

No. 12-55351

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STREET SURFING, LLC, a Nevada limited liability company,

Plaintiff / Appellant

v.

GREAT AMERICAN E&S INSURANCE COMPANY, a Delaware corporation,

Defendant / Appellee

**BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS
URGING GRANTING OF PETITION FOR REHEARING**

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Amicus United Policyholders is a non-profit 501(c)(3) organization, has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Dated: July 2, 2014

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ARGUMENT¹

I. THE STANDARD FOR REHEARING AND REHEARING *EN BANC* IS SATISFIED

United Policyholders (“UP”) believes that Street Surfing, LLC (“Street Surfing”) should be granted rehearing or rehearing *en banc* of the June 10, 2014 panel decision (Fisher, Goodwin, Clifton – collectively the “Panel”) because the Panel made at least two critical errors of law:

First, offense (g) “infringing upon another’s slogan in your ‘advertisement’” is readily implicated in light of reasonable inferences arising from the asserted facts. The Panel’s holding that “**nothing** in the complaint or in the extrinsic evidence **suggests** that **Noll ever used ‘Streetsurfer’ as a slogan**” (internal citations omitted; emphasis added) [Dkt. 54-1:10] fails to apply California coverage law, requiring that an “insured must prove the existence of a *potential for coverage*, while the insurer must establish the *absence of any such potential*.”²

“StreetSurfer” is a phrase that is a slogan because it was used to advertise the claimant, Mr. Noll’s, products by proclaiming their desirable qualities. Mr. Noll alleges that he promoted his skateboard products by repeatedly using the phrase “StreetSurfer.” He allegedly offered his skateboard products for sale with the phrase “StreetSurfer” affixed to them and claims that the phrase is *well-known* as designating his products. [SS-00424]

The Panel’s reliance on *Interstate Bakeries Corp. v. OneBeacon Ins. Co.*, 686 F.3d 539, 546 (8th Cir. 2012) is problematic, as that decision fails to apply

¹Pursuant to FRAP 29(c), UP states that this brief was authored in part by counsel for Appellee, Street Surfing. No party or person other than UP contributed funding for this brief.

²*Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 300 (1993) (emphasis in original).

Missouri's equally liberal coverage standard³ and is unwilling to draw even the most reasonable of inferences, instead requiring that there be a "specific allegation relating to [use of the product as a slogan]." *Interstate Bakeries*, 686 F.3d at 546.

The Panel's reliance also improperly overlooks pertinent Ninth Circuit authority discussing what an insurer can infer relating to slogan claims. *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1268 (9th Cir. (Cal.) 2010) held that "Steel Curtain" is a slogan even though the underlying complaint did not label it a slogan because it is an "'attention-getting' phrase that is meant to promote" the Pittsburgh Steelers. The use by the Steelers of the phrase "steel curtain" like the claimant's use of the trademarked phrase "Street Surfer" meets the "another's slogan" element of offense (g) in both instances.

Second, the "Material Published Prior" exclusion cannot be raised by GAIC because it forfeited any right to rely on facts purportedly rendering that exclusion applicable when it did not previously assert that exclusion as a ground for denying coverage. Street Surfing expressly called upon GAIC to do so, and GAIC is now estopped from raising it under California law.

Instead, the Panel sets forth an older and less encompassing test for equitable estoppel from *State Farm Fire & Cas. Co. v. Jioras*, 24 Cal. App. 4th 1619, 1626 (1994) rather than using more recent, and directly applicable, authority urged by Street Surfing—*City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 488 (2008). Under its three part test, cases readily find that it is inequitable or blameworthy for an insurer to fail to assert a ground for denial in initial communications with an insured and then to later argue a lack of coverage based

³*Stark Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385, 392 (Mo. App. 2007) (In Missouri the defense duty "arises whenever there is a potential or possible liability to pay based on the facts at the outset of the case and is not depend[e]nt on the probable liability to pay based on the facts ascertained through trial").

on that ground—precisely what GAIC did here.

II. THE PANEL FAILED TO EVALUATE GAIC’S DUTIES IN LIGHT OF THE BROAD DUTY TO DEFEND

GAIC must establish that Street Surfing’s inferences are “farfetched and tenuous” to avoid its duty to defend herein.⁴ GAIC is required to look to the factual allegations and liability under the potentially covered “advertising injury” offenses, as facts, not labels, are determinative in a coverage determination.⁵ Those facts may be buried within causes of action, but must still be properly analyzed to determine whether they may possibly give rise to coverage.⁶ Any fact assertions, which directly or by inference or implication⁷ arguably place part of the underlying claim within the policy, trigger a defense. The district court’s analytic approach, as well as that of this Panel is more analogous to that applicable in analyzing a 12(b) motion for failure to state a claim, as it refused to accept the facts pled as true in analyzing the duty to defend.⁸

⁴*Vann v. Travelers Cos.*, 39 Cal. App. 4th 1610, 1616 (1995) (The failure to affirmatively establish that Street Surfing’s inferences are “farfetched” and “tenuous” leaves GAIC’s burden to negate the potential for coverage unmet).

⁵*Atlantic Mut. Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1034 (2002) (“The scope of the duty [to defend] does not depend on the labels given to the causes of action in the third party complaint; instead it rests on whether the **alleged facts or known extrinsic facts** reveal a **possibility** that the claim may be covered by the policy.”).

⁶*Pension Trust Fund v. Fed. Ins. Co.*, 307 F.3d 944, 951 (“**The duty to defend does not usually turn on whether facts supporting a covered claim predominate or generate the claim.** Instead, California courts have repeatedly found that remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty. Thus, **California law does not require that the insured’s conduct proximately cause the third party claim in order to trigger the defense duty.**” (Emphasis added; citations omitted)).

⁷*Hudson Ins. Co.*, 624 F.3d at 1269 (“**[I]t does not matter that the NFL complaint never referred to ‘steel curtain’ as a slogan and never listed slogan infringement as a cause of action.** . . . The technical label on a cause of action does not dictate the duty to defend whether the claimed cause of action was omitted out of negligence or ‘for strategic adversarial reasons.’ . . . It only matters whether the facts . . . suggest potential liability or whether they do not.”).

⁸*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for **more than a sheer possibility**

III. “INFRINGEMENT UPON ANOTHER’S SLOGAN IN YOUR ‘ADVERTISEMENT’” IS ALLEGED

A. Elements For An “Infringement Upon Another’s Slogan In Your ‘Advertisement’” Claim

The offense of “infringing upon another’s slogan in your ‘advertisement’ ” comprises three elements: (1) infringing upon (2) another’s slogan (3) in your “advertisement.” [SS-00470]

B. Potential Coverage For “Infringing Upon” Another’s Slogan In Your ‘Advertisement’” Is Factually Asserted

1. The “Infringing Upon” Element Is Met

The Panel does not contest that this element is met.

2. The “Another’s Slogan” Element Is Satisfied

a. Street Surfer Used Street Surfer As A Slogan

The Panel held that “**nothing** in the complaint or in the extrinsic evidence **suggests** that **Noll ever used ‘Streetsurfer’ as a slogan.**” (internal citations omitted; emphasis added) [Dkt. 54-1:10] It cited only one case, not addressing California law, in reaching its conclusion. Contrary to the Panel’s opinion, the underlying parties’ use of “StreetSurfer” satisfies this element. The Panel conceded that “StreetSurfer” “arguably could be used as . . . a slogan. . . .” [Dkt. 54-1:10] The Panel, however went on to hold that “Street Surfer has not identified any instance of such a use that would have been readily ascertainable by [Great American] at the time the claim was filed, and specifically, **nothing** in the complaint or in the extrinsic evidence **suggests** that **Noll ever used ‘Streetsurfer’ as a slogan.**” (internal citations omitted; emphasis added) [Dkt. 54-1:10]

Mr. Noll alleges that “Plaintiff is a skateboard manufacturer who, since at least 1994, has manufactured and sold skateboards and skateboard accessories,

that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely-consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of “entitlement to relief.”’ ” (emphasis added)).

including riser pads, wheels and clothing, under the trademark STREETSURFER.” [SS-00424] “. . . Defendants have knowledge of Plaintiff’s mark, have sold and continue to sell skateboards bearing the confusingly similar name ‘Street Surfing’ in competition with Plaintiff . . . within the United States.” [SS-00422]

A reasonable inference is that Noll promoted his own rights to use and license the “StreetSurfer” moniker. Otherwise, he would not have alleged the insured used an ideation of that phrase in competing advertising thereby causing consumer confusion.

Noll’s status as a trademark owner and manufacturer as well as seller of skateboards and skateboard accessories since 1994, which was before he received his “Street Surfer” trademark “[o]n February 20, 2001 . . . under Registration No. 2430013 in Class 28 for goods described as ‘Skateboards and skateboard accessories, namely, riser pads’” [SS-00424] demonstrates that “StreetSurfer” was in fact used by Noll as a slogan.

“StreetSurfer” is a phrase that is a slogan, as it was used by Noll, because he used it to promote his products. Mr. Noll alleged that he promoted his skateboard products by repeatedly using the phrase “StreetSurfer.” [SS-00424] He allegedly offered his skateboard products for sale with the phrase “StreetSurfer” affixed to them and claims that the phrase is *well-known* as designating his products. [SS-00424] This supports the reasonable inference that Noll has repeatedly used the phrase to promote his skateboards.

b. Interstate Bakeries Does Not Support The Panel’s Analysis

Interstate Bakeries Corp. v. OneBeacon Ins. Co., 686 F.3d 539, 546 (8th Cir. 2012), the only case cited in support of its analysis of the slogan claim, is contrary to clear policy interpretation standards applied in Missouri and California⁹

⁹*Montrose Chem. Corp.*, 6 Cal. 4th at 300 (“To prevail, the insured must prove

requiring only a mere potential for coverage.

That court held it is “conceivable that ‘Nature’s Own’ could serve as a slogan,” but then said the lack of specific facts pled, known or “readily ascertainable” to establish that use defeated coverage. *Interstate Bakeries*, 686 F.3d at 546. This holding ignored the allegation that “‘Nature’s Own’ has ‘achieved significant fame and public recognition in connection with . . . bakery goods’ through the mark’s ‘widespread use’ in the ‘retail grocery industry.’”¹⁰ The underlying plaintiff’s allegations satisfy the dictionary definition of a “brief attention-getting device used in advertising or promotion.”¹¹

. . . But the majority overlooked the very specific Flowers allegation that “Nature’s Own” has “achieved significant fame and public recognition in connection with . . . bakery goods” through the mark’s “widespread use” in the “retail grocery industry.” [SA-0028] Flowers allegation satisfies the dictionary definition of a “brief attention-getting device used in advertising or promotion.”

Had the majority fully considered the facts pleaded and followed Missouri law by properly inferring that Flowers uses “Nature’s Own” as “brief attention-getting phrase . . . in advertising or promotion” for its packaged bread just as IBC does for “Nature’s Pride,” it would have found the “infringement of slogan” element of the covered offense triggered.

Both phrases readily and unavoidably raise the inference that the packaged bakery goods they are applied to contain natural ingredients, come from nature, or provide whatever benefits customers associate with the word “Nature” when used to identify or advertise food products. In this manner, “Nature’s Own” does “double duty” as both a trademark (product source identifier) and a “slogan” (attention-getting phrase). Even if “Nature’s Own” did not communicate these qualities the mark could still function as a “slogan” merely by drawing public attention through its stylized large logo. *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1268-69 (9th Cir. (Cal.) 2010) (“infringement of slogan” coverage triggered where insured used “Steel Curtain,” words affixed to Pittsburgh Steelers jerseys, by

the existence of a *potential for coverage*, while the insurer must establish the *absence of any such potential*.” (emphasis in original)).

¹⁰Pet. for Reh’g, *Interstate Bakeries Corp. v. OneBeacon Insurance Company*, Docket No. 3940157, Appellate Case No. 11-1802, at 7 (8th Cir. Aug. 7, 2012) (“IBC Pet. for Reh’g”).

¹¹IBC Pet. for Reh’g, at 11.

printing them on its own jerseys, promoting the team). [SA-0026, ¶11]

Additionally, OneBeacon has never disputed that “Nature’s Own” was used by Flowers to advertise and promote its “bread products,” meeting the second dictionary definition of “slogan.” For example **OneBeacon’s** “suggestions in opposition” to the coverage MSJ **conceded** that “**Flowers** alleges in the amended complaint that its ‘**Nature’s Own**’ phrase, as well as the accused phrases, ‘Nature’s Pride’ and ‘Nature’s Choice,’ **were used in ‘advertising,’ ‘promotions’ and ‘marketing’** of the parties respective **bread products.**” [SA-0335; SA-0326] “Nature’s Own” does not identify a particular product but promotes a line of natural bread products. Indeed, the underlying parties agreed in a joint filing that “Flowers produces and markets a variety of fresh breads and buns under the NATURE’S OWN trademark.” [SA-0310]

Further, an underlying summary judgment order noted Flowers evidence that “‘NATURE’S OWN is the best-selling brand by volume of soft variety bread in the United States’ and that ‘\$267 million has been spent on marketing, advertising and promotion since 1981.’” [SA-0545] The same order discussed Flowers’ evidence of potential confusion including customers “mistaking [IBC’s] commercials for [Flowers],” customers and retailers’ “mixing up coupons and promotions for NATURE’S OWN and NATURE’S PRIDE,” “retailers mixing up NATURE’S PRIDE and NATURE’S OWN in advertisements,” and confusing shelf tags for the bread packages sold side by side. [SA-0553]

In light of these indisputable facts that do not even require inferences, the majority’s admission that “it is conceivable that “Nature’s Own” could serve as a slogan in Flowers’ marketing efforts for a line of natural bread products” must lead to the conclusion that a *potential* for coverage existed. The majority’s contrary conclusion, based on a claimed “lack of any specific allegation relating to such use” and “failure to identify any instance of such use ... readily ascertainable by OneBeacon...” cannot stand. That conclusion is contrary to the record evidence.¹²

c. Hudson’s Validation of “Steel Curtain” As The Pittsburgh Steelers’ Slogan Is Factually Analogous

Hudson Ins. Co. v. Colony Ins. Co., 624 F.3d 1264, 1268 (9th Cir. (Cal.) 2010)¹³ held that “Steel Curtain” is a slogan even though the underlying complaint did not label it a slogan because it is an “‘attention-getting’ phrase that is meant to promote” the Pittsburgh Steelers.

¹²*IBC* Pet. for Reh’g, at 11–14.

¹³Cited on **six** occasions by the Appellants in their briefs but not addressed by the Panel’s opinion.

In attempting to distinguish *Hudson*, GAIC admitted that the slogan at issue in that case was “alleged[ly] trademarked” and the NFL asserted “multiple causes of action in connection with the alleged trademarked slogan” [SS-00206:13-14] including “unfair competition, and deceptive acts and practices.” *Hudson*, 624 F.3d at 1265. But Noll also asserted multiple causes of action including unfair competition and false designation of origin. [GA-00082, ¶ 33]

d. Ultra Coachbuilders Supports Finding a Defense

The court in *Ultra Coachbuilders, Inc. v. General Sec. Ins. Co.*, No. 02 CV 675(LLS), 2002 WL 31528474, at *2-3 (S.D.N.Y. July 15, 2002) observed that to satisfy the “slogan of another” provision in the policy, a phrase need only attract the attention of (and thus constitute a slogan to) a specialized target audience, *not* necessarily an unfamiliar layperson. For instance, to a layperson the acronyms VQM and QVM have no meaning. To the sellers of stretch limousines, however, they connote a seal of approval and function as potential slogans to induce limousine buyers to purchase those limousines because the acronym suggests that the automobile (Ford Navigator) analogous to those stretched in *Ultra Coachbuilders*’ reconstruction action meets with the original manufacturers’ approval and is entitled to the QVM “Quality Vehicle Manufactured” seal of approval. *Id.*

California law also concluded that “QVM” was a slogan even though it was an automobile safety certification and a product feature because the claimant used the mark to convey a degree of quality and safety to consumers and was attached to the product.

Here, like “Steel Curtain” in *Hudson*, the phrase “StreetSurfer” has meaning to the target audience—youth attracted to the surfer image and lifestyle. They appreciate the implications of the phrase suggesting that they can surf on the street and be a “surfer.” **“StreetSurfer” connotes association** with an attractive image

to the target audience of this product just like the “Wearable Light.”

e. *Zen Design’s Use Of “The Wearable Light” Analyzed*

Cincinnati Ins. Co. v. Zen Design Group, Ltd., 329 F.3d 546, 556 (6th Cir. 2003) concluded that “The Wearable Light” was a slogan because:

Directly beneath “SAPPHIRE,” the phrase “The Wearable Light” appears smaller and notably is not followed by the registered trademark emblem. From this advertisement, “SAPPHIRE” appears to be the name of the product, while “The Wearable Light” can easily be construed as a “catchword or catch phrase” used by the manufacturer to promote its product.

Central to the *Zen Design* court’s determination that “The Wearable Light” was a slogan as used by the claimant was its manner of display in the advertisement for the “SAPPHIRE” product. Noll similarly used the trademark “Street Surfer” as a slogan by displaying the name on the skateboards and skateboarding accessories he manufactured. [SS-00424] Hence, the manner of display coupled with trademark claims for “StreetSurfer” indicate claimant’s use of the mark as a slogan.

3. “In Your Advertisement”

An “advertisement” is defined in the policy as “a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.” [SS-00470] The “in your advertisement” policy language is satisfied after Hartford’s policy inception since Street Surfing allegedly used Noll’s “Street Surfer” idea in widespread commercial advertising, including on its website, but only within Hartford’s policy period. [SS-00472–74] The Policy defines “notices that are published . . . on the Internet” as an “advertisement.” [SS-00470] GAIC does not contest that this element is satisfied based on the underlying complaint and the Panel correctly accepted that concession. [Dkt. 54-1:9]

IV. THE “MATERIAL PUBLISHED PRIOR” EXCLUSION DOES NOT BAR A DEFENSE

A. The Panel’s Decision Regarding The “Material Published Prior” Exclusion

The Panel only devotes one paragraph in a footnote to this very important issue. It states that under the two part test articulated in a twenty-year-old decision, *State Farm Fire & Cas. Co. v. Jioras*, 24 Cal. App. 4th 1619, 1628 (1994), GAIC’s reservation of rights letter was sufficient to preclude a finding of equitable estoppel. No further analysis is provided. The Panel’s decision addresses this argument in a footnote and improperly states that equitable estoppel is only available to an insured where it can show that: “(1) a reasonable belief that the insurer would provide coverage and (2) detrimental reliance on that conduct.”

[Dkt. 54-1:11]

B. The Panel’s Analysis Of The “Material Published Prior” Exclusion Is Of No Moment To The Covered Claim For “Infringement of Slogan in Your ‘Advertisement’”

Prior to 2006, when Hartford’s policy incepted, Street Surfing could not have been using Noll’s “advertising idea” or “slogan” in Street Surfing’s “advertisements” because it was not promoting any Street Surfer products which used that slogan. This is particularly true given that GAIC did not meet its obligation in addressing the “Material Published Prior” exclusion where it “has the burden of proving, through conclusive evidence that the exclusion applies in all possible worlds.” *J. Lamb, Inc.*, 100 Cal. App. 4th at 1039.

C. GAIC’s Failure to Refute Street Surfing’s Contentions Equitably Estops GAIC From Enforcing Its “Prior Publication” Exclusion

1. Elements Of An Estoppel Claim

Estoppel is an equitable remedy and cannot be read as narrowly as the *Jioras* court suggests. While the facts before that court did not evidence estoppel, *Jioras* did not purport to articulate a test that would govern all potential claims of estoppel. *City of Hollister v. Monterey Ins. Co.*, 165 Cal. App. 4th 455, 488

(2008), relied on by appellant but not addressed by the Panel, sets forth California's elements regarding equitable estoppel: "(1) The party to be estopped has engaged in blameworthy or inequitable conduct; (2) that conduct caused or induced the other party to suffer some disadvantage; and (3) equitable considerations warrant the conclusion that the first party should not be permitted to exploit the disadvantage he has thus inflicted upon the second party."

2. The Elements Of Estoppel Are Met Here

GAIC did not rely on the "Material Published Prior" exclusion in denying coverage following Street Surfing's advice as to why it could not bar a defense. [SS-00670-78; SS-00705-13] Street Surfing's letter seeking reconsideration specifically stated that the "Material Published Prior" exclusion cannot bar a defense and offered several pages of supporting case law and factual authority. [SS-00693-97] GAIC explicitly responded that the "Material Published Prior" exclusion is irrelevant **because "Great American did not cite or rely upon these policy provisions for its denial of coverage."** [SS-00712]

Once GAIC affirmatively told Street Surfing of its position that it would not be relying on the "Material Published Prior" exclusion it had a duty to inform Street Surfing of its change in position before Street Surfing resolved the underlying lawsuit:

The court was entitled to conclude that once MIC told city officials it would "fight" a claim for functional replacement value, it assumed an affirmative duty . . . to plainly inform City of its supposed decision *not* to fight such a claim. This is something MIC apparently had not done as of the commencement of trial[.] [T]here is no evidence that it ever informed City, directly or indirectly, that it was abandoning the defense. Its failure to do so was by itself enough to sustain an estoppel.¹⁴

[Insureds] argue that since they incurred expense by acting on their belief that the bodily injury defense to coverage was without merit, [insurer] ought now be estopped to raise the occurrence defense. . . .

¹⁴*Hollister*, 165 Cal. App. 4th at 494.

We conclude [promissory estoppel applies]¹⁵

So there, the lack of an “occurrence” was never raised as a ground for challenging potential coverage. Here, alleged pre-policy issuance “advertisements” were never argued by GAIC. This is undoubtedly because it believed they would not show liability under offense (f) or (g) and thus could not bar a defense. Addressing the issue of what conduct arose before policy inception, GAIC deflected attention from pre-policy activity that would never meet the “in your advertisement” component of either offense.

The court found an insurer estopped where its conduct “*caused* the party seeking the estoppel to suffer some harm, disadvantage, or change of position.”¹⁶ There, the insurer failed to “cooperate with and assist the insured in determining the extent of the insurer’s additional liability” thus interfering with the insured’s 180-day contracting condition.¹⁷

In a case that is directly analogous, a Florida Court of Appeals determined that estoppel arose on similar facts:

[T]hroughout the first litigation and appeal [insurer] denied the claim solely on the basis of the bodily injury defense. Therefore, [insureds] argue that since they incurred expense by acting on their belief that the bodily injury defense to coverage was without merit, [insurer] ought now be estopped to raise the occurrence defense. We conclude that the circumstances of this case establish the applicability of the doctrine of promissory estoppel.¹⁸

So here, the “Material Made Public” exclusion was conceded to be irrelevant based on Street Surfing’s factual showing and coverage analysis. **[SS-00712]**

¹⁵*Am. States Ins. Co. v. McGuire*, 510 So. 2d 1227, 1229 (Fla. Dist. Ct. App. 1987).

¹⁶*Hollister*, 165 Cal. App. 4th at 500.

¹⁷*Id.* at 491.

¹⁸*McGuire*, 510 So. 2d at 1229.

3. **Concluding That Estoppel Cannot Bar A Defense Rewards GAIC For Failing To Assert A Factual Basis For The “Material Published Prior” Exclusion**

Street Surfing had a reasonable belief that GAIC was on notice of the potential for “fresh wrongs” due to the insurance application which stated that Street Surfing had “new products still in progress.” [SS-00406] Nor did GAIC assert the “Material Published Prior” exclusion as a grounds for denial of a defense following its review of extended argument from Street Surfing’s counsel which clarified why it was inapplicable. [SS-00693; SS-00712] As this court concluded, “[N]otice must ‘not only be prompt, but it must ‘provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.’”¹⁹

4. **Street Surfing Detrimentally Relied On GAIC’s Actions**

“[O]bstructionism or recalcitrance . . . can nonetheless give rise to estoppel where it causes harm to another[.]”²⁰ Though not required by California to prove estoppel, in analyzing “detrimental reliance” *Hollister* confirmed that “in the case of affirmative representations this will usually translate into detrimental reliance by the person to whom the representations were made.” *Id.*

In *Hollister*, despite the insured’s notification to its insurer that it had tentative plans to demolish a building, the insurer never suggested any legal basis on which it might avoid the obligation. *Id.* at 491. Similarly here, despite Street Surfing’s notification in its policy application that it had plans to introduce new products “still in progress” [SS-00406] GAIC never advised Street Surfing that those new products would not be covered. Street Surfing’s detrimental reliance on the reasonable belief that its new products would be covered estops GAIC from now asserting a “Material Published Prior” defense against Street Surfing.

¹⁹*Lutz v. First Fin. Ins. Co.*, 247 F. App’x 911, 912 (9th Cir. (Alaska) 2007).

²⁰*Hollister*, 165 Cal. App. 4th at 513.

GAIC “forced [Street Surfing] to a choice.” *Id.* at 500. Street Surfing settled the case after GAIC offered no substantive response to its factually and legally supported attack on the “Material Published Prior” exclusion. [SS-00465; SS-00712] It reasonably relied on its belief that neither GAIC’s “Intellectual Property” nor “Advertising Injury” endorsements eliminated all potential for coverage. This led Street Surfing to spend additional money litigating the *Noll* Action and then settle based on the belief that GAIC had improperly denied a defense due to its reliance on two inapplicable exclusions. [SS-00465]

Street Surfing did not have to settle but could have fought Noll’s right to a trademark, or argued that its “Street Surfing” logo did not infringe Noll’s trademark. After GAIC abandoned Street Surfing, it faced exposure exceeding a million dollars plus underlying plaintiff’s attorney’s fees. [SS-00465]

In *Spray, Gould & Bowers v. Associated Int’l Ins. Co.*, 71 Cal. App. 4th 1260, 1269 (1999), estoppel was appropriate because the insurer failed to advise its insureds of applicable claim time limits. Had the insureds in *Spray* been advised of the time limits, they would have filed their suit sooner. Analogously here, GAIC failed to notify Street Surfing that post policy inception use of different advertisements for Lime Green Street Surfing Wheels in 2006 and Street Surfer Wheels in 2007 would not suffice to secure coverage due to its overly restrictive construction of the “Material Published Prior” exclusion. Under GAIC’s present construction, distinct legal liability for potentially covered conduct must bear no relationship to that claimed against Street Surfing before policy inception. [SS-00212]

Statements that an insurer makes to its insured, with an intention that it rely upon them, create detrimental reliance. In *CalFarm Ins. Co. v. Krusiewicz*, 131 Cal. App. 4th 273, 285 (2005), an insurer was estopped from denying payment because its attorney had previously promised that the insurer would pay. GAIC

made equivalent representations to Street Surfing, that Street Surfing was entitled to rely upon, that it would not be enforcing the “Material Published Prior” exclusion.

5. GAIC’s Conduct In “Hiding In The Weeds” Was Bad Faith

Preventing GAIC from raising the “material published prior” exclusion which causes no enlargement of GAIC’s substantive liabilities would require insurers to use any facts subsequently intended to be relied upon so an insured can determine whether the insurer’s coverage position was meritorious and proceed to defend the underlying action so informed. A contrary rule would provide a windfall to insurers, like GAIC, who refuse to identify all facts that they wish to rely upon in establishing that a defense arose. They would, in effect, be incentivized to reverse delegate their duty to investigate to their insureds. Indeed, it rewards the kind of “obstructionism or recalcitrance . . . [which can] give rise to estoppel where it causes harm to another.”²¹

V. CONCLUSION

For all the above reasons, the Petition for Rehearing should be granted or in the alternative, the Petition for Hearing *En Banc* granted.

Dated: July 2, 2014

SCHINDLER LAW GROUP

By: /s/ Eric J. Schindler

Eric J. Schindler

Attorney for Amicus
UNITED POLICYHOLDERS

²¹*Hollister*, 165 Cal. App. 4th at 513.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed R. App. P. 40 (b)(7)(B) and Ninth Circuit Rule 29-2 (c) (2), the attached petition for rehearing does not exceed fifteen (15) pages.

Dated: July 2, 2014

SCHINDLER LAW GROUP

By: /s/ Eric J. Schindler
Eric J. Schindler

Attorney for Amicus
UNITED POLICYHOLDERS

CERTIFICATE OF SERVICE

I, Brent L. Vossler, declare:

I am employed in Orange County, California. I am over the age of 18 and not a party to this action; my business address is 20321 SW Birch St., Suite 200, Newport Beach, California 92660; Phone: 949-387-0495; Fax 949-464-9714; E-mail address: brent@schindlerlaw.net.

I certify that on July 2, 2014, I caused the attached BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS URGING GRANTING OF PETITION FOR REHEARING to be electronically submitted to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I declare that all participants in the case are registered CM/ECF users and that service of this document will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and I am employed in the office of a member of the bar of this Court at whose direction this service was made.

Executed on July 2, 2014, in the City of Newport Beach, County of Orange, California.

NAME: Brent L. Vossler



(Signature)