New York County Clerk's Index No. 651982/11

NEW YORK SUPREME COURT

APPELLATE DIVISION — FIRST DEPARTMENT

ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff-Respondent,

—against—

SONY CORPORATION OF AMERICA and

SONY COMPUTER ENTERTAINMENT AMERICA LLC,

Defendant-Appellants,

—and—

MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant-Respondents,

—and—

SONY ONLINE ENTERTAINMENT LLC, SONY NETWORK ENTERTAINMENT INTERNATIONAL LLC, SONY NETWORK ENTERTAINMENT AMERICA INC., ACE AMERICAN INSURANCE COMPANY, XL INSURANCE COMPANY LIMITED – IRISH BRANCH and GREAT AMERICAN INSURANCE COMPANY OF NEW YORK,

Defendants.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF DEFENDANT-APPELLANTS

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INTEREST OF AMICUS CURIAE

United Policyholders ("UP") respectfully requests leave to file this brief *amicus curiae* in support of Appellants. UP is a non-profit organization founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. UP serves as an information resource and a voice for a diverse range of insurance consumers across the United States, from low income homeowners to international businesses. Donations, foundation grants and volunteer labor support the organization's work, which is divided into three program areas: Roadmap to Recovery (helping disaster victims navigate the insurance claim process and recover fair settlements), Roadmap to Preparedness (promoting disaster preparedness and insurance literacy for homeowners and businesses), and Advocacy and Action (advancing the interests of insurance consumers in courts of law and before regulators).

UP serves an important purpose by representing the interests of policyholders. Most consumers can scarcely afford legal counsel to pursue their rights under their insurance policies, whereas insurance companies have extensive resources to retain lawyers at major law firms to oppose providing coverage to their policyholders. In coverage disputes, the insurers also enjoy a major advantage because their policies are written on standardized forms, which individual policyholders have no power to revise. UP seeks to level the playing

field by offering similar resources and comparable counsel to represent otherwise vulnerable policyholders in cases raising important insurance coverage issues.

UP has been active since its founding in helping a diverse range of policyholders throughout the United States. UP's Executive Director has been appointed for six consecutive terms as an official consumer representative to the National Association of Insurance Commissioners, and works closely with State Insurance Commissioners on issues affecting insurance consumers. Media and academics also regularly seek UP's input on insurance consumer issues. Since its founding, UP has filed *amicus curiae* briefs in numerous federal and state courts in over 350 cases.[1]

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[1] UP's arguments were adopted by the Texas Supreme Court in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools Inc.*, 246 S.W.3d 42 (Tex. 2008), as well as by the California Supreme Court in *Vandenberg v. Superior Court*, 88 Cal. Rptr. 2d 366 (1999), and numerous other proceedings including *TRB Investments, Inc. v. Fireman's Fund Insurance Co.*, 145 P.3d 472 (Cal. 2006), and *In Re Salem Suede, Inc.*, 221 B.R. 586 (D. Mass. 1998). UP has also been granted leave to file briefs as an *amicus curiae* in numerous U.S. Supreme Court cases, including the following: *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604 (2013); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *Hardt v. Reliance Standard Life Insurance Co.*, 130 S. Ct. 2149 (2010); *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

INTRODUCTION

All of the insurance policies at issue in this case provide coverage for injury arising out of an "[o]ral or written publication, *in any manner*, of material that violates a person's right of privacy." (Italics added.) The policies contain no language restricting this coverage only to instances in which the policyholder is alleged to have published the material, as opposed to having negligently permitted publication by a third party. Accordingly, a plain reading of the policy language applies (*e.g., White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267 (2007)), which in this instance means that each policy's open-ended language encompasses both circumstances. Under hornbook principles of New York insurance law, the insurers may not rely upon – and no Court may insert – limiting language not included in the policy. *See, e.g., Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co., Inc.*, 16 N.Y.3d 257, 264 (2011) ("If the plain language of the policy is determinative, we cannot rewrite the agreement by disregarding that language.").

But that is exactly what the insurers seek here. Their position is that – even though the words used in their policies do not condition coverage on a publication *by the policyholder* – the Sony Insureds should have known that coverage was so limited because, twenty-one years ago, a Court of Appeals decision concerning coverage for pollution-related torts included a statement to the effect that a now-superseded version of a standard-form Personal Injury Endorsement "was intended

to reach only purposeful acts undertaken by the insured or its agents." *County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 627-28 (1994). The insurers contend, in essence, that this claimed coverage limitation, implied from the 1994 decision in the pollution case, should be read into Sony Insureds' 2011-2012 insurance policies. The Court should reject this contention for several reasons.

First, and most fundamentally, the portion of *County of Columbia* relied upon by the insurers is *dicta*; it does not bind this Court. *See Pollicino v. Roemer and Featherstonhaugh P.C.*, 277 A.D.2d 666, 668 (3d Dep't 2000) ("Language that is not necessary to resolve an issue, however, constitutes dicta and should not be accorded preclusive effect."). This Court can and should consider the language actually included in the relevant policies and apply its own reasoned judgment to this case.

Second, even if the language the insurers cite from the *County of Columbia* case were a holding, it could not resolve this coverage dispute because the Court of Appeals was construing a differently-worded coverage grant, and not enunciating a general rule that would apply for all time, no matter what the contract language provides. The Personal Injury Endorsement analyzed in *County of Columbia* was drafted years before Part B coverage existed and contains significantly different language. The Court cannot apply *County of Columbia* to the Sony Insureds' 2011-2012 policies without first analyzing the new language contained in those

policies. *See Fieldston*, 16 N.Y.3d at 264 ("In resolving insurance disputes, we first look to the language of the applicable policies."). The actual policy language at issue in this case demonstrates that only some of the covered offenses were intended to be restricted to the purposeful acts of the insured, while others – like the grant of coverage for a "oral or written publication" at issue here – were not.

Third, adopting the insurers' position would flip well-settled New York insurance law on its head, to the detriment of all policyholders. Rather than simply being able to read their own (already lengthy) insurance policies to determine what was covered and what was not, policyholders would be forced to scour legal repositories to see if any dicta construing different insurance policy language could possibly limit their rights of recovery. No principle of New York insurance law supports the creation of this novel phantom exclusion. It should be rejected.

For these reasons, the Court should reverse the finding of the trial court that Part B's coverage for injury arising from "[o]ral or written publication, *in any manner*, of material that violates a person's right of privacy" is implicitly limited to publication in a single manner – where the policyholder is alleged to have published the offending material itself.

ARGUMENT

I. The Language the Insurers Cite from *County of Columbia* Is Dicta

The insurers rely upon language in the Court of Appeals decision in *County of Columbia*, which stated that "coverage under the personal injury endorsement provision in question was intended to reach only purposeful acts undertaken by the insured or its agents." 83 N.Y.2d at 627. The insurers claim that this observation constitutes binding authority as to the interpretation of the "oral or written publication" grant of coverage at issue in this case. They are mistaken. *County of Columbia* concerned a completely different grant of coverage under the Personal Injury Endorsement for a completely different type of claim. As discussed in detail below, the single paragraph in the opinion cited by the insurers was not necessary to the actual issue decided by the Court – the interpretation of the phrase "invasion of private occupancy" – and is thus not precedential. *See Pollicino*, 277 A.D.2d at 668 ("Language that is not necessary to resolve an issue, however, constitutes dicta and should not be accorded preclusive effect.").

In *County of Columbia*, the policyholder (the "County") ran a waste management facility and was sued by an adjacent land-owner for continuing nuisance and trespass arising from alleged leachate contamination. The County's insurers denied coverage based on a pollution exclusion that applied to all Bodily Injury and Property Damage Liability. While the County admitted that the

pollution exclusion barred coverage for the lawsuit under the Bodily Injury and Property Damage insuring agreement, the County argued that coverage was still available under the separate Personal Injury Endorsement, which included an insuring agreement granting coverage for lawsuits alleging "wrongful entry or eviction or other invasion of the right of private occupancy" and to which the pollution exclusion arguably did not apply. *Id.* at 394.

The trial court found for the insurers and the Appellate Division affirmed. The Appellate Division reasoned that the interpretation of "the phrase 'invasion of the right of private occupancy' lies in the definition of 'wrongful entry' and 'eviction', both of which involve actual interference with possessory rights to real property." *Id.* at 395. Accordingly, the Appellate Division concluded that the term "invasion of the right of private occupancy" was limited to liability for "purposeful acts aimed at dispossession of real property by someone asserting an interest therein," which was not present in the pollution-related claims brought in the underlying lawsuit. *Id.* That Court further reasoned that, were the County's interpretation to prevail, "extending personal injury coverage to occurrences which fall squarely within the property damage coverage would have the effect of rendering the pollution exclusion meaningless." *Id.* at 395-96.

The Court of Appeals affirmed. Like the Appellate Division, the Court of Appeals found the County's position unsupportable because it would read the

pollution exclusion into a nullity. *See* 83 N.Y.2d at 628 ("It would be illogical to conclude that the claims fail because of the pollution exclusion while also concluding that the insurer wrote a personal injury endorsement to cover the same eventuality."). The Court of Appeals further noted that the types of torts enumerated in the Personal Injury Endorsement suggested that the language "could not have been intended to cover the kind of indirect and incremental harm that results to property interests from pollution." *Id.* However, the Court of Appeals took its analysis beyond the scope of the language actually at issue in that case (*i.e.*, the phrase "invasion of the right of private occupancy") by observing that the list of *all torts* contained in the Personal Injury Endorsement suggested that "only purposeful acts were to fall within the purview of the personal injury endorsement." *Id.* at 627.

That last observation – which is the only language in *County of Columbia* upon which the insurers rely – is dicta. The torts mentioned in that paragraph by the Court of Appeals (*e.g.*, false arrest, detention, imprisonment, malicious prosecution, defamation and invasion of privacy by publication) appeared in subsections of the Personal Injury Endorsement that were not at issue in the case. Accordingly, the Court of Appeals' brief and uncritical interpretation of that language was not necessary to the resolution of the issue before it: whether the

phrase "invasion of the right of private occupancy" encompassed the pollution-related torts at issue in the underlying lawsuit.

II. The Reasoning of County of Columbia Does Not Apply to the Language At Issue in This Case

Even were the overbroad language Court of Appeal's decision in *County of Columbia* precedential, it would not apply here because the insuring agreement that the Court of Appeals interpreted in that case contained materially different language from that at issue in this case.

The policies in *County of Columbia* included a Personal Injury Endorsement commonly used in insurance policies issued from 1970 through 1986, before Personal and Advertising Injury Liability Coverage was added to the standard commercial general liability insurance policy form. That Endorsement defined "Personal Injury" as:

> [I]njury arising out of one or more of the following offenses committed during the policy period:
>
> (1) false arrest, detention, imprisonment, or malicious prosecution;
>
> (2) wrongful entry or eviction or other invasion of the right of private occupancy;
>
> (3) a publication or utterance [constituting defamation or invasion of an individual's right of privacy]".

County of Columbia, 189 A.D.2d at 393-94 (bracketed words in original). This three-part definition of "Personal Injury" was completely silent as to whether the

enumerated torts must be carried out by the insured. Thus, although the Court of Appeals' determination that the policy conditioned coverage on the purposeful action of the insured was beyond the scope of the issues involved in *County of Columbia*, its interpretation of that language could be defended given this silence.

The same is not true of the "Part B" Coverage at issue here. In response to *County of Columbia* and many similar cases in other jurisdictions, the new Part B insuring agreement for Personal and Advertising Injury Liability was drafted to specify which torts the insured must be alleged to have committed itself, and which were not so limited. The Part B coverage defines "Personal and Advertising Injury" as injury arising from:

> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
>
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's good, products or services;
>
> e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
>
> f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

The changes to the standard form renders the Court of Appeals' analysis in *County of Columbia* inapplicable. First, the new language removed the ambiguity at the heart of the *County of Columbia* case from the policy by specifying that the wrongful entry, eviction, or invasion of privacy must be "committed by or on behalf of its owner, landlord or lessor." *Id.*[2] In other words, the insurers did what they should have done back in the 1980's, which is specify the actor required to be alleged to have committed the enumerated tort if they intended coverage to be so limited. Similarly, the new definition's use of the phrase "your advertisement" in subsections (f) and (g) specified that it was *the policyholder's* advertisement – and not a third-party advertisement – that must form the basis for the advertising-related damages sought under the policy.

The new Part B policy form could have easily been amended to specify the same for subsection (e)'s grant of coverage for oral or written publications that violate a right to privacy. It would have taken the addition of a single word: "*Your* oral or written publication, in any manner, of material that violates a person's right

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[2] *See* Woodward et al., *Commercial Liability Insurance* (International Risk Management Institute, Inc. 2012) pp. IV.F.12 (noting that the 1988 Part B coverage form was amended to require the invasion of the right of private occupancy to be "committed by or on behalf of its owner, landlord or lessor" in an effort to prevent insureds from obtaining coverage for pollution liability through the grant of personal and advertising injury coverage).

of privacy." The insurers chose not to include that language; they cannot second-guess that decision now. The insurers' conscious choice to specify the actor for some – but not all – of the enumerated torts in Part B leads to the inescapable conclusion that coverage for some – but not all – of the enumerated torts is so limited. *See United States Fid. & Guar. Co. v Annunziata*, 67 N.Y.2d 229, 233 (1986) (holding that a fire insurance policy's clear requirement that the insured submit to questioning under oath and the "omission of any similar reference to the mortgagee in the clause pertaining to examinations under oath must be assumed to have been intentional under accepted canons of contract construction."); *Rosado v. Eveready Ins. Co.*, 34 N.Y.2d 43, 48 (1974) (applying the canon of *expressio unius est exclusio alterius, i.e.*, the expression of one thing is the exclusion of another).

At the very least, the changes in the Part B form demonstrate that the interpretation advocated by the Sony Insureds is a reasonable one, in which case the Court must find in favor of coverage. *See General Assur. Co. v. Schmitt,* 696 N.Y.S.2d 72, 74 (2d Dep't 1999) ("The law is clear that if an insurance policy is written in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the insured against the insurer.") (citation omitted).

III. Enforcing the Insurers' Phantom Exclusion Would Contradict the Foundational Principles of New York Insurance Law

The insurers cannot direct the Court to any policy language that limits Part B's coverage solely to publications made by the policyholder (as opposed to a third party where the policyholder is found legally responsible). That language does not exist. Instead, the insurers ask this Court to reach back twenty-one years to a Court of Appeals decision interpreting substantially different language in order to *imply* a limitation into their policies' otherwise broad grant of coverage. Numerous principles of New York insurance law preclude this tactic.

First, it is well-settled New York law that "[i]nsurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured." *Dean v. Tower Ins. Co. of New York*, 19 N.Y.3d 704, 708 (2012) (citation omitted); *see also Michaels v. City of Buffalo*, 628 N.Y.S.2d 253, 254 (1995) ("'an insurance policy term must be construed "as would the ordinary [person]") (bracketed word in original) (citation omitted). Of course, no "average insured" or "ordinary person" would construe the open-ended policy language at issue here as carrying the insurers' unspoken limitation.

Second, restrictions to coverage will not be enforced unless the policy contains "clear and unmistakable language" limiting coverage. *See Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 307 (2009) (quoting *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984)). Limitations "are not to be extended by interpretation or implication," *id.*, and are enforced only

where they are found to "have a definite and precise meaning, unattended by danger of misconception . . . and concerning which there is no reasonable basis for a difference of opinion," *id.* (citing *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 353 (1978). In this case, no clear and unmistakable policy language conditions coverage for injury arising from a "publication" in the manner suggested by the insurers. In order to enforce that restriction, the Court would necessarily be required to read an exclusion into the policy by implication, which New York law does not permit.

Third, where an ambiguity exists in a policy form drafted by an insurer, that ambiguity must be read in favor of coverage. *See Schmitt*, 696 N.Y.S.2d at 74 (2d Dep't 1999) ("The law is clear that if an insurance policy is written in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the insured against the insurer.") (citation omitted). Here, the insurers' failure to clearly exclude coverage for third-party publications for which the policyholder is legally responsible renders the policy ambiguous at the very least. The insurers may not enforce their unspoken exclusion without violating this tenet of insurance policy interpretation.

Fourth, adopting the insurers' argument would substantially lessen the incentive for all insurers to draft clear and easily understandable policy forms. Policyholders should be able to read their insurance policies (which can already

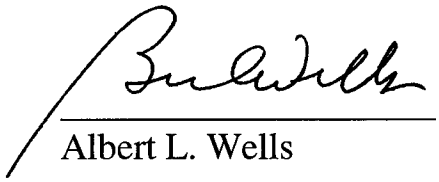
number in the hundreds of pages) and determine what coverage is and is not available. They should not be forced to guess whether, by implication, the enumerated torts in Coverage B apply only when the policyholder is alleged to have committed the requisite act, or whether they also apply when the policyholder is alleged to be legally responsible for a third party's act. If there is a question, there should be coverage. Holding otherwise incentivizes insurers to promise seemingly broad coverage (like the language at issue here) but then insist that its broad language actually contains hidden limitations when the time to pay a claim arrives. This is antithetical to established insurance law in every jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's decision and hold that the policies at issue in this case provide coverage for injury arising from any oral or written publication that violates a person's right of privacy for which the policyholder is responsible, regardless of whether the policyholder or a third party is alleged to have made that publication.

Date: January 16, 2015

Respectfully submitted,



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