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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202	Case No. **2015CA770**
***Plaintiff-Appellant*:** **MARKWEST ENERGY PARTNERS, LP**, a Delaware master limited partnership, v. ***Defendant-Appellee*:** **ZURICH AMERICAN INSURANCE COMPANY**, a New York corporation	
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BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT

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I. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that

The *amicus* brief complies with the applicable word limit set forth in C.A.R. 29(d).

This brief contains 3581 words (does not exceed 4,750 words).

The *amicus* brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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II. INTEREST OF AMICUS CURIAE

United Policyholders ("UP") is a non-profit 501(c)(3) organization founded in 1991 that is a voice and an information resource for insurance consumers in Colorado and throughout the United States. The organization assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations, and volunteers support our work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (insurance and financial literacy and disaster preparedness), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of tips, sample forms and articles on commercial and personal lines insurance products, coverage, and the claims process at www.uphelp.org.

In partnership with El Paso, Boulder, and Larimer counties, UP has been engaged in long term wildfire and flood recovery work in Colorado since 2010. UP works closely with the Colorado Department of Insurance and has participated in legislative proceedings in Denver.

State insurance regulators, academics, and journalists throughout the United States routinely seek UP's input on insurance and legal matters. We have been

appointed for six consecutive years as an official consumer representative to the National Association of Insurance Commissioners.

UP seeks to assist courts as *amicus curiae* in appellate proceedings throughout the United States. UP has appeared as *amicus curiae* in three Colorado Supreme Court cases: Craft v. Philadelphia Indemnity Insurance Co. (2014 SA 43, 2015), Mountain States Mutual Casualty Co. v. Roinestad (2010 SC 853, 2011), and Board of Directors Metro Wastewater vs. National Union Fire Insurance Co. (03 SC 846, 2004). A complete listing of all cases we've weighed in on can be found in our online *Amicus* Project library.

III. STATEMENT OF THE ISSUES

1) Whether Colorado's notice-prejudice rule applies to interim notice requirements placed in endorsements to occurrence based insurance policies?

IV. STATEMENT OF THE CASE

United Policyholders adopts the Statement of the Case contained in the brief of the Plaintiff-Appellant, MarkWest Energy Partners, LP ("MarkWest").

V. SUMMARY OF ARGUMENT

The notice-prejudice rule is black-letter Colorado law. It supports insurance consumers by avoiding disproportionate forfeiture. Insurance serves the public interest by ensuring a source of recovery for victims and by protecting businesses and individuals from the risks of litigation. The public interest would be harmed

by a rule that allows an insurance company to avoid responsibility for a covered claim whenever a policyholder reports that covered claim within the policy period but later than an interim reporting period inserted in an endorsement by the insurance company.

The better rule is that the notice-prejudice rule applies to the entirety of occurrence policies. Consequently, courts should allow the forfeiture of coverage only when late notice causes substantial prejudice to the interests of the insurance company. This includes late notice under a purported interim notice provision in an endorsement that calls for a set number of days to give notice imbedded in an occurrence policy.

VI. ARGUMENT

A. Establishing a Rule Only Applying the Notice-Prejudice Rule To Certain Provisions of An Occurrence Policy is Confusing and Would Negatively Affect All Colorado Policyholders.

1. The Trigger of Coverage In An Occurrence Policy Is Injury or Damage During the Policy Period Not When a Claim is Made Against the Policyholder.

Dramatically different reporting requirements riddled throughout an occurrence policy would only cause confusion and prejudice the policyholder. Under an occurrence-based policy, coverage is effective if the damage or injury from a negligent or omitted act occurred during the period of the policy, regardless of the date a claim is actually made against the insured. See COUCH ON

INSURANCE § 1:5, at 15–16 (3d ed. 2009 & Supp. 2014). This fundamental understanding of the nature of coverage under occurrence policies has been accepted by Colorado. Indeed, the Colorado Division of Insurance defines an occurrence policy as "an insurance policy that provides liability coverage only for injury or damage that occurs during the policy term, regardless of when the claim is actually made." See 3 COLO. CODE REGS. 702-5:5-1-8 (2014).

2. Notice Is Not a Prerequisite To Coverage Under an Occurrence Policy.

With an occurrence policy, an occurrence entitles the policyholder to benefits under coverage that already exists, and timely notice is not one of the prerequisites to the creation of coverage. Instead timely notice is merely a condition of retaining that coverage. See 3 Allan D. Windt, INSURANCE CLAIMS AND DISPUTES § 11:5 (6th ed. 2013). This is because under occurrence policies, "the peril insured is the 'occurrence' itself." Sigma Fin. Corp. v. Am. Int'l Specialty Lines Ins. Co., 200 F. Supp. 2d 710, 716 (E.D. Mich. 2002); Molyneaux v. Molyneaux, 553 A.2d 49, 52 (N.J. Super. Ct. App. Div. 1989). The notice requirement serves to allow the insurance company to protect the policyholder's and the insurance company's interests, including the right to investigate the claim, negotiate with the third party asserting the claim, and defend the claim. See Friedland v. Travelers Indem. Co., 105 P.3d 639, 644 (Colo. 2005).

Consequently, if these interests are not compromised, the insurance company is not prejudiced.

This is in direct contrast to claims made policies where timely notice of a claim is the event that triggers coverage. Molyneaux, 553 A.2d at 52 ("In a 'claims made' policy it is the making of the claim which is the event and peril insured, regardless of when the occurrence took place").

3. Colorado Policyholders Would Not Reasonably Expect Separate Reporting Requirements Within An Occurrence Policy.

Given the fundamental principles of occurrence policies, no Colorado policyholder would reasonably expect her occurrence policy to have a reporting requirement in an endorsement that is different than the reporting period in the main body of the policy. Indeed, notice is not a material term of coverage that is part of the insuring agreement or coverage granted under such policies. Consequently, a policyholder would reasonably expect that if she timely gave notice of an occurrence, she would receive the coverage that she paid for under the policy. This expectation would be even greater when the policyholder reports the occurrence **within the policy period**.

What a Colorado policyholder would not reasonably expect is that some portion of coverage under her **occurrence policy** would arbitrarily be subject to **claims made** policy reporting requirements. Put another way, it is doubtful that an

insurance company would ever accept a policyholder's argument that an endorsement in a claims made policy should be treated with an occurrence policy reporting requirement. This would be the case even if the endorsement stated that a claim had to be reported "as soon as practical." Instead, the insurance company would argue that the **entire** policy is a claims made policy regardless of the endorsement language.

Furthermore, generally, discussions of insurance policy types speak in terms of claims made policies and occurrence policies as two distinct and separate entities. As Colorado courts have acknowledged:

> occurrence policies and claims-made policies are almost the mirror image of each other: an occurrence policy provides coverage for events that happen during the policy period, even if the claim is brought many years in the future; a claims-made policy provides potential coverage for claims brought against the insured during the policy period, even if the underlying event giving rise to liability occurred many years in the past.

Craft v. Philadelphia Indem. Ins. Co., 343 P.3d 951, 957 (Colo. 2015). Allowing claims made reporting requirements in an occurrence policy would fundamentally alter the nature of coverage under an occurrence policy in a way that would be detrimental to the unsuspecting policyholder.

4. The Notice-Prejudice Rule Should Apply To the Entire Occurrence Policy.

The notice-prejudice rule states that an insurance company cannot deny coverage based solely on untimely notice of a claim—the insurance company must

suffer prejudice because of that late notice before denying coverage. See, e.g., Friedland v. Travelers Indem. Co., 105 P.3d 639, 643 (Colo. 2005). Colorado applies the notice-prejudice rule to occurrence policies and not to claims made policies. Compare Friedland, 105 P.3d at 649 with Craft, 343 P.3d at 961. This is a simple bright-line rule to leads to no confusion. Zurich American Insurance Company ("Zurich") would have that rule turned on its head by trying to introduce claims made rules to an endorsement in an occurrence policy. If Zurich's position is adopted, instead of having a clear understanding of the coverage and notice requirements of their occurrence policies, Colorado policyholders will face uncertainty with each endorsement in their policy. This confusion will inevitably lead to inadvertent forfeitures of coverage and increased litigation. Applying the notice-prejudice rule to the entire occurrence policy provides clarity and protects Colorado policyholders.

B. Labeling a Policyholder As "Sophisticated" Does Not Justify Abandoning the Notice-Prejudice Rule.

Zurich's attempt to labeling MarkWest as a "sophisticated insured" is a red herring. See Zurich Br. for its Reply in Supp. of Mot. for Summ. J. and Resp. to Mark West's Mot. for Determination of Law, at 2. As commentators have noted, "[t]he first obvious problem with the sophisticated policyholder argument is that standard form insurance policies contain no 'sophisticated' policyholder exclusion,

although nothing prevents the insurance industry from drafting one." John N. Ellison et al., Bad Faith and Punitive Damages: The Policyholder's Guide to Bad Faith Insurance Coverage Litigation—Understanding the Available Recovery Tools, SJ099 A.L.I.- A.B.A. 235, 339 (2004); Carl A. Salisbury, Pollution Liability Insurance Coverage, the Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia, 21 Envtl. L. 357, 404, n. 13 (1991). Applying a different standard to commercial policyholders "suggests that big companies ought to receive less insurance coverage than small companies, notwithstanding that big companies pay big premiums for their coverage." Ellison, supra at 340. Colorado, however, has a strong public policy of protecting **all** its policyholders, including commercial policyholders.

More importantly, standard policy forms are issued to big and small businesses throughout the state. As one court noted "it would be incongruous for the court to apply different rules of construction based on the policyholder because once the court construes the standard form coverage clause as a matter of law, **the court's construction will bind policyholders throughout the state regardless of the size of their business.**" Boeing Co. v. Aetna Cas. & Sur. Co., 784 P.2d 507, 514 (Wash. 1990) (emphasis added).

1. The Size of a Corporation Does Not Automatically Equate To Sophisticated Knowledge of Insurance.

Insurance companies such as Zurich will often attempt to label their commercial policyholders as "sophisticated" in order to avoid policyholder favorable rules of insurance contract interpretation such as *contra preferendum*. See e.g. Cary v. United of Omaha Life Ins. Co., 108 P.3d 288, 290 (Colo. 2005) ("Any ambiguity in an insurance policy is construed in favor of providing coverage to the [policyholder]"); Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 299 (Colo. 2003) ("because of the unique nature of insurance contracts and the relationship between the [insurance company] and [policyholder], courts do construe ambiguous provisions against the [insurance company] and in favor of providing coverage to the [policyholder]).

Likewise the alleged "sophistication" of the policyholder does not justify abandoning notice-prejudice rules. Just because a policyholder is a large corporation does not mean that it has sophisticated knowledge of insurance. Indeed, one commentator noted that much like individual policyholders, sophisticated commercial policyholders rarely read insurance policy language, but instead mostly rely on a broker's description. See Michelle E. Boardman, Contra Proferentem: The Allure of Ambiguous Boilerplate, 104 Mich. L. Rev. 1105, 1107 (2006).

2. Insurance Contracts Are Still Largely Form Policies and Unnegotiated.

Even the largest corporations still buy standard form insurance policies like any other policyholder. Moreover, most large commercial policyholders do not purchase "manuscript" policies, and policies which insurance companies purport to be manuscript policies are often no more than a typewritten version of the standard form language. Standard form language policies are sold on a take it or leave basis regardless of whether the policyholder is a large corporation or an individual homeowner. Even large commercial policyholders who work with brokers are only paying to have segments of yet more standard-form language assembled — terms are rarely rewritten.

3. Forfeiture Is Just As Harsh For a "Sophisticated Policyholder" As For Any Other Policyholder.

The size or alleged "sophistication" of the policyholder does not justify abandoning the notice-prejudice rule. "Forfeiture is just as harsh for a sophisticated [policyholder] as for any other insured and the presence or lack of prejudice on the [policyholder] is equally felt." Hazel Glenn Beh, Reassessing the Sophisticated Insured Exception, 39 Tort Tr. & Ins. Prac. L.J. 85, 114 (2003). Furthermore, commercial policyholders are equally prone to ignorance about the existence or nature of their insurance coverage like any other policyholder. Colorado has recognized that "forfeiting insurance benefits when the [insurance

company] has not suffered any prejudice would be a disproportionate penalty and provide the [insurance company] a windfall based on a technical violation of the policy." Lauric v. USAA Cas. Ins. Co., 209 P.3d 190, 193 (Colo. App. 2009). Carving out an exception based on a "sophisticated policyholder" status would lead to inequitable treatment of policyholders. This is in direct contravention of Colorado's well established principles of protecting **all** policyholders.

C. Applying Zurich's Rule Would Create a Trap That Would Lead To Forfeitures of Coverage.

Zurich would have Colorado adopt a rule where the notice-prejudice rule should apply only to "as soon as practicable" notice provisions, and then only to those provisions contained in the main body of occurrence-based policies, but **not** to endorsements in the insurance policy, even where the policyholder gives notice within the policy period. Such a rule would only serve to create traps that lead to disfavored forfeitures of coverage for **all** Colorado policyholders. Furthermore, such a rule would incentivize insurance companies to draft policies that shift basic occurrence based coverage to endorsements with claims made reporting requirements. This would leave the policyholder with an empty shell of an occurrence policy filled with claims-made endorsements and none of the protections generally afforded to occurrence policies, e.g. the notice-prejudice rule.

1. Colorado strongly disfavors the "forfeiture" of insurance coverage.

It is a longstanding principle that Colorado strongly disfavors the "forfeiture" of insurance coverage. O'Connor v. Proprietors Ins. Co., 696 P.2d 282, 285 (Colo. 1985) ("Public policy does not favor the forfeiture of insurance coverage based on the insured's technical violation of the insurance policy."); Grooms v. Rice, 429 P.2d 298, 300 (Colo. 1967) ("Forfeitures are not favored and Courts should be liberal in construing the transaction in favor of avoiding a forfeiture."); Moorman Mfg. Co. v. Rivera, 395 P.2d 4, 6 (Colo. 1964) ("Forfeitures are not looked upon with favor and the right thereto must clearly appear before a forfeiture will be upheld."); Genesis Ins. Co. v. Crowley, 495 F. Supp. 2d 1110, 1115 (D. Colo. 2007) ("Colorado law reflects the general disfavor of forfeiture and therefore appears to require substantial, not strict, compliance with a notice provision.").

Black letter law fully supports Colorado's anti-forfeiture precedent:

> To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

Restatement (Second) of Contracts § 229 (1979). Indeed, while insurance companies often focus on notice as a "condition" of coverage, conditions can be excused on account of disproportionate forfeiture.

As a general principle, reporting a claim during the policy period of an occurrence policy is not a requirement. Yet in this case, MarkWest gave notice within the policy period. Once notice was provided, the insurance company's duty to pay arose. So long as the insurance company's performance due to the purported late notice under the endorsement would not be "materially more burdensome" to the insurance company than earlier performance, the late notice should be excused:

> Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

Restatement (Second) of Contracts § 269 (1979). The "materially more burdensome" standard of Section 269 of the Restatement is identical to the notice-prejudice rule, which requires the insurance company to prove that "its significant interests were prejudiced by the delayed notice." See Friedland, 105 P.3d at 643 ("In Clementi, we concluded that the insurer has the burden of demonstrating by a preponderance of the evidence that its significant interests were prejudiced by the delayed notice."). Accordingly, in the absence of material and substantial prejudice, or harm, or burden, to the insurance company, there is no legal basis for

excusing the insurance company from its fundamental obligation to pay a covered claim.

2. Insurance Companies Would Be Incentivized To Draft Policies That Shift Coverage From the Main Body of the Policy To Endorsements and Include More "Reporting Requirements."

It is not hard to envision a scenario where insurance companies will attempt to add various endorsements gutting the coverage known and understood to be provided by an occurrence policy. For example, nothing would stop an insurance company from adding an endorsement purporting to change a basic coverage such as "bodily injury" and surreptitiously including a change to the reporting condition by adding a date-certain notice requirement. Through the use of endorsements and clever drafting, the entire policy could be incorporated into the endorsements. Policyholders would then be worse off than a party to any other type of contract.

Colorado has a strong public policy of protecting Colorado policyholders, not impairing them. Policy drafting tactics of insurance companies cannot supplant the rule of law. An insurance company should no more be permitted to draft its way out of the notice-prejudice rule than to draft a provision requiring a policyholder to prove the inapplicability of all exclusions, which would violate a similarly well-established rule of insurance law. Even when insurance policies are drafted to require a policyholder to report a claim to the insurance company within the policy period or within a certain number of days of an occurrence, the

insurance company still should be required to prove both that notice was provided late and that the insurance company was materially prejudiced by the delay.

D. Zurich is Attempting an End-Run Around the Colorado Insurance Regulations and Colorado Consumer Protection Laws.

The Colorado Legislature enacted a statute requiring, as a condition for issuance of claims-made insurance to "any person in this state" that:

> the insurer defines the nature of risks or exposures to be insured on the claims-made policy; (2) the policy contain "**clear and adequate disclosure and alerts the insured to the fact that the policy is a claims-made policy and explains the unique features distinguishing it from an occurrence policy**"; (3) the policy "clearly defines the events and conditions which trigger coverage and defines when and how a claim is deemed to be made or is deemed made" . . .

COLO. REV. STAT. ANN. § 10-4-419 (emphasis added). These conditions apply to claims-made policies and **endorsements**. Id.

In addition, the regulations "provide minimum disclosure standards for claims-made insurance policies." Id. The required warnings are extensive, focusing on the coverage gaps that can be created. Indeed, under Colorado law, "issuing, soliciting, or using a **claims-made policy form, endorsement**, or disclosure form that does not comply with statutory mandates" is considered an unfair or deceptive insurance practice. COLO. REV. STAT. ANN. § 10-3-1104 (emphasis added).

Likewise, Colorado protects policyholders under the Colorado Consumer Protection Act ("CCPA"). See Showpiece Homes Corp. v. Assur. Co. of Am., 38 P.3d 47, 59 (Colo. 2001) (concluding that the insurance industry is not excluded from the provisions of the CCPA). The CCPA was enacted to regulate commercial activities and practices which, "because of their nature, may prove injurious, offensive, or dangerous to the public." Rhino Linings USA, Inc. v. Rocky Mt. Rhino Lining, Inc., 62 P.3d 142, 146 (Colo. 2003); People ex rel. Dunbar v. Gym of Am., Inc., 493 P.2d 660, 667 (Colo. 1972).

Zurich goes to great length to claim that the Policy is still an occurrence policy, only with an endorsement having a date-certain reporting requirement. This argument is specious. The date-certain notice requirement is unique to claims-made policies and is integrally related to the nature of such policies. See Craft, 343 P.3d at 958. Colorado requires insurance companies to provide minimum statutory disclosures for claims made products including **endorsements**. See COLO. REV. STAT. ANN. § 10-3-1104. The sound logic behind these warning requirements is readily apparent: it protects unsuspecting policyholders from forfeitures of coverage. Indeed, Zurich never warned MarkWest and now MarkWest is embroiled in a coverage dispute over an occurrence clearly covered by the Policy and reported within the policy period.

Insurance companies should not be allowed to circumvent Colorado insurance regulations and consumer protection laws by clever labelling. Indeed Colorado has a strong public policy of protecting its policyholders from such unfair and deceptive practices.

VII. CONCLUSION

United Policyholders respectfully requests that this Court answer the question presented in the affirmative. Colorado's notice-prejudice rule does, and rightfully should, apply to interim notice provisions in endorsements to "occurrence" liability insurance policies. This Court drew a clear distinction between the various types of liability insurance policies in Craft. MarkWest's coverage should not be forfeited as a remedy for late notice unless Zurich proves that it was materially prejudiced.

Dated: October 26, 2015

AMICUS CURIAE UNITED POLICYHOLDERS

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 26th day of October, 2015, a true and correct copy of the foregoing BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT was filed and served via ICCES on the following:

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