SAXE DOERNBERGER & VITA, P.C.

July 28, 2017

Blake A. Hawthorne, Clerk
The Supreme Court of Texas
P.O. Box 12248
Austin, Texas 79711

Via Electronic Filing

Re: *Great American Insurance Company, et al. v. Glen Hamel, et al.*; No. 14-1007; in the Supreme Court of Texas

Dear Mr. Hawthorne:

I am writing on behalf of *amicus curiae* United Policyholders ("UP").[1] UP is a non-profit 501(c)(3) whose mission is to be a trustworthy and useful information resource and a respected voice for consumers of all types of insurance in all 50 states. UP's work is divided into three programs: UP 1) provides tools and resources for solving insurance problems after a loss; 2) promotes disaster preparedness and insurance literacy through outreach and education programs; and 3) advances pro-consumer laws and public policy related to insurance matters. UP has also submitted over 400 *amicus* briefs in both state and federal actions.

UP submits this brief because it concerns policyholder issues that extend beyond the facts that are the subject of this litigation. If permitted to stand, UP believes that insurers will be able to misuse the holding in this case to avoid liability after a wrongful denial of coverage, doing a grave injustice to policyholders. Additionally, the financial incentive test promulgated by this Court's Opinion creates more questions than answers, imposes inaccurate presumptions regarding the adversarial nature of the underlying proceeding, and unfairly disadvantages policyholders and innocent third parties as further described herein. For these reasons, UP respectfully joins the Hamels in asking that this Court grant the Hamels' Motion for Rehearing, filed June 27, 2017.

Remanding This Case For Retrial Does No Justice To The Innocent Party

In obtaining commercial general liability insurance, a policyholder's natural expectation is that it will be afforded defense and indemnity for any claims to which the insurance applies. In the event that the insurer wrongfully refuses to pay for defense of

[1] United Policyholders is paying the cost of preparing this letter brief.

a covered claim, the policyholder is often left with little recourse but to resolve the claim itself and pursue coverage from the insurer afterwards. As it stands, this Court's Opinion rewards the insurer for its breach, because it provides an insurer who wrongfully declines to defend its insured a means of avoiding liability after judgment has been rendered against the policyholder.

This Court ordered retrial of the coverage case "in the interest of justice."[2] However, a retrial can only serve to further the interests of the insurer. In its Opinion, this Court repeatedly recognizes that the insurer takes a significant risk by declining to defend its insured.[3] Yet, the Court's Opinion mitigates that risk by permitting the insurer the opportunity to re-litigate issues of liability, allowing yet another bite at the apple now that the insurer's prior attempts to avoid liability on this case have been unsuccessful. Had the insurer not breached its duty to the insured, it could have controlled the litigation of these issues from the beginning. Furthermore, the insurer had the opportunity to present any evidence it wished in the insurance coverage trial before the District Court. If the insurer wished to present evidence that the policyholder had no meaningful incentive to ensure that the judgment accurately reflected the damages, it could and should have done so at that time. Even UP, an outsider to this case, can see based on the record that the insurer chose not to do so; in fact, the insurer went so far as to stipulate that it *agreed* to the evidence presented before the District Court.[4] Nobody prevented the insurer from presenting additional evidence at trial, and there is no reason why it should get another chance to do so now.

On the other hand, a retrial does no justice to the Hamels, the innocent party, who have been litigating this insurance coverage suit for more than a decade, during which time their judgment has remained unpaid. A retrial will not only further delay the Hamels' recovery of the monies owed to them, but will also cause them to incur additional attorney's fees. Furthermore, by ordering that the parties relitigate the coverage action because this evidence was not presented at trial, this Court places an undue burden on the Hamels, who cannot be certain that the costs they incur in retrying the coverage action will be reimbursable even if they are successful in establishing that Great American is obligated to provide coverage for the underlying judgment.[5]

What is just is for the insurer to take the correct course of action from the start. If there is a genuine dispute as to whether an insurance policy provides coverage for the underlying action, this could mean agreeing to provide a defense under a reservation of rights, or initiating a declaratory judgment action to resolve the coverage dispute. It is not just to reward an insurer that wrongfully denies its duty to defend its insured, yet permitting

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[2] Opinion at p.2.
[3] Opinion at p.11-12.
[4] *See* R.R., Vol. 16, Ex. 95, 96.
[5] Because Great American concedes that it wrongfully denied coverage, and the only remaining issues are liability and damages, it is unclear whether the Hamels must proceed with the retrial on the basis of breach of contract or declaratory judgment. These two causes of action have different rules for recovery of attorney's fees under Texas law.

a retrial does exactly that by allowing the insurer to deny coverage, sit back while the policyholder litigates the case alone, and later dispute the outcome of a case that the insurer itself chose not to participate in.

The Hazards of Applying a Financial Incentive Test

In determining whether the judgment obtained in the underlying action was the result of a fully adversarial trial, the Court held that "the controlling factor is whether, at the time of the underlying trial or settlement, the insured bore an actual risk of liability for the damages awarded or agreed upon, or had some other meaningful incentive to ensure that the judgment or settlement accurately reflects the plaintiff's damages and thus the defendant-insured's covered liability loss."[6] Applying this "controlling factor" to the facts of the case, the Court held that the underlying trial was not fully adversarial because the Hamels agreed not to execute against Terry Mitchell personally or seek to pierce the corporate veil, and instead only to pursue a judgment from the Builder. Because the Builder had no assets, the Court determined that it did not have a financial stake in the outcome of the case. In so holding, the Court appears to establish a new rule; that is, in order for a trial to be fully adversarial, and therefore in order for any resulting judgment or settlement to be binding on an insurer, the policyholder must have had a financial stake, or incentive, in the outcome of the underlying case.

This Court concluded that the pretrial agreement in this case eliminated the Builder's financial stake in the outcome of the case and therefore eliminated any meaningful incentive to contest the judgment, and that written pretrial agreements such as this one are not necessary to prove that the insured lacked financial incentive, but rather that such agreements create a "strong presumption" that the judgment did not result from an adversarial proceeding. To the contrary, by entering the pretrial agreement in this case, the parties actually *improved* the chances that the trial would be adversarial. At the time of the agreement, the Builder had no assets, could no longer afford its own defense, and was essentially headed towards a default. The pretrial agreement could not have eliminated the Builder's financial stake in the case or destroyed the adversarial nature of the trial, because the Builder had no collectible assets to begin with. Rather, by entering into the agreement, the parties at least ensured that the Builder would appear and testify at trial, thereby presenting a defense to the claim under penalty of perjury, which certainly should be sufficient to constitute an adversarial trial. This result is completely opposite to the notion that pretrial agreements create a presumption of a non-adversarial proceeding.

The Court's new financial incentive rule is apparently intended to be more accurate than the prior method of determining whether a trial was fully adversarial – namely, by reviewing the evidence on the record. However, if anything, it creates additional

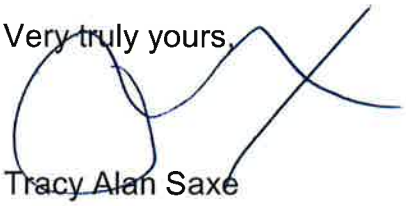
[6] Opinion at p.15-16.

uncertainties. Notably, the Opinion does not provide any guidance as to what *would* constitute proof of an adequate financial incentive to establish adversity. Given the vast diversity of businesses that obtain commercial general liability insurance in order to mitigate their risks and protect their assets, this holding could lead to inconsistency and uncertainty for policyholders. Does a financial incentive have to be based on an actual risk to the policyholder's assets? If so, how is that risk measured, and what is the threshold for establishing that the policyholder has a financial stake in the outcome of the action? If the actual risk to the policyholder's assets is low, can a policyholder prove that it had some other financial stake in the outcome of the case – for example, the policyholder may be incentivized to minimize the damages in the underlying case, because if the insurer is obligated to pay a claim under the policy, the policyholder's premium will increase in subsequent policy periods? In cases such as this one, where a policyholder's rights are assigned to the third party, how is that third party supposed to prove that the policyholder, an unrelated entity that it likely knows little to nothing about, had a financial stake in the outcome of the case? Because the threshold for proving that the policyholder has a financial incentive is unclear, some policyholders may be deterred from settling cases even when doing so is the best course of action; based on this Court's holding, doing so may force the policyholder into prolonged litigation with the insurer.

The application of a financial incentive test also further disadvantages a policyholder that lacks financial assets. The primary purpose of CGL coverage is that the insurer pays for defense of the policyholder in litigation by third parties. A policyholder who has limited financial assets, and is counting on its insurer to pay its defense for a covered claim, is particularly disadvantaged when an insurer wrongfully denies its duty to defend. Based on this Court's decision, a policyholder under those circumstances is forced to fund its own defense due to the insurer's breach, which is a heavy burden and which naturally incentivizes the policyholder to settle in order to avoid incurring additional costs. When the policyholder then attempts to seek coverage from the insurer, under the Court's new financial incentive test, it may now face an inquiry into whether it had sufficient assets to constitute a stake in the outcome of the underlying case, dragging the policyholder through even more needless litigation.

This Court's Opinion disadvantages policyholders by exposing them to prolonged litigation, and unfairly rewards an insurer that breaches its duty to defend by permitting it another opportunity to avoid liability. This outcome is contrary to the purpose of obtaining CGL insurance. Therefore, UP requests that this Court grant the Hamels' Motion for Rehearing.

Very truly yours,



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CERTIFICATE OF SERVICE

I certify that on July 28, 2017, a true and correct copy of this letter brief was served, via electronic filing or email, to the following counsel:

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