Supreme Court No. 940665

Court of Appeals, Division II, No. 46654-6

SUPREME COURT OF THE STATE OF WASHINGTON

PORT OF LONGVIEW,

Respondent,

v.

ARROWOOD INDEMNITY CO.,

Petitioner.

AMENDED BRIEF OF *AMICUS CURIAE* COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

Laura A. Foggan (*of counsel*)
Crowell & Moring LLP
1001 Pennsylvania Ave. NW
Washington, D.C. 20004
Email: lfoggan@crowell.com
Telephone: (202) 624-2500

Joseph D. Hampton
Kathryn N. Boling
Betts Patterson & Mines, P.S.
701 Pike Street, Suite 1400
Seattle, WA 98101-3927
Telephone: (206) 292-9988

Counsel for Amicus Curiae Complex Insurance Claims Litigation Association

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INTEREST OF AMICUS CURIAE

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance companies. CICLA seeks to assist courts addressing important coverage issues that are of great consequence to insurers, policyholders, and the public. CICLA is vitally interested in this case because its members have issued insurance policies similar or identical those at issue in this dispute. In this case, the Court is asked to accept review of questions of great public importance with constitutional dimensions. The decision below held that a policyholder could obtain coverage under policies issued decades ago for liability resulting from its knowing purchase of contaminated property years after the policy term. If allowed to stand, that result would throw into doubt the nature of risk assumed in insurance contracts under Washington law. CICLA respectfully submits that it will provide a unique and broader perspective about the impact of this Court's decision on the insurance system and that its participation as *amicus curiae* may assist this Court in considering the petition for review.

SUMMARY OF ARGUMENT

London Market Insurers' (LMI's) Petition involves issues of substantial public interest, including significant constitutional questions under the due process clause of the Constitution of the State of

Washington and the United States. Specifically, the Petition presents the question whether a policyholder can obtain coverage under policies it obtained years earlier for liability for cleanup of after-acquired property *that it purchased with knowledge of the contamination.* Finding that a policyholder can retroactively alter the risk assumed after a policy was issued by purchasing property known to be contaminated and later claiming coverage for liability arising out of that purchase is at odds with the parties' agreement and the most fundamental notions of fairness and due process. If upheld, that result would impose limitless liability on insurers, untethered to the underlying insurance contract. The arbitrariness of such an award, which would be excessive and disproportional, is repugnant to basic constitutional due process interests under the Washington and United States Constitutions. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

CICLA respectfully submits that coverage cannot be extended to liability arising from the purchase of after-acquired property the policyholder bought with knowledge of its contamination. To hold otherwise would do harm to the insurance underwriting process, which relies heavily on the predictability and enforcement of the terms and scope

of insurance agreements. This Court should grant the Petition for Review to address a question of substantial public interest which presents significant constitutional due process concerns under the Washington and United States Constitutions.[1]

ARGUMENT

I. INSURERS CANNOT BE HELD LIABLE FOR LOSSES FOR WHICH THEY DID NOT BARGAIN AND WHICH THE POLICYHOLDER KNOWINGLY ASSUMED SUBSEQUENT TO THE INSURANCE AGREEMENT.

Liability insurance covers losses due to unintentional, unexpected events outside of a policyholder's control. Insurers are "risk spreaders," whose function is to equalize the unpredictably distributed costs of liability assessments in a litigious society. There is no ability to underwrite risk where a policyholder seeks coverage under existing insurance agreements for liability it voluntarily incurs when it later purchases property known to be contaminated and thereby consciously becomes statutorily liable for cleanup as a result of the purchase.

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[1] LMI presents a number of questions for review in its Petition, each of which independently merits consideration by this Court. As *amicus curiae*, CICLA focuses on the issues raising not only important principles of insurance contract interpretation, but also presenting fundamental constitutional concerns.

In *Weyerhaeuser Company v. Commercial Union Insurance Company*, this Court adopted a minority position in holding an insurer liable for cleanup costs on property the insured had no involvement with during the policy term. 142 Wn.2d 654, 679, 15 P.3d 115 (2000). The Court held under Washington law that an insurer's coverage obligations should be coextensive with the joint and several nature of liability under CERCLA and therefore must extend to property damage pre-dating the insured's first involvement at a waste site. *Id.* at 681. Most jurisdictions have rejected the notion that an insurer issuing an occurrence-based policy can be liable for cleanup costs a policyholder incurs as a result of activity after the policy period. *See, e.g., Textron, Inc. v. Aetna Cas. & Sur. Co.*, 638 A.2d 537, 541 (R.I. 1994) (finding no duty to indemnify the policyholder for environmental liabilities it assumed by acquiring a separate company following the expiration of the policy period); *Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 150 (D.N.H. 1994) (same); *Maryland Cas. Co. v. W.R. Grace & Co.*, 794 F. Supp. 1206, 1232 (S.D.N.Y. 1991), *rev'd on other grounds,* 23 F.3d 617 (2d Cir. 1993) (finding no duty to defend or indemnify, noting that prior to the acquisition the policyholder had no insurable interest in the dispute); *Stone Ridge Country Properties, Corp. v. Mohonk Oil Co.*, No. 5481/09, 2011 WL 2858603 (N.Y. Sup. Ct. June 16, 2011).

However, even under Washington's outlier position in *Weyerhaeuser* finding coverage for contaminated property the insured had no involvement with during the policy term, there is no support for the result here. The court below went too far in awarding coverage for liability from the purchase of property after the policy term with the policyholder's knowledge both that it was contaminated and that the Port would thereby automatically incur statutory responsibility for the cleanup.[2] As an insured cannot knowingly assume liability and then claim coverage under a previously-existing liability insurance policy.

It is fundamentally unreasonable to read the policy provisions in this case to require coverage where the factual predicate for liability –

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[2] Neither court below acknowledged that liability knowingly assumed by the policyholder through the purchase of contaminated property after insurance was in place cannot expand the insurer's liability. The trial court suggested that because the Port already was liable based on its ownership of other property at the TWP site, the Port's subsequent purchase of the contaminated IP plant area did not affect its liability or coverage for that site. *See* Slip. Op., *Port of Longview v. Arrowood Indem. Co.*, No. 46654-6-II, 2016 WL 4133121, *10 (Wash. Ct. App. Aug. 2, 2016). However, that is flatly wrong. By definition, the purchase of the IP site increased the liability of the Port. Prior to that transaction, the Port was not automatically statutorily liable for clean up as an owner of the IP site. *See* RCW 70.105D.040. Even in a draconian joint and several liability scheme, where one party may be required to pay all damages but there are multiple parties with responsibility, it becomes the responsibility of the defendants to sort out their respective proportions of liability and payment. A party's proportion of liability for damages will be expanded by the ownership of additional parcels of contaminated property.

that is, the Port's purchase of the contaminated IP plant site – took place both after the policy was purchased and with knowledge of the liability it now seeks to impose on the insurer. Insurance policies are contracts, and the goal of the court is to determine the intent of the contracting parties. *Eurick v. PEMCO Ins. Co.*, 108 Wn.2d 338, 340-41, 738 P.2d 251 (1987). The policy must be given a fair, reasonable, and sensible construction such as the average purchaser of insurance would give it. *Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998); *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 65, 882 P.2d 703 (1994). No reasonable commercial purchaser of insurance would expect a policy it purchased years ago to cover statutorily imposed liability for contamination arising out of a subsequent purchase of property that it acquired knowing it was contaminated and knowing that liability for that contamination would attach automatically as a result of the purchase.[3] This goes much further than the Court's conclusion in *Weyerhaeuser* and, if left intact, would hold that a general liability policy that expired years earlier by its terms

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[3] One buys insurance in order to guard against possible losses resulting from some event that may occur. An insurer is able economically to sell insurance precisely because the events it insures are fortuitous and will not arise as to all insureds. This risk-spreading is the primary function of insurance, and the notion of fortuitous loss is basic to its operation.

will cover damage even under the circumstances where the policyholder knowingly acquires liability for it, years after it purchased coverage.

The decision below turns basic precepts of insurance on their head. Insurance must, by definition, only indemnify the insured against a contingent or unknown risk of loss. Just as no one can obtain coverage after a home burns to the ground by purchasing insurance after the fire, no one who owns an insurance policy can later acquire a home knowing it had burned to the ground during that policy period and expect coverage for the loss.[4] However, that is precisely the result that would obtain under the reasoning of the court below. That radical result would violate essential principles of insurance law and seriously undermine the insurance underwriting process.[5]

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[4] It is axiomatic that a policyholder cannot insure a loss after that loss has taken place, and any suggestion that it could do so would result in a moral hazard. *See* George Dionne & Scott E. Harrington, *An Introduction to Insurance Economics,* FOUNDATIONS OF INSURANCE ECONOMICS: READINGS IN ECONOMICS AND FINANCE 14 (George Dionne & Scott E. Harrington eds., 1st ed. 1992).

[5] As former Harvard Professor (and later Judge) Keeton stated in his treatise, implicit in *every* liability insurance policy is the requirement that coverage will be provided only for fortuitous losses. "A requirement that loss be accidental in some sense in order to qualify as the occasion for liability of an insurer is implicit, when not express, because of the very nature of insurance." R.E. Keeton, *Insurance Law* § 5.4(a), at 288 (1971).

II. INTERPRETING THE POLICY TO COVER LIABILITY KNOWINGLY INCURRED AFTER THE POLICY WAS PURCHASED FOR HARM THAT TOOK PLACE DURING THE POLICY PERIOD WOULD VIOLATE DUE PROCESS INTERESTS PROTECTED BY THE WASHINGTON AND UNITED STATES CONSTITUTIONS.

The decision below is at odds with the parties' agreement and the most fundamental notions of fairness and due process. The court below found that a policyholder could retroactively alter the risk assumed by the insurer years after a policy was issued by purchasing property known to be contaminated and later claiming coverage for liability arising out of that purchase.

This radical result is at odds with the coverage afforded by the parties' insurance agreement for many reasons.[6] Any one of these limitations independently requires reversal of the ruling below. By

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[6] It does not meet the occurrence requirement of an accident. The basis for liability was the Port's purchase of property it knew to be contaminated and it knew would result in automatic statutory liability for cleanup. It is a claim for coverage of contamination that was expected or intended from the standpoint of the insured. *See* LMI's Petition at 25. It is a loss barred by the known loss doctrine. *Id.* at 22. It is a risk not insured by virtue of the fortuity requirement inherent in insurance. Fortuity is an essential element of insurance. *See, e.g., Standard Oil Co. v. United States*, 340 U.S. 54, 58 n.9 (1950) ("Ordinary marine insurance covers losses due to fortuitous perils of the sea."). See *supra* note 5. And it is an untenable extension of Washington law concerning circumstances where coverage may extend to clean up of property the insured had no involvement with during the policy term. *See supra* pp. 4-7.

ignoring limitations on the parties' insuring agreement and retroactively extending coverage to encompass new liabilities knowingly assumed by the policyholder long after it purchased coverage, the ruling below improperly impairs contractual rights in violation of LMI's established and constitutionally protected interests. If upheld, that result would expose insurers to unlimited liability, untethered to the underlying insurance contract. The arbitrariness of such an award, which would be excessive and disproportional, is repugnant to basic constitutional due process interests under the Washington and United States Constitutions. *See Cooper Indus., Inc.*, 532 U.S. 424 (2001); *BMW of N. Am*, 517 U.S. 559; *State Farm Mut. Auto. Ins.*, 538 U.S. 408 (2003).[7]

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[7] Insurance policies, "being contracts, are property and create vested rights." *Lynch v. United States*, 292 U.S. 571, 577 (1934) (Brandeis, J.). When a contractual right has arisen, "the right to enforce it, having become vested, comes within the protection. . . of the due process clause of the Fourteenth Amendment, of the Federal Constitution." *Coombes v. Getz*, 285 U.S. 434, 448 (1932). Insurers' rights under insurance contracts are valuable assets. By retroactively imposing liability on insurers on the facts here, the Court has unconstitutionally impaired vested contractual rights. *See Lynch*, 292 U.S. at 576.

CONCLUSION

CICLA respectfully submits that this Court should grant the Petition for Review.

RESPECTFULLY SUBMITTED this 3rd day of April, 2017.

BETTS, PATTERSON & MINES, P.S.

By _____
Joseph D. Hampton, WSBA #15297
Kathryn N. Boling, WSBA #39776

Betts Patterson & Mines
701 Pike Street, Suite 1400
Seattle WA 98101-3927
Email: jhampton@bpmlaw.com
Email: kboling@bpmlaw.com
Telephone: (206) 292-9988

Laura A. Foggan (*of counsel*)
Crowell & Moring LLP
1001 Pennsylvania Ave. NW
Washington, D.C. 20004
Email: lfoggan@crowell.com
Telephone: (202) 624-2500

Counsel for Amicus Curiae Complex Insurance Claims Litigation Association