, I have served the foregoing “AMENDED BRIEF OF *AMICI CURIAE* AMERICAN INSURANCE ASSOCIATION AND COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF TRAVELERS INDEMNITY COMPANY AND REVERSAL” upon counsel of record listed below by placing the same in the United States mail, postage prepaid, addressed as follows:

| | |
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| <p>Jeffrey M. Wakefield Erica M. Baumgras Flaherty Sensabaugh Bonasso PLLC 200 Capitol Street Charleston, WV 25338 Fax: (304) 345-0260</p> <p><i>Counsel for Petitioner Travelers Indemnity Company</i></p> | <p>Charles F. Printz, Jr. J. Tyler Mayhew Bowles Rice LLP P.O. Drawer 1419 Martinsburg, WV 25402-1419 Fax: (304) 267-3822</p> <p><i>Counsel for Respondent U.S. Silica Company</i></p> |
|--|---|



Herschel H. Rose III (#3179)
Rose Law Office
300 Summers Street, Suite 1440
Charleston, West Virginia 25301
(304) 342-5050
(304) 342-0455 (facsimile)
herschelrose@roselawwv.com