

12-30-98

NO. 98-14361

**J T THORPE COMPANY,  
THORPE CORPORATION,  
THORPE PRODUCTS COMPANY and  
THORPE INSULATION SERVICES  
COMPANY**

**v.**

**TEXAS PROPERTY AND CASUALTY  
INSURANCE GUARANTY  
ASSOCIATION, AMERICAN  
MOTORISTS INSURANCE  
COMPANY, ST. PAUL FIRE AND  
MARINE INSURANCE COMPANY,  
THE ST. PAUL INSURANCE  
COMPANY, FEDERAL INSURANCE  
COMPANY, VIGILANT INSURANCE  
COMPANY, THE HOME INDEMNITY  
COMPANY, NATIONAL UNION FIRE  
INSURANCE COMPANY OF  
PITTSBURGH, PA. and REPUBLIC  
INSURANCE COMPANY**

**IN THE DISTRICT COURT OF**

**TRAVIS COUNTY, T E X A S**

201<sup>st</sup> **JUDICIAL DISTRICT**

**PLAINTIFFS' ORIGINAL PETITION**

**TO THE HONORABLE JUDGE OF SAID COURT:**

**NOW COME J T THORPE COMPANY, THORPE CORPORATION,  
THORPE PRODUCTS COMPANY and THORPE INSULATION SERVICES COMPANY,  
Plaintiffs, and file this their Plaintiffs' Original Petition, complaining of TEXAS PROPERTY**

*A. Varela*

**AND CASUALTY INSURANCE GUARANTY ASSOCIATION, AMERICAN MOTORISTS INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, THE ST. PAUL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, THE HOME INDEMNITY COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. and REPUBLIC INSURANCE COMPANY, Defendants, and for cause of action would respectfully show unto the Honorable Court and Jury as follows:**

**General Nature of the Case**

**I.**

This is a declaratory judgment action and a suit for damages, arising out of diverse breaches of contract, as well as other statutory and common law violations. It is brought by four (4) insureds against nine (9) primary and excess insurers, as a consequence of the wrongful failure and/or refusal of such insurers to fully defend and indemnify them, their insureds, for liabilities they have incurred in the past and will incur in the future, occasioned by numerous asbestos-related bodily injury suits.

**Specific Nature of the Case**

**II.**

This is a suit for declaratory judgment, pursuant to the Texas Civil Practice &

Remedies Code, §37.001, et seq., seeking to clarify the rights, duties and obligations of the parties pursuant to certain primary liability insurance policies issued to **J T THORPE COMPANY, THORPE CORPORATION, THORPE PRODUCTS COMPANY** and **THORPE INSULATION SERVICES COMPANY (THORPE, ET AL)**, by **EMPLOYERS CASUALTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, THE ST. PAUL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, THE HOME INDEMNITY COMPANY** and **NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.**

Further, this is a suit for declaratory judgment, pursuant to the Texas Civil Practice & Remedies Code, §37.001, et seq., seeking to clarify the rights, duties and obligations of the parties pursuant to certain excess liability insurance policies issued to **THORPE, ET AL** by **REPUBLIC INSURANCE COMPANY (REPUBLIC)**.

Further, this is a suit for actual damages, brought by **THORPE, ET AL** against the **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION (ASSOCIATION)**, pursuant to the Insurance Code, Art. 21.28-C, Property & Casualty Insurance Guaranty Act (the Act), arising from its failure to make payment of the defense costs of **THORPE, ET AL**, in behalf of an "impaired insurer", **EMPLOYERS CASUALTY**

**COMPANY (EMPLOYERS CASUALTY), as mandated by the Act.**

Further, this is a suit for actual, exemplary and/or punitive damages, brought by **THORPE, ET AL** against **AMERICAN MOTORISTS INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, THE ST. PAUL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, THE HOME INDEMNITY COMPANY** and **NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. (AMERICAN MOTORISTS, ET AL)**, arising from their having concealed from **THORPE, ET AL** the fact that "premises-operations" coverage was and is applicable to asbestos-related cases.

Further, this is a suit for actual, exemplary and/or punitive damages, brought by **THORPE, ET AL** against **AMERICAN MOTORISTS, ET AL**, arising from their having falsely represented to **THORPE, ET AL** that all their applicable limits of liability for asbestos-related cases have been exhausted.

Further, this is a suit for actual, exemplary and/or punitive damages, brought by **THORPE, ET AL** against **AMERICAN MOTORISTS, ET AL**, arising from their having conspired to conceal from **THORPE, ET AL** the fact that "premises-operations" coverage was and is applicable to asbestos-related cases and, as well, having conspired to falsely represent to **THORPE, ET AL** that all of their applicable limits of liability for asbestos-related cases have

been exhausted.

Further, this is a suit for actual, exemplary and/or punitive damages, brought by **THORPE, ET AL** against **AMERICAN MOTORISTS, ET AL**, arising from their having failed to maximize the coverage for asbestos-related cases available to **THORPE, ET AL**, by proper utilization of their "premises-operations" coverage.

Further, this is a suit for actual, exemplary and/or punitive damages, brought by **THORPE, ET AL** against **AMERICAN MOTORISTS, ET AL**, arising from their failure and refusal to defend **THORPE, ET AL** in asbestos-related cases, pursuant to their "premises-operations" coverage.

Further, this is a suit for actual, exemplary and/or punitive damages, brought by **THORPE, ET AL** against **REPUBLIC**, arising from its failure and refusal to make payment for **THORPE, ET AL** in asbestos-related cases, pursuant to its excess liability insurance policies.

Finally, this is a suit for actual, exemplary and/or punitive damages, brought by **THORPE, ET AL** against **REPUBLIC**, arising from its failure and refusal to defend **THORPE, ET AL** in asbestos-related cases, pursuant to its excess liability insurance policies.

**Parties and Service of Process**

**III.**

**J T THORPE COMPANY**, Plaintiff, is a corporation organized and existing under the laws of the State of Texas, with its principal place of business located at 6833 Kirbyville Street, Houston, Texas 77033.

**THORPE CORPORATION**, Plaintiff, is a corporation organized and existing under the laws of the State of Texas, with its principal place of business located at 6833 Kirbyville Street, Houston, Texas 77033.

**THORPE PRODUCTS COMPANY**, Plaintiff, is a corporation organized and existing under the laws of the State of Texas, with its principal place of business located at 6833 Kirbyville Street, Houston, Texas 77033.

**THORPE INSULATION SERVICES COMPANY**, Plaintiff, is a corporation organized and existing under the laws of the State of Texas, with its principal place of business located at 6833 Kirbyville Street, Houston, Texas 77033.

**THE TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION**, Defendant, is a non-profit legal entity, created by the Insurance Code, Art. 21.28-C, Property and Casualty Insurance Guaranty Act, which may be served with citation herein by serving its Executive Director, Marvin Kelly, 9120 Burnett Road, Austin, Travis

County, Texas 78758.

**AMERICAN MOTORISTS INSURANCE COMPANY**, Defendant, is a corporation organized and existing under the laws of a state other than the State of Texas, authorized to engage in the business of insurance in the State of Texas, which may be served with citation herein by serving its attorney for service of process, Wayne August Gravzas, Corporation Service Company, 400 North St. Paul Street, Dallas, Dallas County, Texas 75201.

**ST. PAUL FIRE AND MARINE INSURANCE COMPANY**, Defendant, is a corporation organized and existing under the laws of a state other than the State of Texas, authorized to engage in the business of insurance in the State of Texas, which may be served with citation herein by serving its attorney for service of process, Bill Richey, 2301 East Lamar Boulevard, Suite 400, Arlington, Tarrant County, Texas 76006.

**THE ST. PAUL INSURANCE COMPANY**, Defendant, is a corporation organized and existing under the laws of the State of Texas, authorized to engage in the business of insurance in the State of Texas, which may be served with citation herein by serving its attorney for service of process, Bill Richey, 2301 East Lamar Boulevard, Suite 400, Arlington Tarrant County, Texas 76006.

**FEDERAL INSURANCE COMPANY**, Defendant, is a corporation organized and existing under the laws of a state other than the State of Texas, authorized to engage in the

business of insurance in the State of Texas, which may be served with citation herein by serving its attorney for service of process, Parker W. Rush, 1445 Ross Avenue, Suite 4200, Dallas, Dallas County, Texas 75202.

**VIGILANT INSURANCE COMPANY**, Defendant, is a corporation organized and existing under the laws of a state other than the State of Texas, authorized to engage in the business of insurance in the State of Texas, which may be served with citation herein by serving its attorney for service of process, Parker W. Rush, 1445 Ross Avenue, Suite 4200, Dallas, Dallas County, Texas 75202.

**THE HOME INDEMNITY COMPANY**, Defendant, is a corporation organized and existing under the laws of a state other than the State of Texas, authorized to engage in the business of insurance in the State of Texas, which may be served with citation herein by serving its attorney for service of process, C T Corporation System, 350 North St. Paul Street, Dallas, Dallas County, Texas 75201.

**NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.**, Defendant, is a corporation organized and existing under the laws of a state other than the State of Texas, authorized to engage in the business of insurance in the State of Texas, which may be served with citation herein by serving its attorney for service of process, Stephen Bisbee, 1999 Bryan Street, 17th Floor, Dallas, Dallas County, Texas 75201.

**REPUBLIC INSURANCE COMPANY**, Defendant, is a corporation organized and existing under the laws of the State of Texas, authorized to engage in the business of insurance in the State of Texas, which may be served with citation herein by serving any officer of the company at Republic Insurance Company, 2727 Turtle Creek Boulevard, Post Office Box 60560, Dallas, Dallas County, Texas 75266-0560.

**Jurisdictional Amount**

**IV.**

Aside from the Declaratory Judgment Action aspect of this litigation, the damages sought herein by **THORPE, ET AL** from **AMERICAN MOTORISTS, ET AL** and **REPUBLIC** far exceed the minimum jurisdictional limits of this Honorable Court.

**Venue**

**V.**

As to the **TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION (ASSOCIATION)**, Defendant, venue is mandatory in Travis County, Texas, pursuant to the Insurance Code, Art. 21.28-C, §10(g), and the Texas Civil Practice & Remedies Code, §15.016. As to **AMERICAN MOTORISTS, ET AL**, Defendants, and **REPUBLIC**, Defendant, venue is proper in Travis County, Texas, pursuant to the Texas Civil Practice & Remedies Code, §15.005.

**Background**

**VI.**

**THORPE, ET AL** has been and is involved in asbestos-related litigation by dint of three separate activities of **J T THORPE COMPANY (J T THORPE)**. First of all, as early as 1954, **J T THORPE** became involved in refractory contracting, utilizing asbestos-containing refractory products. Secondly, as early as 1956, **J T THORPE** became involved in insulation contracting, utilizing asbestos-containing insulation products. Thirdly, as early as 1956, **J T THORPE** become involved in distributing Johns-Manville asbestos-containing products, e.g. **JM Super X Block, JM Asbestos Paper, JM Asbestos Mill Board, JM 85% Magnesia, JM 301 Insulation Cement, JM 352 Insulation Cement, JM Insulcote, JM Thermobestos Block, JM Thermobestos Pipe Covering and JM Asbestos Rope.**

Because of the activities of **J T THORPE** in its refractory contracting, insulation contracting and distribution of Johns-Manville asbestos-containing products, litigation against **THORPE, ET AL** ensued, continued and continues. In the litigation filed against **THORPE, ET AL**, exposures to asbestos-containing products are alleged to have arisen from all three activities of **J T THORPE**, or any combination thereof.

At the beginning of 1997, **THORPE, ET AL** were parties defendant in individual or multi-plaintiff lawsuits which involved 28,971 active asbestos-related personal injury or

wrongful death claims. During the calendar year of 1997, THORPE, ET AL received some 4,033 new claims. New claims are being received in 1998 and will be received for some years thereafter; however, the total number thereof is problematical.

Primary Insurance Coverage

VII.

All of the primary insurance policies issued to THORPE, ET AL by AMERICAN MOTORISTS, ET AL were standard insurance industry forms.<sup>1</sup> As such, each policy subsumes within a single insuring agreement two different types of bodily injury coverages.

First, there is the basic "premises-operations" coverage. "Premises-operations" coverage pays "all sums" for which THORPE, ET AL are liable, caused by an "occurrence" and arising (a) during activities conducted on premises owned by or rented to THORPE, ET AL, and (b) during all THORPE, ET AL off-premises operations.

Insofar as the asbestos-related liabilities of THORPE, ET AL are concerned, "premises-operations" coverage insures against injury occurring during, or as a consequence of, their handling or installation of asbestos-containing products. "Premises-operations" coverage is subject to a specified limit of liability per person and a specified limit of liability per

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<sup>1</sup>A listing of such policies is attached hereto marked "Exhibit A".

occurrence; however, unlike "products-completed operations" coverage, "premises-operations" coverage is subject to no form of a specified "aggregate" limit of liability.

Secondly, there is the basic "products-completed operations" coverage. "Products-completed operations" coverage pays "all sums" for which **THORPE, ET AL** are liable, caused by an "occurrence" and arising (a) after the sale of a product by **THORPE, ET AL** and (b) after the operations of **THORPE, ET AL** have been completed. "Products-completed operations" coverage is subject to a specified limit of liability per occurrence; however, unlike "premises-operations" coverage, "products-completed operations" coverage is subject to an "aggregate" limit of liability.

Although the basic "premises-operations" coverage and the basic "products-completed operations" coverage are subsumed within a single insuring agreement, a separate premium is charged for each. An insured could choose whether to purchase only one or both of these coverages, which, as a practical matter, might well be issued under entirely separate policies. Indeed, some insureds chose to forego either one or the other of these coverages. **THORPE, ET AL**, however, bought from **AMERICAN MOTORISTS, ET AL**, and paid separate premiums for, both "premises-operations" coverage and "products-completed operations" coverage. Accordingly, **THORPE, ET AL** are entitled to the benefit of each such coverage.

In sum, aside from their "products-completed operations" coverage, the "premises-operations" coverage of the primary insurance policies issued to **THORPE, ET AL** by **AMERICAN MOTORISTS, ET AL** provided for indemnity against "all sums" that **THORPE, ET AL**, by law, became obligated to pay, on account of personal injuries caused by an "occurrence" and arising (a) during activities conducted on premises owned or rented to **THORPE, ET AL** and (b) during all **THORPE, ET AL** off-premises operations. Additionally, under "premises-operations" coverage, the primary insurance policies issued to **THORPE, ET AL** by **AMERICAN MOTORISTS, ET AL**, provided for the defense of **THORPE, ET AL**, as well as the payment of all costs and expenses attendant thereto.

Excess Insurance Coverage

VIII.

All of the excess insurance policies issued to **THORPE, ET AL** by **REPUBLIC** were either standard insurance industry forms or manuscripts of the following form variety.<sup>2</sup> After exhaustion of the limits of liability of certain scheduled underlying policies, these excess policies provided **THORPE, ET AL** with a continuum of coverage, subject to (a) a limit of liability as respects each occurrence and (b) a limit of liability as respects the "aggregate" for each policy year.

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<sup>2</sup>A listing of such policies is attached hereto marked "Exhibit B".

In sum, the excess insurance policies issued to **THORPE, ET AL** by **REPUBLIC** provided for indemnity against "all sums" that **THORPE, ET AL**, by law, became obligated to pay, on account of personal injuries caused by an "occurrence" arising from the "premises-operations" hazard and/or the "products-completed operations" hazard. Additionally, the excess insurance policies issued to **THORPE, ET AL** by **REPUBLIC**, provided for the defense of **THORPE, ET AL**, as well as the payment of all costs and expenses attendant thereto.

Occurrence - Triggers of Coverage

**IX.**

Although subject to insignificant variance, the standard definition of "occurrence" is as follows:

"'Occurrence' means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage, neither expected nor intended from the standpoint of the insured".

As respects asbestos inhalation, not only medical science, but the overwhelming majority of all legal decisions, accept these facts: (1) asbestos disease is a progressive disease; (2) there is an insult to tissue immediately upon inhalation; (3) such insult continues during residency; and, (4) bodily injury occurs during that entire period of time, up to and including the date of manifestation of the disease, i.e. (a) pleural thickening, (b) pleural plaques, (c) interstitial fibrosis, (d) asbestosis, (e) lung cancer, (f) other cancer, e.g. esophageal cancer, and

(g) mesothelioma.

Although there is significant variance from jurisdiction to jurisdiction, there are five frequently offered theories for triggers of coverage. First, there is the exposure theory, which holds that the date of occurrence is the date on which the injury-producing agent first contacts the body. Secondly, there is the manifestation theory, which holds that injury resulting from the inhalation of asbestos fibers does not "occur" until the disease manifests itself. Thirdly, there is the continuous-trigger theory, which holds that injury occurs during each phase of environmental contamination, i.e. exposure, exposure in residence (defined as further progression of injury even after exposure has ceased), and manifestation of disease. Fourthly, there is the injury-in-fact trigger theory (or damages-in-fact trigger theory), which holds that insurance coverage is triggered by the showing of actual injury or a damage-producing event. Fifthly, there is the double trigger theory, which holds that injury occurs at the time of exposure and at the time of manifestation, for purposes of determining insurance coverage, but not necessarily during the intervening period.

Under the facts of the individual cases, each of these five theories has been adopted as a means of maximizing insurance coverage. Further, when the coverage of two or more insurers is triggered, their liability for both indemnity and maintenance of the defense is either joint and several or, in the alternative, judicially allocated upon three or more other bases.

Allocation of Losses Among Triggered Policies

X.

There are four frequently offered theories for the allocation of losses among triggered policies. First, there is the joint and several liability theory, which holds that every triggered policy is responsible, in full, for the entire loss, up to its limits of liability, with allocation among the triggered policies determined by their "other insurance" provisions. Secondly, there is the prorata, based upon time on the risk, theory, which holds that losses are prorated based upon the time each triggered policy was on the risk, in relation to the total period during which damage took place. Thirdly, there is the prorata, based upon policy limits, theory, which holds that losses are prorated upon the limits of liability of each policy. Fourthly, there is the prorata, based upon time on the risk and policy limits, theory, which holds that losses are prorated based upon the time each triggered policy was on the risk, as well as the degree of risk assumed, i.e. the limits of liability of each policy.

Under the facts of the individual cases, each of these four theories has been adopted as a means of maximizing insurance coverage. While judicial methodology may vary, the end result sought remains relatively constant.

The Liability of the Texas Property & Casualty Insurance Guaranty Association

XI.

Even though the ASSOCIATION has long since recognized its obligation to make indemnity payments of "covered claims" in behalf of an "impaired insurer", EMPLOYERS CASUALTY, and, further, had made such indemnity payments, it has yet failed and refused to make any payment whatsoever toward the defense costs of THORPE, ET AL, as mandated by the Act. This constitutes breach of contract, negligence, negligence per se, negligent misrepresentation and the breach of a statutory duty, all of which were and are producing causes and/or proximate causes of damage to THORPE, ET AL, for which damage they here and now sue.

The Liability of American Motorists, et al

XII.

Even though AMERICAN MOTORISTS, ET AL have recognized the applicability of "products-completed operations" coverage in asbestos-related cases and, further have made indemnity and defense cost payments in behalf of THORPE, ET AL, they have y. to make any payment whatsoever under their "premises-operations" coverage. Notwithstanding the fact that AMERICAN MOTORISTS, ET AL have long been aware that "premises-operations" coverage is applicable to asbestos-related cases, they, by their silence, words and

deeds, have concealed that fact from **THORPE, ET AL**. This constitutes breach of contract, fraud, actual or constructive negligence, gross negligence and negligent misrepresentation, all of which were and are producing causes and/or proximate causes of damage to **THORPE, ET AL**, for which damage they here and now sue. Further, **THORPE, ET AL** also sue for exemplary and/or punitive damages in the maximum amount allowed by law.

**XIII.**

Even though **AMERICAN MOTORISTS, ET AL** have recognized the applicability of "products-completed operations" coverage in asbestos-related cases and, further, have made indemnity and defense cost payments in behalf of **THORPE, ET AL**, they have yet to make any payment whatsoever under their "premises-operations" coverage. Notwithstanding the fact that **AMERICAN MOTORISTS, ET AL** have long been aware that "premises-operations" coverage is applicable to asbestos-related cases, they, by their silence, words and deeds, have falsely represented to **THORPE, ET AL** that all their applicable limits of liability for asbestos-related cases have been exhausted. This constitutes breach of contract, fraud, actual or constructive negligence, gross negligence and negligent misrepresentation, all of which were and are producing causes and/or proximate causes of damage to **THORPE, ET AL**, for which damage they here and now sue. Further, **THORPE, ET AL** also sue for exemplary and/or punitive damages in the maximum amount allowed by law.

**XIV.**

Even though **AMERICAN MOTORISTS, ET AL** have recognized the applicability of "products-completed operations" coverage in asbestos-related cases and, further, have made indemnity and defense cost payments in behalf of **THORPE, ET AL**, they have yet to make any payment whatsoever under their "premises-operations" coverage. Notwithstanding the fact that **AMERICAN MOTORISTS, ET AL** have long been aware that "premises-operations" coverage is applicable to asbestos-related cases, they, by their silence, words and deeds, have conspired to conceal that fact from **THORPE, ET AL** and, further, have conspired to falsely represent to **THORPE, ET AL** that all their applicable limits of liability for asbestos-related cases have been exhausted. This constitutes breach of contract, fraud, actual or constructive negligence, gross negligence and negligent misrepresentation, all of which were and are producing causes and/or proximate causes of damage to **THORPE, ET AL**, for which damage they here and now sue. Further, **THORPE, ET AL** also sue for exemplary and/or punitive damages in the maximum amount allowed by law.

**XV.**

Even though **AMERICAN MOTORISTS, ET AL** have recognized applicability of "products-completed operations" coverage in asbestos-related cases and, further, have made indemnity and defense cost payments in behalf of **THORPE, ET AL**, they have yet

to make any payment whatsoever under their "premises-operations" coverage. Notwithstanding the fact that **AMERICAN MOTORISTS, ET AL** have long been aware that "premises-operations" coverage is applicable to asbestos-related cases, they have arbitrarily and improperly, in the teeth of actual contrary knowledge or, alternatively, in the absence of adequate investigation, made all indemnity and defense costs payments under their "products-completed operations" coverage, which is subject to a specified "aggregate" limit of liability, rather than under their "premises-operations" coverage, which is not. By this course of action, **AMERICAN MOTORISTS, ET AL** have breached their duty to maximize the coverage for asbestos-related claims available to **THORPE, ET AL**. Contrariwise, they have exhausted the "products-completed operations" coverage of **THORPE, ET AL** which, by its nature, is finite, while leaving untapped the "premises-operations" coverage of **THORPE, ET AL** which, by its nature, is infinite, thus minimizing the coverage for asbestos-related claims available to **THORPE, ET AL**. This constitutes breach of contract, fraud, actual or constructive negligence, gross negligence and negligent misrepresentation, all of which were and are producing causes and/or proximate causes of damage to **THORPE, ET AL**, for which damage they here and now sue. Further, **THORPE, ET AL** also sue for exemplary and/or punitive damages in the maximum amount allowed by law.

The Liability of Republic

XVI.

Even though **REPUBLIC** has long since been furnished with a veritable plethora of documentary evidence, evidence sufficient to establish the payment and/or commitment to make payment of all aggregate limits of liability and all self-insured retentions of all primary insurance underlying the "first level" of excess insurance of **THORPE, ET AL**, it has yet to make any payment or commitment to make payment under its excess liability insurance policies. Rather, it has continually sought to extort substantial payments from **THORPE, ET AL**, under diverse inapplicable and improper guises, as a condition precedent to the fulfillment of its contractual duty to make payment for **THORPE, ET AL** in asbestos-related cases. This constitutes breach of contract, fraud, actual or constructive negligence, gross negligence and negligent misrepresentation, all of which were and are producing causes and/or proximate causes of damage to **THORPE, ET AL**, for which damage they here and now sue. Further **THORPE, ET AL** also sue for exemplary and/or punitive damages in the maximum amount allowed by law.

Duty to Defend

XVII.

Even were **AMERICAN MOTORISTS, ET AL** not legally liable to indemnify

**THORPE, ET AL** in the premises, which they are, **AMERICAN MOTORISTS, ET AL** are yet legally liable to defend **THORPE, ET AL** in asbestos-related cases, under the so-called "eight corners" rule, for the duty to defend is far broader than the duty to indemnify. **AMERICAN MOTORISTS, ET AL** have breached their duty to **THORPE, ET AL** by failing and refusing to defend them in asbestos-related cases. This constitutes breach of contract, fraud, actual or constructive negligence, gross negligence and negligent misrepresentation, all of which were and are producing causes and/or proximate causes of damage to **THORPE, ET AL**, for which damage they here and now sue. Further, **THORPE, ET AL** also sue for exemplary and/or punitive damages in the maximum amount allowed by law.

Even were **REPUBLIC** not legally liable to indemnify **THORPE, ET AL** in the premises, which it is, **REPUBLIC** is yet legally liable to defend **THORPE, ET AL** in asbestos-related cases, under the so-called "eight corners" rule, for the duty to defend is far broader than the duty to indemnify. **REPUBLIC** has breached its duty to **THORPE, ET AL** by failing and refusing to defend them in asbestos-related cases. This constitutes breach of contract, fraud, actual or constructive negligence, gross negligence and negligent misrepresentation, all of which were and are producing causes and/or proximate causes of damage to **THORPE, ET AL**, for which damage they here and now sue. Further, **THORPE, ET AL** also sue for exemplary and/or punitive damages in the maximum amount allowed by law.

**Attorney's Fees**

**XVIII.**

In the declaratory judgment action aspect of this litigation, **THORPE, ET AL** are entitled to recover reasonable and necessary attorney's fees from **AMERICAN MOTORISTS, ET AL** and **REPUBLIC**, pursuant to the Texas Civil Practice & Remedies Code, §37.009, for which fees they here and now sue.

In the breach of contract aspect of this litigation, **THORPE, ET AL** are entitled to recover reasonable and necessary attorney's fees from **AMERICAN MOTORISTS, ET AL** and **REPUBLIC**, pursuant to the Texas Civil Practice & Remedies Code, §38.001(8), for which fees they here and now sue.

In the violation of the Texas Insurance Code aspect of this litigation, **THORPE, ET AL** are entitled to recover reasonable and necessary attorney's fees from **AMERICAN MOTORISTS, ET AL** and **REPUBLIC**, pursuant to the Texas Insurance Code, Art. 21.21, §16(b)(1), and Art. 21.55, §6, for which fees they here and now sue.

**Violation of the Texas Insurance Code**

**XIX.**

By virtue of the unfair, deceptive and misleading acts or practices of **AMERICAN MOTORISTS, ET AL** and **REPUBLIC**, which were knowingly committed, **THORPE, ET AL**

are entitled to recover treble damages and/or such other and further relief which this Honorable Court may deem proper, pursuant to the Texas Insurance Code, Art. 21.21, §4(1), §4(10)(i), §4(10)(ii), §4(10)(iv), §4(10)(v), §4(10)(viii), §4(11), §16(b)(1) and Art. 21.55, §6, for which damages and relief they here and now sue.

**Prompt Payment of Claims**

**XX.**

Because of the unwarranted and unconscionable refusal to pay and/or delay by **AMERICAN MOTORISTS, ET AL** and **REPUBLIC** in their payment of asbestos-related claims, **THORPE, ET AL** have been compelled to pay or cause to be paid such claims, to their great detriment. Accordingly, in addition to the total amount of their claims, **THORPE, ET AL** are entitled to recover, as a penalty, interest thereon at the rate of eighteen percent (18%) per annum, together with reasonable attorney's fees, taxed as part of the costs in this case, pursuant to the Texas Insurance Code, Art. 21.55, *et seq.*, for which interest and fees they here and now sue.

**Breach of the Duty of Good Faith and Fair Dealing**

**XXI.**

Because of the unwarranted and unconscionable refusal to pay and/or delay by **AMERICAN MOTORISTS, ET AL** and **REPUBLIC** in their payment of asbestos-related

claims, **THORPE, ET AL** have been compelled to pay or cause to be paid such claims, to their great detriment.

**AMERICAN MOTORISTS, ET AL** and **REPUBLIC** knew or should have known that it was reasonably clear that such asbestos-related claims were covered. Further, **AMERICAN MOTORISTS, ET AL** and **REPUBLIC** were actually aware that their actions would probably result in extraordinary harm not ordinarily associated with breach of contract or bad faith denial of a claim. This constitutes a breach by **AMERICAN MOTORISTS, ET AL** and **REPUBLIC** of the duty of good faith and fair dealing owed to **THORPE, ET AL**, which breach was and is a producing cause and/or a proximate cause of damage to **THORPE, ET AL** for which damage they here and now sue.

Further, inasmuch as **AMERICAN MOTORISTS, ET AL** and **REPUBLIC** were actually aware that their actions involved extreme risk - that is, high probability of serious harm, and were nevertheless consciously indifferent to the rights, safety or welfare of **THORPE, ET AL**, **THORPE, ET AL** also sue for exemplary and/or punitive damages in the maximum amount allowed by law.

**Policies, Duties and Construction**

**XXII.**

At all material times, the policies listed on Exhibit A and Exhibit B, attached

hereto, were and are in full force and effect. **THORPE, ET AL** have performed and are performing all duties and obligations required by their terms and conditions, including (but not by way of limitation) making timely payment of all due premiums, giving timely notice of all occurrences, claims and lawsuits, and cooperating fully with the **ASSOCIATION, AMERICAN MOTORISTS, ET AL** and **REPUBLIC**.

Nothing in the language of the terms, conditions and exclusions of the aforesaid policies, serves to relieve the **ASSOCIATION, AMERICAN MOTORISTS, ET AL** or **REPUBLIC** from their duties to defend and indemnify **THORPE, ET AL** in asbestos-related litigation. Alternatively, should that happenstance exist by dint of ambiguous provisions in such policies, then, in that event, those provisions must be construed in favor of **THORPE, ET AL**, in order to effectuate coverage.

**Jury Demand**

**XXIII.**

**THORPE, ET AL** respectfully demand a trial by jury as to all aspects of this litigation.

**Prayer**

**XXIV.**

**WHEREFORE**, premises considered, **THORPE, ET AL** request and pray that

the ASSOCIATION, AMERICAN MOTORISTS, ET AL and REPUBLIC be cited to appear and answer herein, and that upon final trial and hearing hereof, judgment be entered in favor of THORPE, ET AL as follows:

A. For a declaratory judgment that the ASSOCIATION, in behalf of an "impaired insurer", EMPLOYERS CASUALTY, has a duty under the Act to make payment toward the defense costs of THORPE, ET AL in asbestos-related cases;

B. For a declaratory judgment that AMERICAN MOTORISTS, ET AL have a duty, under their "premises-operations" coverage, to defend and indemnify THORPE, ET AL in asbestos-related cases;

C. For a declaratory judgment that the "premises-operations" coverage of AMERICAN MOTORISTS, ET AL is subject to no "aggregate" limit of liability;

D. For a declaratory judgment that, under any coverage trigger adopted, the liability of AMERICAN MOTORISTS, ET AL be deemed joint and several or, alternatively, allocated in a manner calculated to best effectuate coverage;

E. For a declaratory judgment that the "premises-operations" coverage purchased by THORPE, ET AL from AMERICAN MOTORISTS, ET AL inures solely to the benefit of THORPE, ET AL, and does not inure to the benefit of REPUBLIC, as a gratuitous windfall;

F. For a declaratory judgment that **REPUBLIC** has a duty, under its excess liability insurance policies, to defend and indemnify **THORPE, ET AL** in asbestos-related cases;

G. For a declaratory judgment that, under any coverage trigger adopted, the liability of **REPUBLIC** be deemed joint and several or, alternatively, allocated in a manner calculated to best effectuate coverage;

H. That **THORPE, ET AL** recover their actual damages from the **ASSOCIATION**, by virtue of its failure to make payment toward the defense costs of **THORPE, ET AL**, in asbestos-related cases, pursuant to the Act;

I. That **THORPE, ET AL** recover their actual, exemplary and/or punitive damages from **AMERICAN MOTORISTS, ET AL**, arising from their having concealed from **THORPE, ET AL** the fact that "premises-operations" coverage was and is applicable to asbestos-related cases;

J. That **THORPE, ET AL** recover their actual, exemplary and/or punitive damages from **AMERICAN MOTORISTS, ET AL**, arising from their having falsely represented to **THORPE, ET AL** that all their applicable limits of liability for asbestos-related cases have been exhausted;

K. That **THORPE, ET AL** recover their actual, exemplary and/or punitive damages from **AMERICAN MOTORISTS, ET AL**, arising from their having conspired to

conceal from **THORPE, ET AL** the fact that "premises-operations" coverage was and is applicable to asbestos-related cases and, as well, having conspired to falsely represent to **THORPE, ET AL** that all of their applicable limits of liability for asbestos-related cases have been exhausted:

L. That **THORPE, ET AL** recover their actual, exemplary and/or punitive damages from **AMERICAN MOTORISTS, ET AL**, arising from their having failed to maximize the coverage for asbestos-related cases available to **THORPE, ET AL**, by proper utilization of "premises-operations" coverage.

M. That **THORPE, ET AL** recover their actual, exemplary and/or punitive damages from **AMERICAN MOTORISTS, ET AL**, arising from their failure and refusal to defend **THORPE, ET AL** in asbestos-related cases, pursuant to their "premises-operations" coverage.

N. That **THORPE, ET AL** recover their actual, exemplary and/or punitive damages from **REPUBLIC**, arising from its failure and refusal to defend **THORPE, ET AL** in asbestos-related cases, pursuant to its excess insurance coverage;

O. That **THORPE, ET AL** recover their attorney's fees from **AMERICAN MOTORISTS, ET AL** and **REPUBLIC**, pursuant to the Texas Civil Practice & Remedies Code §37.009 and §38.001(8), the Texas Insurance Code, Art. 21.21, §16(b)(1) and Art. 21.55, §6;

P. That **THORPE, ET AL** recover treble damages and/or such other and further relief which this Honorable Court may deem proper, from **AMERICAN MOTORISTS, ET AL** and **REPUBLIC**, pursuant to the Texas Insurance Code, Art. 21.21., §4(1), §4(10)(i), §4(10)(ii), §4(10)(iv), §4(10)(v), §4(10)(viii), §4(11), §16(b)(1) and Art. 21.55, §6;

Q. That **THORPE, ET AL** recover interest on their claims at the rate of eighteen percent (18%) per annum, together with reasonable attorney's fees, pursuant to the Texas Insurance Code, Art. 21.55, et seq.;

R. That **THORPE, ET AL** recover their actual, exemplary and/or punitive damages from **AMERICAN MOTORISTS, ET AL** and **REPUBLIC**, arising from their breach of the duty of good faith and fair dealing owed to **THORPE, ET AL**;

S. That **THORPE, ET AL** recover from **AMERICAN MOTORISTS, ET AL** and **REPUBLIC** pre-judgment and post-judgment interest at the lawful rate;

T. That **THORPE, ET AL** recover from **AMERICAN MOTORISTS, ET AL** and **REPUBLIC** their costs in this behalf expended; and

U. For general relief.

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Respectfully submitted,

**BEAN & MANNING, L.L.P.**  
Attorneys for J T THORPE COMPANY, THORPE  
CORPORATION, THORPE PRODUCTS  
COMPANY and THORPE INSULATION  
SERVICES COMPANY. Plaintiffs

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**EXHIBIT "A"**

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**PRIMARY INSURANCE POLICIES**

**American Motorists Insurance Company**

<u>Policy No.</u>	<u>Policy Term</u>
4YM-426-192	1/1/54-1/1/55
5ZM-426-192	1/1/55-1/1/56
6ZM-426-192	1/1/56-1/1/57
7ZM-426-192	1/1/57-1/1/58
8ZM-426-192	1/1/58-1/1/59
9ZM-426-192	1/1/59-1/1/60
02M-94-278	1/1/60-1/1/61
12M-94-278	1/1/61-1/1/62

**St. Paul Fire and Marine Insurance Company**

<u>Policy No.</u>	<u>Policy Term</u>
542AC8412	1/1/62-1/1/63
542AD3775	1/1/63-1/1/64
542AD8612	1/1/64-1/1/65
542AE3462	1/1/65-1/1/66
542AE7535	1/1/66-1/1/67
542AG1362	1/1/67-1/1/68
542AG8400	1/1/68-1/1/69
542AH4334	1/1/69-1/1/70
542AJ0297	1/1/70-1/1/71

The St. Paul Insurance Company

<u>Policy No.</u>	<u>Policy Term</u>
542TA5181	1/1/71-1/1/72

Federal Insurance Company

<u>Policy No.</u>	<u>Policy Term</u>
7762-89-07	1/1/72-1/1/73
7762-89-08	1/1/72-1/1/73
7776-92-01	1/1/73-1/1/74
7776-92-02	1/1/73-1/1/74

Vigilant Insurance Company

<u>Policy No.</u>	<u>Policy Term</u>
7777-89-95	1/1/74-1/1/75
7777-89-94	1/1/74-1/1/75
(76)7778995	1/1/75-1/1/76
(76)7778994	1/1/75-1/1/76
(77)7778995	1/1/76-1/1/77
(77)7778994	1/1/76-1/1/77
(78)7778995	1/1/77-1/1/78
(78)7778994	1/1/77-1/1/78
77778995	1/1/78-3/1/78
77778994	1/1/78-3/1/78

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The Home Indemnity Company

<u>Policy No.</u>	<u>Policy Term</u>
GA 99-64-92	3/1/78-3/1/79
GA 99-65-99	4/1/79-4/1/80

National Union Fire Insurance Company of Pittsburgh, Pa.

<u>Policy No.</u>	<u>Policy Term</u>
GLA 127-0698 RA	4/1/80-4/1/81
GLA 127-2849 RA	7/1/81-7/1/82
GLA 935-6563 RA	7/1/82-7/1/83
GLA 945-6955 RA	7/1/83-7/1/84
GLA 152-4271 RA	7/1/84-7/1/85
GLA 180-2923 RA	7/1/85-7/1/86

Employers Casualty Company

<u>Policy No.</u>	<u>Policy Term</u>
CGL A 512336	7/1/86-7/1/87
CGL B 512336	7/1/87-7/1/88
EXL B 582877	7/1/88-8/15/89

**EXHIBIT "B"**

B-1

**EXCESS INSURANCE POLICIES**

**Republic Insurance Company**

<u>Policy No.</u>	<u>Policy Term</u>
CDU 5200	1/1/81-7/1/81
CDU 6500	7/1/81-7/1/82
CDU 10321	7/1/82-7/1/83
CDU 13947	7/1/83-7/1/84
CDU 16633	7/1/84-7/1/85