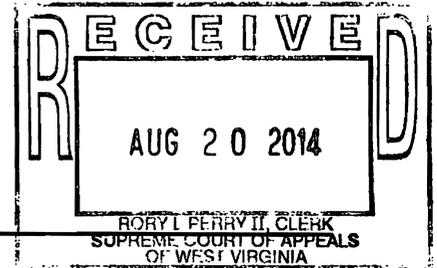


**PLEADING FILED
WITH MOTION**

No. 14-0343



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

at Charleston

THE TRAVELERS INDEMNITY COMPANY,

on behalf of THE TRAVELERS INSURANCE COMPANY,

Petitioner,

v.

U.S. SILICA COMPANY,

formerly known as PENNSYLVANIA GLASS SAND COMPANY,

Respondent.

From the Circuit Court of Morgan County, West Virginia

Civil Action No. 06-C-2

AMICUS BRIEF OF WEST VIRGINIA MANUFACTURERS ASSOCIATION

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Amicus Brief of the West Virginia Manufacturers Association

I. INTRODUCTION

The West Virginia Manufacturers Association (“WVMA”) submits this amicus brief in support of the Respondent, U.S. Silica Company (“U.S. Silica”), on the issues of the late notice defense and the “all sums” approach to allocation of damages. The WVMA is an organization comprised of hundreds of companies from across the State, with a principal purpose of advancing manufacturing in West Virginia. Members include producers of primary materials, such as metals and chemicals, as well as finished products made from such materials. Other members provide services to manufacturers throughout the State. Collectively, manufacturing is an important sector of the economy in West Virginia - - representing nearly 10 percent of the Gross State Product and over half of the State’s exports annually, and providing more than 51,000 jobs. U.S. Silica is a member of the WVMA.¹

II. ARGUMENT

A. Insurers Should Demonstrate Prejudice Before Coverage Can Be Denied.

At issue in this appeal is the notice provision set forth in U.S. Silica’s insurance policies with Petitioner, Travelers Insurance Company, on behalf of The Travelers Indemnity Company (“Travelers”), which states: “If 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.” In the proceeding below, Travelers asserted as a defense that U.S. Silica had not provided timely notice and that, as such, U.S. Silica’s claims for reimbursement under the policies in connection with various suits alleging injury from silica

¹ The undersigned counsel authored this brief in its entirety. U.S. Silica has made a monetary contribution specifically intended to fund the preparation or submission of this brief. This disclosure is made pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure.

exposure were barred. On March 5, 2014, Judge Frye of the Circuit Court of Morgan County, West Virginia entered an *Order Denying Defendant's Motion for Judgment as a Matter of Law and in the Alternative, Motion for a New Trial and Granting Plaintiff's Motion for Attorneys' Fees, Expenses and Prejudgment Interest*. The standard adopted by Judge Frye, one that is very favorable to insurers such as Travelers, required U.S. Silica to carry the initial burden of establishing the reasonableness of any delay in providing notice to Travelers; Travelers was required to demonstrate prejudice only upon satisfaction of the initial burden by U.S. Silica. The WVMA concurs with U.S. Silica's position that the Circuit Court properly denied Travelers' motion on the issue of late notice, as set forth in U.S. Silica's brief; however, the WVMA also advocates for the continued modernization of West Virginia law on this issue. The WVMA urges this Court to explicitly hold - - in keeping with the current trend - - that West Virginia has adopted the "prejudice" standard, pursuant to which the policyholder does *not* bear the initial burden of showing reasonableness, but rather the *insurer* must establish that it was materially prejudiced by the late notice before it may deny coverage.

As this Court's prior case law makes clear, late notice does not automatically provide the insurer with a free pass to deny coverage to the insured. To the contrary, "the notice provision—also called a proof of loss provision—'is to be liberally construed in favor of the insured.'" *Colonial Ins. Co. v. Barrett*, 208 W.Va. 706, 711, 542 S.E.2d 869, 874 (2000) (quoting *Petrice v. Federal Kemper Ins. Co.*, 163 W.Va. 737, 740, 260 S.E.2d 276, 278 (1979)). As such, before an insurer may deny coverage based on late notice, the "overall reasonableness" of the delay is examined, which involves an examination of factors including "*prejudice to the investigative interests of the insurer . . .* , along with the reasons for delay and the length of delay." *State Auto. Mut. Ins. Co. v. Youler*, Syl. Pt. 2, 183 W.Va. 556, 558, 396 S.E.2d 737, 739 (1990). *See*

also Syl Pt. 2, *Dairyland Ins. Co. v. Voshel*, 189 W.Va. 121, 122, 428 S.E.2d 542, 543 (1993) (“In cases which involve liability claims against an insurer, several factors must be considered before the Court can determine if the delay in notifying the insurance company will bar the claim against the insurer. The length of the delay in notifying the insurer must be considered along with the reasonableness of the delay.”). See also *North American Precast, Inc. v. General Cas. Co. of Wis.*, No. 3:04-1307, 2008 WL 906327, at *2 n.3 (“The fact-finder’s multi-faceted inquiry is focused on (1) prejudice to the investigative interests to the insurer, (2) the reasons for delay, and (3) the length of delay.” (citing Syl. Pt. 2, *Youler*, 183 W.Va. at 556, 396 S.E.2d at 737)). However, it is the *insurer* that bears the burden of showing that it has been prejudiced by the insured’s delay in giving notice. *Youler*, Syl. Pt. 2, 183 W.Va. at 558, 396 S.E.2d at 739; *Voshel*, Syl. Pt. 2, 189 W.Va. at 122, 428 S.E.2d at 543. Without such a showing, a “claim is not barred by the insured’s failure to notify.” *Voshel*, Syl Pt. 2, 189 W.Va. at 122, 428 S.E.2d at 543.

Requiring an insurer to show it has been prejudiced before a claim will be barred is fully in accord with this Court’s adoption of the requirement in other contexts. For example, this Court held that “[w]here an insured has failed to obtain his/her insurer’s consent before settling with a tortfeasor but in settling has procured the full policy limits available under the tortfeasor’s insurance policy, *the insurer must show that it was prejudiced by its insured’s failure to obtain its consent to settle* in order to justify a refusal to pay underinsured motorist benefits.” Syl Pt. 7, *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. 570, 572, 490 S.E.2d 657, 659 (1997) (emphasis added). This Court also held that “[b]efore an insurance policy will be voided because of the insured’s failure to cooperate, such failure must be substantial *and of such nature as to prejudice the insurer’s rights*.” Syl. Pt. 5, *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W.Va. 293, 295, 452 S.E.2d 384, 386 (1994) (emphasis added).

We believe the clear trend in the law throughout the United States is toward a “prejudice” standard. Given the lack of prejudice to Travelers in this case, the trial court properly applied settled West Virginia law in ruling for U. S. Silica. It is clear from the decisions cited above that the trajectory of West Virginia’s case law is unmistakably toward a requirement that the insurer must demonstrate prejudice before it can deny coverage based on the insured’s failure to meet a particular contractual term, such as the notice provision at issue in the instant proceeding. Indeed, “[t]he [notice] provision is not to be read as a series of technical hurdles.” *Barrett*, 208 W.Va. at 711, 542 S.E.2d at 874. We urge this Court to adopt the “prejudice” approach that would place on insurers the burden of demonstrating that late notice was prejudicial.

Many other state courts have adopted this approach, and refused to allow insurers to escape coverage obligations, and have discouraged coverage forfeiture, by placing the onus on the insurer to show actual prejudice. *See, e.g., Sherwood Brands, Inc. v. Hartford Accident & Indemnity Co.*, 347 Md. 32, 42, 698 A.2d 1078, 1083 (1997) (“In order to avoid its duty to defend or to indemnify on the ground of delayed notice, the insurer must establish by a preponderance of affirmative evidence that the delay in giving notice has resulted in actual prejudice to the insurer.”); *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 76–77, 371 A.2d 193, 198 (1997) (“[W]here an insurance company seeks to be relieved of its obligations under a liability insurance policy on the ground of late notice, the insurance company will be required to prove that the notice provision was in fact breached and that the breach resulted in prejudice to its position.”); *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 882, 587 P.2d 1098 (1978) (“An insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, but the breach cannot be a valid defense unless the insurer was substantially prejudiced thereby. . . . Similarly, it has been held that prejudice must be shown

with respect to breach of notice clause. . . . We are satisfied that the requirement of prejudice set forth in these decisions is proper.” (citing *Campbell v. Allstate Ins. Co.*, 60 Cal.2d 303, 305–06, 384 P.2d 155 (1963)); *Moe v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 289, 302 (1971) (“It is settled that breach of notice clause by an insured may not be asserted by an insurer unless the insurer was substantially prejudiced thereby; that prejudice is not presumed as a matter of law from such breach; and that the insurer has the burden of proving actual prejudice and not just a mere possibility of prejudice.”); *Cooper v. Government Employees Ins. Co.*, 51 N.J. 86, 94, 237 A.2d 870, 874 (1968) (“[A] carrier may not forfeit the bargained-for protection unless there are both a breach of the notice provision and a likelihood of appreciable prejudice. The burden of persuasion is the carrier’s.”). Placing the onus on insurers to show how they were damaged would create a more equitable situation where insured parties would benefit from their bargained-for coverage in the absence of prejudice to the insurer, and we urge this Court to make the insurer’s obligation under West Virginia law clear and unmistakable.

The companies who comprise the membership of the WVMA face claims like those asserted against U.S. Silica, which have a tendency to materialize years and even decades later. Placing the burden upon these companies to prove lack of prejudice to the insurer is a hardship, as it increases the expense of defending such claims and makes West Virginia a less attractive place to do business. Such an approach also contravenes this Court’s previously articulated policy of liberally construing notice provisions in favor of the insured. *See Barrett*, 208 W.Va. at 711, 542 S.E.2d at 874 (quoting *Petrice*, 163 W.Va. at 740, 260 S.E.2d at 278). This policy suggests that it is the insurer, *not* the insured, who should bear the burden within the context of a late notice defense. In keeping with this policy, the WVMA urges this Court not only to affirm

the verdict below but also to take the next step in the modernization of West Virginia law and adopt the “prejudice” approach to the late notice defense.²

B. The “All Sums” Approach Adopted By the Trial Court Was the Correct Interpretation of West Virginia Law.

Also at issue in this appeal is the allocation of defense and indemnity costs. U.S. Silica’s insurance policies state that Travelers is liable “[t]o pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident,” as well as “[t]o pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.” In the proceeding below, Travelers asserted that this language only requires it to pay a “pro rata” share of the defense and indemnity costs that U.S. Silica incurred. By order of September 11, 2013, Judge Frye adopted the allocation method advocated by U.S. Silica and which had been applied previously in *Wheeling Pittsburgh Corp. v. American Ins. Co.* - - *i.e.*, that if “one or more policies are actually triggered, then the [insured] may proceed to select which insurer shall respond and then collect full indemnity, not exceeding policy limits, from any insurer whose coverage has been triggered.” *Wheeling Pittsburgh Corp. v. American Ins. Co.*, No. Civ.A 93-C-340, 2003 WL 23652107, at *20 (W.Va.Cir.Ct. Oct. 18, 2003). WVMA concurs with this “all sums” approach, which is in keeping with the modern trend in many states.

The “all sums” approach to allocation is preferable to the pro rata approach for several reasons. First, it reflects a plain reading of the clear and unambiguous language of the insurance

² For the same reasons, the Court should make clear that West Virginia law applies a “prejudice” standard with respect to Travelers’ similar “pre-tender” defense.

policies, which expressly state that the insurer shall “pay on behalf of the insured *all sums* which the insured shall become legally obligated to pay as damages.” See *Wheeling Pittsburgh Corp.*, 2003 WL 23652107, at *19. Similarly, the “all sums” approach safeguards the insured’s expectations of coverage upon buying the insurance policy. See *id.* It has also been suggested that the “all sums” approach avoids the “potential unintended effect of multiplying the deductibles applicable to each claim.” *Id.*, at n.23 (citing *In re Prudential Lines Inc.*, 158 F.3d 65, 86 (2d Cir. 1998)). Finally, the “all sums” approach has been adopted by numerous other courts, and therefore comports with the modern trend in the law on this issue. See, e.g., *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034, 1048 (D.C.Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982); *State v. Cont’l Ins. Co.*, 281 P.3d 1000 (Cal. 2012); *Hercules Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489 (Del. 2001); *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150 (Ill. 1987); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835 (Ohio 2002); *Cascade Corp. v. Am. Home Assur. Co.*, 135 P.3d 450 (Or.App. 2006); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502 (Pa. 1993); *Am. Nat’l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250 (Wash. 1998); *Plastics Eng’g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613 (Wis. 2009).

Like U.S. Silica, WVMA member companies purchase insurance policies in order to protect themselves against liability within policy limits. Their expectation is that the insurer will “pay on behalf of the insured *all sums* which the insured shall be legally obligated to pay” within such limits. These companies deserve to have these expectations of coverage honored. The “all sums” method ensures just that. As such, it is both a more equitable as well as progressive solution to the question of allocation than the alternative advocated by Travelers. Like the “prejudice” standard, the “all sums” approach helps our member companies stay in business and

continue to contribute to the economy. Therefore, the WVMA encourages this Court to affirm the verdict below and the trial court's adoption of the "all sums" method of allocation.

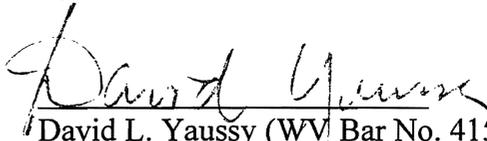
III. CONCLUSION

WVMA members depend upon insurance to protect them against unexpected occurrences. Silicosis claims are a perfect example of the unforeseen liabilities that can arise years after a policy is effective. The WVMA encourages this Court to view coverage determination issues in a manner that best protects the reasonable expectations of the policyholder. Given the facts presented in the present case, we hope that the Court will approve use of the "prejudice" standard for determining an insurer's late notice defense, and the "all sums" method of determining the scope of coverage provided by each relevant insurer.

Respectfully submitted,

**WEST VIRGINIA MANUFACTURERS
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CERTIFICATE OF SERVICE

I, David L. Yaussy, counsel for the West Virginia Manufacturers Association, hereby certify that I served a true copy of the foregoing *Motion of The West Virginia Manufacturers Association For Leave To File Amicus Curiae Brief* and *Amicus Brief of the West Virginia Manufacturers Association* upon the following individuals, via regular U. S. mail, postage prepaid, on this 20th day of August, 2014:

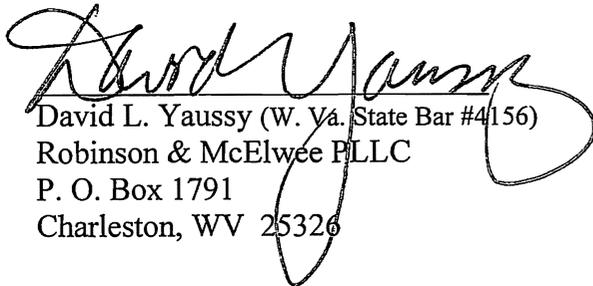
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