U.S. COURT OF APPEALS CASE NO. 15-55777

Published Opinion Issued August 23, 2017
Richard C. Tallman and N. Randy Smith, Circuit Judges
and Stephen Joseph Murphy III, District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE LOS ANGELES LAKERS, INC., a California corporation

Plaintiff/Appellant,

vs.

FEDERAL INSURANCE COMPANY, an Indiana corporation

Defendant/Appellee.

BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC ON BEHALF OF AMICUS CURIAE UNITED POLICYHOLDERS

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, *amicus curiae* 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.

In addition, pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, no counsel for a party to the litigation authored this brief in whole or in part and no person other than *amicus curiae*, its members or its counsel contributed money to fund preparation or submission of the brief.

Dated: September 18, 2017

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INTEREST OF AMICUS CURIAE

United Policyholders submits this *amicus curiae* brief in support of Plaintiff/Appellant Los Angeles Lakers, Inc.'s petition for rehearing *en banc*. The panel's Majority Opinion violates fundamental principles governing the interpretation of insurance contracts that were designed to protect insurance consumers – large and small, corporate, family, and individual – in their dealings with insurance companies. The importance of this case is underscored by the exponential growth in litigation under the TCPA.

United Policyholders is a non-profit organization dedicated to helping preserve the integrity of the insurance system by serving as a voice and an information resource for consumers in all 50 states. United Policyholders' work is supported by donations, grants, and volunteer labor. United Policyholders does not sell insurance or accept funding from insurance companies. While much of United Policyholders' work is aimed at helping individuals and businesses purchase appropriate insurance, United Policyholders engages with regulators, public officials, academics, and various stakeholders regarding legal and marketplace developments relevant to all policyholders and all lines of insurance.

A diverse range of individual and commercial policyholders throughout the United States regularly communicate their insurance concerns to United Policyholders which allows United Policyholders to submit *amicus curiae* briefs to

assist state and federal courts in deciding cases involving important insurance principles. United Policyholders' *amicus curiae* brief was recently cited by the California Supreme Court in *Association of California Insurance Cos. v. Dave Jones, Insurance Commissioner*, Case No. S226529, Cuellar, J., January 23, 2017 (Ct.App. 2/1B248622, Los Angeles County Super. Ct. No. BC463124) and its arguments have been adopted by the Supreme Court in *TRB Investments, Inc. v. Fireman's Fund Ins. Co.*, 40 Cal. 4th 19 (2006) and *Vandenburg v. Superior Court*, 21 Cal. 4th 815 (1999). United Policyholders has filed *amicus curiae* briefs in over 400 cases throughout the United States.

In this brief, United Policyholders seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

SUMMARY OF ARGUMENT

United Policyholders strongly urges rehearing *en banc* because the published opinion in this action is unmoored from the fundamental principles of insurance law that protect all insurance consumers. If California law required exclusions to be construed broadly and for coverage to be avoided wherever possible, then there could be no quarrel with the outcome of this action. Because California law

commands the opposite, however, the Panel's divided decision deserves additional scrutiny and, ultimately, reversal.

This case presents two fundamental interpretive questions: (1) Should the words "based upon, arising from, or in consequence of" be interpreted broadly in an exclusion to mean "in connection with" – words that were not used in the exclusion and that are broader than those employed; and (2) Should the phrase "invasion of privacy" as used in an exclusion be expanded beyond the common law invasion of privacy tort to include unrelated statutory claims when the term "invasion of privacy" is included in a list of other common law torts? Both of these questions present issues of significant importance to consumers and policyholders, and the Majority Opinion answered both of these questions inconsistently with governing law.

Fundamental principles of California insurance law ensure that coverage exclusions are construed narrowly to avoid defeating the mutual intentions of the parties and, particularly, the reasonable expectations of the insured. If insurance policies were negotiated instruments, one could imagine a policyholder requesting the insurance company to strike language like "in connection with" or "related to" – thinking that doing so cabined the exclusion to words of causation: "based upon, arising from, or in consequence of." By adding the phrase "in connection with" by interpretation where it does not actually appear, and concluding that such words

mean that statutory claims are included within the phrase "invasion of privacy," the Court writes for Federal a better contract than it wrote for itself.

California law does not consider words of an insurance policy (or any contract) in isolation. Rather, the relevant language is construed in context of (a) the exclusion as a whole, (b) the insurance policy as a whole, and (c) the policyholder's reasonable expectation of coverage in an insurance transaction intended to achieve a transfer of risk from policyholder to insurance company. The words "invasion of privacy" gain meaning from the company they keep, in accordance with the doctrine of *noscitur a sociis*. Here, the company kept by "invasion of privacy" is a list of common law torts: "libel, slander, oral or written publication defamatory or disparaging material, invasion of privacy, wrongful entry, eviction, false arrest, false imprisonment, malicious prosecution, malicious use or abuse of process, assault, battery or loss of consortium."

In context of the exclusion, the most reasonable meaning, indeed the only reasonable meaning, is that "invasion of privacy" is intended solely to exclude loss under the common law tort of invasion of privacy. It does not extend to any and all federal, state, and local statutes that have any connection with privacy in general. The exclusion is limited to the listed common law claims. Adding the TCPA to the end of that list would be like the children's game, "one of these things is not like the other." It would stand out like a sore thumb because the TCPA

would be the only cause of action in the list that was not a common law tort. If Federal had tried to slip the TCPA into such a list, a policyholder might at least have had a remote chance to see it prior to purchase and remove it. Here, the Majority Opinion simply adds it subsequent to purchase, giving Federal an unexpected gift and the L.A. Lakers a shocking reformation of its contract without any evidence of a mutual intent – or any expectation from the policyholder – that TCPA claims were to be excluded. TCPA exclusions are freely available in the insurance marketplace and have been *widely* in use since around 2011. Federal elected not to exclude TCPA claims; yet, this court excluded them.

For these reasons, United Policyholders stands firmly for review *en banc*.

ARGUMENT

I. THE MAJORITY OPINION UNDERMINES IMPORTANT RULES OF CONSTRUCTION DESIGNED TO PROTECT CONSUMERS AND ENSURE THE AVAILABILITY OF COVERAGE TO REDRESS INJURIES.

The fundamental error underlying the panel majority's decision is its failure to apply, rather than merely recite, the standard under which insurance policy exclusions are interpreted. The phrases "arising from" and "invasion of privacy" in the Policy's invasion of privacy exclusion must be interpreted narrowly, not broadly. When interpreting an insurance policy, "exclusionary clauses are interpreted narrowly against the insurer" and coverage parts are to be "interpreted broadly so as to afford the greatest possible protection to the insured." *MacKinnon*

v. Truck Ins. Exch., 31 Cal. 4th 635, 648 (Cal. 2003) (internal citations and quotations omitted); Couch on Insurance § 22: 14 (3d ed. 2017) ("Ambiguous or doubtful language or terms, it is said, must be given the strongest interpretation against the insurer which they will reasonably bear, or, conversely, that the meaning of the words used that is most advantageous to the insured should be adopted."). Moreover, "[p]rovisions which purport to exclude coverage or substantially limit liability must be set forth in plain, clear and conspicuous language." *Thompson v. Occidental Life Ins. Co. of Ca.*, 9 Cal. 3d 904, 921 (Ca. 1973).

These rules of interpretation are not mere platitudes. As the California Supreme Court has explained, they are vital protections for consumers of insurance. California courts recognize the unequal bargaining power between insurance companies and the typical insured, leading courts "to insist that insurers draw clear policies or suffer adverse consequences":

> We think that the responsibility for writing clear and simple policies lies with the insurance industry, and that the tremendous growth of insurance in this country enhances the need for such policies. . . . [T]hese multitudes of insured persons and their beneficiaries, many of whom are unversed in the sophisticated ways of commerce, are utterly unable to decipher obscure and technical language. They are singularly dependent upon the good will and the good draftsmanship of the insurer. These considerations of public policy have long led courts to insist that insurers draw clear policies or suffer adverse consequences.

Bareno v. Emps Life Ins. Co. of Wausau, 7 Cal. 3d 875, 878 (Cal. 1972). Further, these rules reflect the important public policy in favor of ensuring that insurance is available to respond to injuries both to insureds and to third-parties.

As will be outlined in further detail below, the Majority Opinion interpreted the phrases "arising from" and "invasion of privacy" far more broadly than can be supported by governing law. Indeed, the panel Majority explicitly gave the relevant exclusion a "broad interpretation." Op. at 8-9. By effectively reversing the rules governing the interpretation of policy exclusions, the Majority Opinion puts yet another thumb on the scale in favor of insurance companies and against consumers, making them more vulnerable to technical – and unexpected – denials of coverage. In addition to violating fundamental notions of fairness, this violates clearly established California law.

II. THE MAJORITY OPINION IMPROPERLY EXPANDED THE PHRASE "ARISING FROM" TO MEAN "IN CONNECTION WITH" CONTRARY TO PRIOR DECISIONS OF THIS COURT AND THE CALIFORNIA COURTS.

The Majority Opinion expressly gave a "broad interpretation to the clause 'arising from,'" holding that the phrase requires only a "'minimal causal connection or incidental relationship' to an invasion of privacy." Op. at 8-9 (quoting *Crown Capital Sec. L.P. v. Endurance Am. Specialty Ins.*, 186 Cal. Rptr. 3d 1, 7 (Cal Ct. App. 2015)). This broad interpretation of an exclusion is contrary

both to the principles governing the interpretation of insurance contracts and with prior precedent of this Court and California courts.

Under governing California law, while interpreting phrases broadly is appropriate in the context of coverage ***grants***, it is wholly inappropriate in the context of coverage ***exclusions*** such as the one at issue here. Because the phrase "arising from" appears in the exclusionary clause it must be "interpreted narrowly against the insurer." *MacKinnon,* 31 Cal. 4th at 648. This narrow interpretation is necessary "in order to protect the [insured's] reasonable expectation of coverage." *HS Servs., Inc. v. Nationwide Mut. Ins. Co.*, 109 F.3d 642, 645 (9th Cir. 1997) (internal quotation and emphasis omitted).

Although the Majority Opinion relies on certain intermediate appellate decisions in support of its broad interpretation of the phrase "arising from," these decisions cannot be reconciled with the rules of construction or California Supreme Court precedent. The Majority Opinion's broad interpretation of "arising from," as requiring "only a minimal connection or incidental relationship," fails for two fundamental reasons. First, the ultimate source of the Majority Opinion's "minimal connection or incidental relationship" definition of "arising from" is the California Court of Appeal's decision in *Acceptance Ins. Co. v. Syufy Ents.*, 69 Cal. App. 4th 321, 328 (Cal. App. 1999). Op. at 9 (quoting *Crown Capital Sec., L.P. v. Endurance Am. Specialty Ins.*, 186 Cal. Rptr. 3d 1, 7 (Cal. App. 2015) (quoting

Acceptance Ins., 69 Cal. App. 4th at 328)). Significantly, however, *Acceptance Insurance* does not interpret the phrase "arising from" in the context of an exclusion. *Id.* at 325-26. Rather, it interpreted that phrase in the context of a coverage grant, and thus interpreted the phrase broadly in a manner that is not applicable here. *Id.* at 327 (holding that the provision must be "resolved against the insurer and in favor of coverage"). In that matter, even in the context of a coverage grant, the insurance company argued that the term "arising out of" meant "there must be a causal connection . . . beyond a 'but for' link." *Id.*

Second, under governing California Supreme Court precedent, the Majority's broad interpretation of "arising from" would only be permissible if that were the ***only*** reasonable interpretation of the phrase. *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 777 (Cal. 2001) ("If a provision has more than one reasonable meaning, the ambiguity is resolved in favor of coverage a lay policyholder would reasonably expect."). "In various contexts," however, "courts have construed the phrases 'arising out of' and arising under' more narrowly than the phrase 'relating to'" and have interpreted the phrase as requiring a causal connection. *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 124 (Cal. App. 2007) (collecting cases).

Thus, a number of recent California and Ninth Circuit cases applying the phrases "arising out of" or "arising from" in the context of policy exclusions have

required the insurance company to prove that the actions at issue "directly and proximately resulted from" the excluded conduct. *E.g.*, *HS Servs.*, 109 F.3d at 647; *Charles E. Thomas Co. v. Transamerica Ins. Grp.*, 62 Cal. App. 4th 379, 373 (Cal. App. Ct. 1998) (rejecting the argument that "[a]rising out of [ ] is much broader than 'caused by' and requires only a slight connection with, or incidental relationship between, the damages and the exclusion"); *Church Mut. Ins. Co. v. U.S. Liab. Ins. Co.*, 347 F. Supp. 2d 880 (S.D. Cal. 2004) (following *HS Services* and holding the "narrow interpretation" was "consistent with recent California case law"); *Peterborough Oil Co., Inc. v. Great Am. Ins. Co.*, 397 F. Supp. 2d 230 , 239 n.8 (D. Mass. 2005) ("[U]nder California law, . . . courts have interpreted the phrase 'arising out of' to require a much more direct causal connection, one more akin to proximate cause . . . .").

In light of the foregoing, the decisions interpreting "arising from" as requiring a direct causal connection when it is included in an exclusion are a better reflection of California law and more accurately predict how the California Supreme Court would resolve the interpretation of the phrase "based upon, arising from, or in consequence of" in the context of an exclusion.

III. THE MAJORITY OPINION'S INTERPRETATION OF "INVASION OF PRIVACY" IS IN CONFLICT WITH GOVERNING LAW.

The Majority Opinion's interpretation of the phrase "invasion of privacy" is wholly inconsistent with the reasonable expectations of an insured and, as such,

violates California law and Ninth Circuit precedent. Most importantly, it assumes that "invasion of privacy" extends to statutory claims, even though that phrase appears in an exclusion listing twelve common law torts without mentioning a single statutory claim. The insurance industry has developed endorsements expressly excluding coverage for claims brought under the TCPA, which Federal elected ***not*** to include here.

A. The Majority Opinion's Interpretation of "Invasion of Privacy" Is Inconsistent with the Terms of the Policy When Read in Context.

When interpreting an insurance policy, the provisions of the policy must not be read in isolation. *London Market Insurers v. Superior Court*, 146 Cal. App. 4th 648, 656 (Cal. App. 2007); *see also* Cal. Civ. Code § 1641. Rather, all provisions should be considered in their entirety. *Id.* Further, the meaning of words should be derived from their association with other words, pursuant to the doctrine of *noscitur a sociis*, which provides that when interpreting the meaning of a term in "a list or catalogue of items, a court should determine the meaning of each by reference to others giving preference to an interpretation that uniformly treats items similar in nature and scope." *Moore v. Cal. State Bd. of Accountancy*, 2 Cal.4th 999, 1011-12 (Cal. 1992) (citations omitted). Thus, "a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning . . . would otherwise make the item markedly dissimilar to the other items in the list." *Id.* at 1012 (citations omitted).

The exclusion at issue precludes coverage for "invasion of privacy" in a list of twelve common law torts, namely, "libel, slander, oral or written publication of defamatory or disparaging material, invasion of privacy, wrongful entry, eviction, false arrest, false imprisonment, malicious prosecution, malicious use or abuse of process, assault, battery or loss of consortium." Policy at 47, Excl. (C)(5). Every single item listed – including invasion of privacy – is a common law tort. *See, e.g.*, Restatement (Second) of Torts § 652A (addressing the tort of "invasion of privacy"); *id.*, Chapter 24 (libel, slander, and publication of defamatory or disparaging material); *id.* § 35 (false imprisonment); *id.*, Chapter 29 (malicious prosecution); *id.*, Chapter 31 (abuse of process); *id.* § 21 (assault); *id.* § 18 (battery). The exclusion does not identify any statute in any way.

Significantly, where Federal intended to include both common law torts and statutory claims in the same exclusion, it did so explicitly. For example, Exclusion (C)(8) bars claims arising from "unfair trade practices or any actual alleged violation of the Federal Trade Commission Act, the Sherman Anti-Trust Act, the Clayton Act, ***or any other federal statutory provision involving*** anti-trust, monopoly, price fixing, price discrimination, predatory pricing or restraint of trade activities. . . ***or any similar provision of federal, state, or local statutory law*** or common law anywhere in the world." Policy at 47, Excl. (C)(8) (emphasis added).

Had Federal wished to expand the scope of the "invasion of privacy" exclusion to include statutory claims, it could have, consistent with Exclusion C(8), appended phrases such as "or any similar provision of federal, state, or local statutory law," or "any federal statutory provision involving," to Exclusion C(5). Including such language would have placed the insured on some notice that the exclusion extended to *some* statutory claims, perhaps even to the TCPA. But no such language was included. Instead, the Panel Majority effectively made a retroactive amendment adding these phrases where they do not exist, thus upending reasonable policyholder expectations in violation of California law.

B. The Majority Opinion's Exclusion of TCPA Claims Cannot Be Reconciled with Federal's Failure to Include a TCPA Exclusion in the Policy.

It is more likely that if Federal actually intended to exclude TCPA claims that it simply would have appended a TCPA exclusion. Insurance companies know how to exclude TCPA claims from coverage. They do it explicitly, with a TCPA exclusion.

As a consequence of the increasing volume of TCPA claims and the significant liabilities arising therefrom, insurance companies offering D&O and general liability policies began issuing endorsements that expressly excluded coverage for claims asserted under the TCPA. TCPA exclusions are freely available in the insurance marketplace and have been widely in use since around

2011. ISO form exclusion CG00 67 03 05 and AAIS form exclusion GL 0225 10 05 are industry-wide examples. Form exclusions typically exclude claims "arising directly or indirectly out of any action or omission that violates or is alleged to violate: a. The Telephone Consumer Protection Act (TCPA) . . . ." *E.g.*, *Windmill Nursing Pavilion, Ltd. v. Cincinnati Ins. Co.*, 2 N.E.3d 582, 591 (Ill. App. Ct. 2013) (quoting the terms of the TCPA endorsement in a general liability policy).

An "insurers' failure to use available language expressly excluding a specific type of coverage implies a manifested intent not to do so." *Lexington Ins. Co. v. Travelers Indem. Co. of Ill.*, 21 F. App'x 585, 590-91 (9th Cir. 2001) (quoting *Pardee Constr. Co. v. Ins. Co. of the West*, 92 Cal. Rptr. 2d 443, 456 (Cal. Ct. App. 2000)); *see also Fireman's Fund Ins. Cos. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842, 852 (Cal. App. 5th Dist. 2001) ("[A]n insurance company's failure to use available language to exclude certain types of liability gives rise to the inference that the parties intended not to so limit coverage."). Thus, according to governing California law, Federal manifested an intent not to exclude TCPA claims.

If Federal wished to exclude coverage for TCPA claims, it should have sold the policy with a TCPA exclusion. Instead, it collected premiums from its insured for a policy that, on its face, had no such exclusion, and when a claim arose that falls squarely within the coverage grant, relied on a court to eliminate coverage

after the fact. Such conduct jeopardizes coverage for all insurance consumers, large and small. Why include a clearly worded exclusion, when you can fool your insured by including a vaguely worded exclusion and then later argue it applies as if you had included the clear exclusion that was available? California's interpretive rules are designed to prevent exactly this situation.

CONCLUSION

For the foregoing reasons, *amicus curiae* United Policyholders respectfully requests that this Court grant Plaintiff/Appellant's motion for rehearing *en banc*.

Dated: September 18, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rules 35-4 and 40-1

For Case Number 15-55777

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached Brief In Support Of Petition For Rehearing En Banc On Behalf Of United Policyholders contains 3,393 words and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

Dated: September 18, 2017 By: /s/ *David E. Weiss*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 18, 2017.

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

Dated: September 18, 2017 By: /s/ *David E. Weiss*